

Meeting Date: April 20, 2022

Staff Contact: David Laughlin, Chief Engineer Centralized Engineering

TITLE: C-22-16 – Approval of Contract with Smith Engineering for P2022000006, South Valley Drinking Water Project, Phase 8 And 9 RFP, Project No. 02333.018

ACTION: Recommend Approval

Summary:

The Albuquerque Bernalillo County Water Utility Authority issued the Request for Proposals (RFP) P2022000006, South Valley Drinking Water Project, Phase 8 And 9 to solicit proposals from qualified vendors to provide design services for the project. This project is being funded with Bernalillo County ARPA funds. This project will contract design services for extension of drinking water distribution pipelines to the areas described in the South Valley Drinking Water Project that have not yet received water service.

The RFP was posted on BidSync and advertised in the local newspaper. Six (6) responses were submitted for evaluation. The Selection Advisory Committee reviewed, evaluated, and scored the responses in accordance with the evaluation criteria published in the RFP.

Based on the recommendation of the Selection Advisory Committee, the Executive Director recommends the award of a contract to Smith Engineering, as this Consultant has the highest composite score, is qualified to perform the work, and meet the requirements of the RFP. The highest total composite score possible is 100. All scores listed are the combined average of all Committee members. The respective scores are as follows:

<u>Offeror</u>	<u>Total Composite Score</u>
Bohannon Huston, Inc.	83
Garver, LLC	85
HDR	88
NV5	76
Smith Engineering Company	93
Wilson Co.	86

Approval of this item will delegate signature authority to the Executive Director to enter into a contract with **Smith Engineering**, to perform the services. Approval of this item shall also serve as delegation of authority for the Executive Director to approve all future amendments to this agreement, if any.

If approved by the Board, an Agreement will be executed between the Water Authority and Smith for these services.

FISCAL IMPACT:

\$ 244,534.00, excluding NM GRT

**AGREEMENT
BETWEEN THE
ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY
AND
SMITH ENGINEERING**

**P2022000006 SOUTH VALLEY DRINKING WATER PROJECT, PHASE 8 AND 9
PROJECT NO. 02333.018**

THIS AGREEMENT is made and entered into on the date of the last signature entered below by and between the Albuquerque Bernalillo County Water Utility Authority, a New Mexico political subdivision, hereinafter referred to as "Owner" or the "Water Authority", and Smith Engineering, hereinafter referred to as the "Consultant," a New Mexico Corporation whose address is 2201 San Pedro Dr., N.E., Building 4-200, Albuquerque, NM 87110.

In consideration of the mutual obligations stated herein, the parties hereto agree as follows:

1. Scope of Services: Consultant shall perform the following professional engineering services (hereinafter the "Services") for the Project identified above in a satisfactory and proper manner, as determined by Owner:

- Basic Services as described in Exhibit A to this Agreement.
- Additional Services which are not included in Exhibit A and not reasonably inferable as part of the Basic Services. Prior to commencing any Additional Service, Consultant shall prepare an Additional Services Proposal detailing the scope of the Additional Services and the proposed fee. Consultant shall perform the Additional Service only after written acceptance of the Additional Services Proposal by Owner and execution of an amendment to this Agreement by the parties. Upon acceptance by Owner, each Additional Services Proposal and the Services performed by Consultant pursuant to such Additional Services Proposal shall become part of this Agreement and shall be subject to all the terms and conditions of this Agreement.

2. Term of Agreement: This Agreement shall commence on the date of final execution by Owner and continue through project completion, unless sooner terminated, not to exceed the term allowed by the Procurement Ordinance for contracts of this type; except that the Chief Procurement Officer may approve, by written Determination, a continuation beyond the term allowed.

3. Compensation and Method of Payment:

3.1 *Total Compensation.* For performing the Services specified in Section 1 hereof, Owner agrees to pay Consultant up to the amount of Two Hundred Forty-Four Thousand Five Hundred Thirty-Four and 00/100 (\$244,534.00), plus any applicable gross receipts taxes (the "Total Compensation") in accordance with Exhibit B. Such amount consists of:

- the **Basic Services Fee**, estimated to be \$214,834.00, and
- **Subconsultants' charges** estimated to be \$29,700.00.

The estimated Total Compensation constitutes full and complete compensation for Consultant's Services under this Agreement, including all expenditures made and expenses incurred by Consultant in performing such Services.

3.1.1 The estimated amounts contained in this Section 3 are not the minimum or maximum amounts which may be payable to Consultant under this Agreement.

3.1.2 Consultant shall give Owner written notice if it becomes apparent that an estimated amount will be exceeded. Upon such notice, Owner and Consultant shall promptly review the Services remaining to be performed and compensation for such Services. Owner may exercise its right to suspend or terminate Consultant's Services for Owner's convenience, agree to compensation exceeding said estimated amount, or agree to a reduction in the remaining Services to be rendered by Consultant. If Owner decides not to suspend Consultant's Services during negotiations and Consultant exceeds the estimated amount before Owner and Consultant have agreed to an increase in the compensation due Consultant or a reduction in the remaining Services, the Consultant shall be paid for all Services rendered hereunder.

3.2 *Basic Services Compensation.* The Basic Services Fee shall consist of:

- an amount equal to Consultant's Direct Labor Costs ("DLC") times a factor of 3.20 for the Services of Consultant's personnel engaged on the Project distributed as follows over the Phases listed below:

SUBTOTAL DLC Services including factor	\$236,534.00
Subconsultant Expenses including factor	\$29,700.00
TOTAL Basic Services Fee	\$244,534.00

3.2.1 The lump sum amounts stated above include compensation for Consultant's Services and Services of subconsultants, if any; and appropriate amounts have been incorporated to account for labor, overhead, profit, and Reimbursable Expenses. The DLC amounts above incorporate all labor, overhead, and profit.

3.2.2 "Direct Labor Costs" or "DLC" means salaries and wages paid to employees but does not include payroll-related costs or benefits.

3.2.3 The personnel, titles, and DLC referenced in Exhibit B may be adjusted annually to reflect equitable changes in the compensation payable to Consultant.

3.2.4 Consultant may alter the allocation of funds between the Phases set out above to be consistent with Services actually rendered, but shall not exceed the Subtotals for Lump Sum or DLC Services or the Total set out above unless approved in writing by Owner.

3.3 *Reimbursable Expenses.*

3.3.1 Reimbursable Expenses include actual and reasonable expenses incurred by Consultant solely and directly in connection with the performance of Consultant's Services as follows:

- Expenses of transportation (including coach class air travel) and living expenses in connection with out-of-state travel as directed and approved in advance by the Owner. Transportation and living expenses incurred within the State of New Mexico are not reimbursable unless expressly approved by the Owner in advance.
- Fees paid for securing approval of authorities having jurisdiction over the Project.
- Professional models and renderings if requested by Owner.
- Reproductions, printing, binding, collating and handling of reports, and drawings and specifications or other Project-related work product, other than that used solely in-house

by Consultant.

- Shipping or mailing of all reports, drawings, specifications, and other items in connection with the Project.
- Other expenses approved in writing by Owner.

3.3.2 Consultant shall not be entitled to receive payment for legal services which Consultant procures or employs for any matter related to the Project except when advance written approval is given by Owner's Attorney.

3.3.3 Reimbursable Expenses shall be billed at the actual cost to Consultant unless otherwise provided herein.

3.4 *Subconsultants' Charges.* Subconsultants' charges shall be billed to Owner at the actual cost to Consultant times a factor of 1.1 unless otherwise provided herein.

3.5 *Monthly Payments.* The portion of the Total Compensation billed each month for Consultant's Services will be based:

- For Lump Sum Services, upon the agreement of the project managers of Owner and Consultant as to the percentage of total Services actually completed for each Phase during the billing period;
- For DLC Services, on the Direct Labor Costs attributable to the cumulative hours charged to the Project by Consultant's principals and employees multiplied by the above-designated factor during the billing period;
- For Reimbursable Expenses on those billed during the billing period; and
- For subconsultant's charges on those billed to Consultant during the billing period.

3.6 *Additional Services.* Owner shall pay Consultant for Additional Services of Consultant's personnel engaged directly on the Project, pursuant to an Additional Services Proposal approved by Owner, utilizing one or a combination of the following methods:

- Payment of a lump sum amount which includes compensation for Consultant's Services and Services of subconsultants, if any, and incorporates amounts to account for labor, overhead, profit, and Reimbursable Expenses.
- Payment of an amount equal to the cumulative hours charged for the Additional Services by each class of Consultant's personnel times Standard Hourly Rates for each applicable billing class for all Services performed on the Project, which amount incorporates all labor, overhead, profit, Reimbursable Expenses and subconsultants' charges, if any.
- Payment of an amount equal to Consultant's Direct Labor Costs times a factor of _____ for the Services of Consultant's personnel engaged in providing the Additional Services which amount incorporates all labor, overhead, profit, Reimbursable Expenses, and subconsultants' charges, if any.
- As otherwise provided in the approved Additional Services Proposal.

3.7 *Invoice Required.* Payments shall be made to Consultant upon receipt by Owner of a properly documented invoice for payment as determined by the budgetary and fiscal guidelines of Owner and on the condition that Consultant has accomplished the Services to the satisfaction of Owner. Applicable taxes will be stated separately on each invoice and paid by Owner at current

rates. Taxes may not be billed more than sixty (60) days after completion of the Services to which they apply.

3.8 *Gross Receipts Tax/Non-Taxable Transactions.* Consultant shall use and require the use of non-taxable transaction certificates by subcontractors and suppliers whenever allowed by law. In any event, Consultant shall not include gross receipts taxes paid to others as a part of the base dollar amount upon which Consultant calculates its gross receipts taxes when billing Consultant's fees and expenses to Owner.

3.9 *Appropriations.* Notwithstanding any other provisions in this Agreement, the terms of this Agreement are contingent upon the Water Authority Board making the appropriations necessary for the performance of this Agreement. If sufficient appropriations and authorizations are not made by the Water Authority Board, this Agreement may be terminated at the end of Owner's then current fiscal year upon written notice given by Owner to Consultant. Such event shall not constitute an event of default. All payment obligations of Owner and all of its interest in this Agreement will cease upon the date of termination. Owner's decision as to whether sufficient appropriations are available shall be accepted by Consultant and shall be final.

3.10 *Non-Exclusivity.* With respect to the purchase of Services on an as needed basis, Owner is not obligated to make any such purchases under this Agreement and Owner may contract with other firms to provide such services at any time.

3.11 *Final Payment.* Consultant, by its acceptance of final payment of the amounts due under this Agreement, releases Owner, its officers and employees, from all liabilities and obligations for fees and costs due under this Agreement, including, but not limited to, all damages, losses, costs, liability, and expenses (including, but not limited to, attorney's fees and costs of litigation) that Consultant may have. All representations, including standard of care issues made in this Agreement will survive final payment and termination or completion of this Agreement.

4. Consultant's Responsibilities and Limitations.

4.1 *General Terms and Conditions.* Except as limited by this Agreement, Consultant's duties and responsibilities, Consultant's relationship with the Contractor, and the limitations of Consultant's authority during the Project shall be in accordance with the General Terms and Conditions, as amended and in effect on the date of Owner's execution of this Agreement, or such other or additional terms and conditions of the Contract between Owner and the Contractor for construction of the Project, all of which are incorporated herein as though set forth in full. Said Contract shall not be modified without Consultant's written consent, to the extent such changes affect the Services required by this Agreement.

4.2 *Standard of Care.* Consultant shall perform the Services required by this Agreement as expeditiously as is consistent with professional standards of care and the orderly progress of the Project. Failure of Consultant to perform in such a manner or to meet the Project Schedule attached as Exhibit B shall constitute a basis for termination and/or withholding of payment until timely performance is achieved by Consultant.

4.3 *Responsible Party.* Consultant shall provide the services of the following named New Mexico registered architect(s) or engineer(s) who will be in responsible charge of providing the Services required of Consultant under this Agreement in accordance with the New Mexico Architectural Act and/or the New Mexico Engineering and Surveying Act.

Architect or Engineer's name

New Mexico Certificate Number

This responsible party shall not be changed without prior approval of Owner, which approval shall not be unreasonably withheld.

4.4 *Limit on Authority.* Consultant agrees not to purport to bind Owner to any obligation not assumed herein by Owner, unless Consultant has express written authority to do so, and then only within the strict limits of that authority.

5. Owner's Responsibilities.

5.1 Owner's responsibilities with respect to the Project, Consultant and the Contractor are described in the General Terms and Conditions and other documents which make up Owner's Contract with the Contractor for construction of the Project, all of which are incorporated herein.

5.2 Owner shall make accessible to Consultant, but not copy, all of its maps, records, reports, or other data pertinent to the Services to be performed by Consultant pursuant to this Agreement, and also make accessible any other maps, records, or other materials available to Owner from any other public agency or body.

5.3 Consultant shall indicate to Owner any additional information needed for the rendering of Services hereunder. Owner shall provide to Consultant such information as is available to Owner and Owner's consultants and contractors, and Consultant shall be entitled to rely upon the accuracy and completeness thereof.

6. Independent Contractor: Neither Consultant nor its employees are considered to be employees of Owner for any purpose whatsoever. Consultant is considered as an independent contractor at all times in the performance of the Services. Consultant further agrees that neither it nor its employees are entitled to any benefits from Owner under the provisions of the Workers' Compensation Act of the State of New Mexico, or to any of the benefits granted to employees of Owner under the provisions of the Merit System Ordinance as now enacted or hereafter amended.

7. Personnel:

7.1 Consultant represents that it has, or will secure at its own expense, all personnel required in performing all of the Services required under this Agreement in a timely manner. Such personnel shall not be employees of or have any contractual relationships with Owner.

7.2 All the Services required hereunder will be performed by Consultant or under its supervision and all personnel engaged in the work shall be fully qualified and shall be authorized or permitted under state and local law to perform such Services. All Services shall be performed in accordance with the standards of the profession.

7.3 None of the work or Services covered by this Agreement shall be subcontracted without the prior written approval of Owner. Any work or Services subcontracted hereunder shall be specified by written contract or agreement and shall be subject to each provision of this Agreement. Such agreements shall not be construed as a diminution of Consultant's liability and responsibilities to Owner.

8. Indemnity:

8.1 *Indemnification by Consultant.* Consultant agrees to indemnify, and hold harmless Owner and its officers, agents and employees from and against liability, claims, damages, losses or expenses, including attorneys' fees, only to the extent that the liability, damages, losses or costs

are caused by or arise out of the acts or omissions of Consultant, its officers, agents or employees in the performance of this Agreement. Nothing in the Agreement shall be construed to require Consultant to indemnify and hold harmless Owner, its officers, agents and employees from and against liability, claims, damages, losses or expenses, including attorneys' fees, arising out of the acts or omissions of Owner or its officers, agents and employees. Receipt by Owner of Consultant's Services under this Agreement and Owner's authorization for Consultant to proceed with the various phases of Services shall not be construed as approval of Consultant's work product by Owner or as the giving of instructions or directions by Owner. This indemnification provision is subject to the limitations and provisions of Section 56-7-1 NMSA 1978.

8.2 *Time and Expenses.* Consultant's time and expenses spent in defending allegations in claims or lawsuits arising from the acts or omissions of Consultant shall be at Consultant's own expense. Consultant shall cooperate with Owner in defending claims and lawsuits arising out of the acts or omissions of Consultant. This will not require of Consultant analyses, computations, and other architect/engineering work which is not in the scope of this Agreement.

8.3 *Indemnification by Contractor.* Owner will require in the general conditions of any construction contract, language which states that the Contractor is required to indemnify and save harmless Owner and Consultant and their officers, agents, and employees from and against all suits, actions or claims of any character brought because of any injury or damage received or sustained by any person, persons or property arising out of the performance of the Work by Contractor, or by reason of any act or omission, neglect or misconduct of Contractor, his agents or employees or any subcontractor, his agents or employees. Owner shall require the Contractor to name Owner and Consultant as additional insureds on the Contractor's commercial general liability insurance policy.

9. Insurance:

General Conditions. The Water Authority will require a Consultant, to procure and maintain at its expense during the term of an Agreement resulting from the RFP, insurance in the kinds and amounts hereinafter provided with insurance companies authorized to do business in the State of New Mexico, covering all operations of Consultant under the Agreement. Upon execution of the Agreement and on the renewal of all coverages, Consultant shall furnish to the Water Authority a certificate or certificates in form satisfactory to the Water Authority as well as any rider or endorsement showing that it has complied with these insurance requirements. All certificates of insurance shall provide that thirty (30) days written notice be given to the Risk Program Manager, Albuquerque Bernalillo County Water Utility Authority, P.O. Box 568, Albuquerque, New Mexico 87103, before a policy is canceled, materially changed, or not renewed. Various types of required insurance may be written in one or more policies. With respect to all coverages required other than professional liability or workers' compensation, the Albuquerque Bernalillo County Water Utility Authority shall be named an additional insured. All coverages afforded shall be primary with respect to operations provided.

Approval of Insurance. Consultant shall not begin to provide Services under the Agreement resulting from this RFP or a Work Order until the required insurance has been obtained and the proper certificates (or policies) filed with the Water Authority. Neither approval nor failure to disapprove certificates, policies, or the insurance by the Water Authority shall relieve Consultant

of full responsibility to maintain the required insurance in full force and effect. The Water Authority reserves the right to review copies of all required insurance policies and/or amendments or replacement policies at any time. If part of the Agreement is sublet, Consultant shall include any or all subcontractors in its insurance policies, or require the subcontractor to secure insurance to protect itself against all hazards enumerated herein, which are not covered by Consultant's insurance policies.

Coverage Required. The kinds and amounts of insurance required are as follows:

- Commercial General Liability Insurance. A commercial general liability insurance policy with combined limits of liability for bodily injury or property damage as follows:

\$1,000,000	Per Occurrence
\$1,000,000	Policy Aggregate
\$1,000,000	Products Liability/Completed Operations
\$1,000,000	Personal and Advertising Injury
\$ 50,000	Fire Legal
\$ 5,000	Medical Payments

Said policy of insurance must include coverage for all operations performed for the Water Authority by Consultant and contractual liability coverage shall specifically insure the hold harmless provisions of the Agreement.

- Automobile Liability Insurance. An automobile liability insurance policy with liability limits in amounts not less than \$1,000,000 combined single limit of liability for bodily injury, including death, and property damage in any one occurrence. The policy must include coverage for the use of all owned, non-owned, hired automobiles, vehicles and other equipment both on and off work.
- Professional Liability Insurance. Professional liability insurance in an amount not less than \$1,000,000.00 per claim and in the aggregate.
- Workers' Compensation Insurance. Workers' compensation insurance policy for Consultant's employees, in accordance with the provisions of the Workers' Compensation Act of the State of New Mexico, (the "Act"). If Consultant has determined that it is not subject to the Act, Consultant will certify, in a signed statement to that effect. Consultant will notify the Water Authority and comply with the Act if it becomes subject to the Act during the term of the Agreement.

Increased Limits. If during the term of the Agreement, the Water Authority requires Consultant to increase the maximum limits of any insurance required herein, an adjustment in Consultant's compensation will be made in the amount of the actual cost of additional insurance attributable directly to this Agreement.

Additional Insurance. The Water Authority may, as a condition of award of a contract, require a successful Offeror to carry additional types of insurance. In such event, the premium cost directly incurred by Consultant for the additional coverage shall be a direct reimbursable expense, which shall be paid by the Water Authority. The type and limit of additional insurance is dependent upon the type of Services provided by the successful Offeror under the Agreement.

Consultant shall not commence any work under this Agreement until the insurances required have been obtained and the proper certificates, riders or endorsements (or policies) have been submitted to Owner.

10. Reports and Information: At such times and in such forms as Owner may require, there shall be furnished to Owner such statements, records, reports, data and information, Owner may request pertaining to matters covered by this Agreement. Unless authorized by Owner, Consultant will not release any information concerning the work product including any reports or other documents prepared pursuant to the Agreement until the final product is submitted to Owner.

11. Establishment and Maintenance of Records: Records shall be maintained by Consultant in accordance with applicable law and requirements prescribed by Owner with respect to all matters covered by this Agreement. Except with respect to lump sum fees, records of Consultant's expenses and those of its consultants pertaining to the Services provided shall be kept on the basis of generally accepted accounting principles. Except as otherwise authorized by Owner, such records shall be maintained for a period of three (3) years after receipt of final payment under this Agreement and shall be available to Owner until all applicable statutes of limitation have run. This Section 11 shall survive and continue beyond the termination of this Agreement or any of its provisions.

12. Audits: At any time during normal business hours and as often as Owner may deem necessary, there shall be made available to Owner, or its representative, for examination all of Consultant's records with respect to all matters covered by this Agreement. Consultant shall permit Owner to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and other data relating to all matters covered by this Agreement. Owner shall have the right to audit all such records and billings both before and after payment. Payment under this Agreement shall not foreclose the right of Owner to recover excessive or illegal payments. Consultant and its sub-consultants shall not be compensated under this Agreement for time or costs incurred in complying with this Section.

13. Ownership and Use of Documents:

13.1 *Ownership.* All designs, drawings, specifications, notes, computer discs and generated work, regardless of the media used, and other work developed in the performance of this Agreement are the sole property of Owner. This includes, but is not limited to, original construction documents such as calculations, technical data, and data related specifically to the Project, field notes, project manuals, and related documents and other such items developed by Consultant in connection with the Project. All such documents shall vest in and shall become the sole property of Owner whether the Project for which they are made is constructed or not. Production costs of such materials are included within Consultant's Basic Services Fee. With respect to computer programs and computer data, Owner, at its option and at its cost, may require that Consultant provide any and all computer licensing agreements necessary to permit Owner to use computer programs and data related to the Project. As part of the Basic Services Fee, Consultant may maintain and retain a complete reproducible set of any and all record documents developed under this Agreement. Delivery of original documents shall not be required by Owner prior to completion of the performance or termination of this Agreement. Electronic data delivered to and accepted by Owner shall not include the professional stamp or signature of an engineer or architect. Owner agrees that Consultant shall not be liable for claims, liabilities or losses arising out of, or connected

with the decline of accuracy or readability of accepted electronic data due to inappropriate storage conditions or duration.

13.2 *Prohibition on Reuse.* All documents, including drawings and specifications prepared by Consultant pursuant to this Agreement, are instruments of service in respect to the Project. They are not intended or represented by Consultant to be suitable for reuse by the Owner on any other project. The original drawings may be marked by Owner or Consultant to designate the restrictions on use of these documents as set forth in this Section.

13.3 *Copyright.* No reports, maps, or other documents produced in whole or in part under this Agreement shall be the subject of an application for copyright by or on behalf of Consultant. However, Consultant may use these documents as reference and research materials and as representations of the design of the Project, including photographs of the work among Consultant's promotional and professional materials, provided however that such documents and materials shall not include Owner's confidential or proprietary information in the event Owner has previously advised Consultant in writing of matters that Owner considers confidential or proprietary. Owner shall provide professional credit for Consultant in promotional materials for the Project if so requested, in writing, by Consultant.

13.4 *Additional Copies.* In the event Owner requires additional copies of the documents prepared under this Agreement, prior to Consultant's delivery of the original documents to Owner, Consultant agrees to promptly provide copies upon request and Owner agrees to reimburse Consultant for reasonable costs of reproduction, not to exceed actual costs of reproduction including labor costs expended in providing the requested copies.

14. Ethical Conduct:

14.1 *General.* Consultant warrants that it will perform the Services under this Agreement in compliance with the Ethical Conduct provisions (§2-390) and Unfair Business Practices provisions (§2-376) of the Procurement Ordinance, the Water Authority Code of Conduct, the Governmental Conduct Act (Sections 10-16-1 through 10-16-18, NMSA), the New Mexico criminal statutes prohibiting bribes, gratuities and kickbacks (Sections 30-41-1 through 30-41-3 NMSA 1978), and any other Water Authority or New Mexico laws, ordinances, rules and regulations, policies, procedures and administrative instructions applicable to ethical conduct. Consultant warrants that it presently has no interest and will not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of this Agreement.

14.2 *Employee Conflicts.* Consultant further covenants that, in the performance of this Agreement, no person having a direct or indirect interest which would conflict in any manner or degree with his or her performance in connection with this Agreement shall be employed by Consultant. Consultant also agrees that neither it nor anyone employed by it shall have an interest, direct or indirect, in any company hired for the Project as a contractor, subcontractor, supplier, or manufacturer, except for those areas of construction for which Owner provides construction phase inspection that is independent of Consultant.

14.3 *Litigation.* Consultant agrees to not serve in the capacity of architect, engineer, consultant, expert, or expert witness for any party to litigation or pending litigation holding an adverse position to, or claim against, Owner on the same subject matter for which Consultant performs Services pursuant to the terms of this Agreement.

15. Unfair Business Practices: Consultant agrees to comply with the Unfair Business Practices provisions (§2-376) of the Procurement Ordinance and the New Mexico Unfair Business Practices Act, Section 57-12-1 et seq. NMSA 1978 (the “Act”). If during the term of this Agreement Consultant has been found to engage in any Unfair Business Practices Consultant agrees to report that finding to the Water Authority Central Purchasing Office. Unfair Business Practices are defined as a system or pattern of acts or practices that a federal or State enforcement agency has made a formal finding within the last three years to be discriminatory, deceptive, fraudulent, or abusive (or similar terms) under the Act, or an applicable federal or State consumer protection law relating to the Scope of this Agreement or that have violated a relevant criminal statute, as evidenced by a public enforcement order or judgment, settlement with the enforcement agency, or other formal finding by the relevant enforcement agency with regulatory enforcement authority under the applicable consumer protection law, or criminal conviction.

16. Compliance with Laws: In providing the Services outlined herein, Consultant shall comply with all applicable laws, ordinances, and codes of the federal, State, and local governments, including, but not limited to the New Mexico Human Rights Act, Title VII of the federal Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and all federal, State and local statutes, regulations and executive orders relating to civil rights. Furthermore, this Agreement must be conducted in accordance with mandatory applicable federal laws and regulations as set forth in Exhibit D, Water Authority Federal Funding Contract Addendum.

17. Changes: If changes occur in the terms and conditions of this Agreement, scope of services, or the description of the Project, a supplemental agreement may be negotiated at the request of either party.

18. Assignability: Consultant shall not assign any interest in this Agreement and shall not transfer any interest in this Agreement (whether by assignment or novation), without the prior written consent of Owner thereto.

19. Dispute Resolution:

19.1 *Mediation Procedures.* In the event a dispute concerning this Agreement arises, any party seeking relief shall mail or deliver a written demand to the other party, describing the relief sought and the basis for such relief within a reasonable time after the claim, dispute or other matter in question has arisen. Owner and Consultant shall attempt to informally negotiate a resolution of such demand. In the event the negotiations fail or no resolution is reached within fifteen (15) days after receipt of the demand, whichever first occurs, the dispute shall be submitted to non-binding mediation. Each party shall pay in equal shares all fees and costs assessed by the mediator. Unless agreed in writing otherwise, the failure of any party making a demand to request mediation within thirty (30) days of the original submission of the demand shall be deemed a waiver of mediation requirements herein, and the parties shall proceed pursuant to arbitration. In the event the dispute is submitted to arbitration, the parties may enter into a written agreement to stay arbitration pending completion of mediation.

19.2 *Arbitration.* If mediation is not successful, any dispute concerning this Agreement, or the performance, interpretation, or breach thereof, shall then be settled by arbitration pursuant to the Uniform Arbitration Act, Section 44-7A-1 et seq. NMSA 1978 (the “NMUAA”) then in effect. The arbitrator(s) shall have no power to render an award, which has the effect of altering or amending or changing in any way any provision of this Agreement. The award of the arbitrator(s) shall be final and binding. Judgment upon any such award shall be rendered only by any state or

federal court sitting in Bernalillo County, New Mexico. Any and all arbitration proceedings, including discovery ordered by the arbitrator(s) shall take place in Bernalillo County, New Mexico. In any such arbitration, the arbitrator(s) shall have the powers of a court having jurisdiction as well as all of the powers pursuant to the NMUAA. Without limiting the generality of the foregoing, the arbitrator(s) shall have the power to issue orders for injunctive relief.

19.3 *Demand for Arbitration.* Notice of demand for arbitration must be filed in writing with the other parties subject to this Section in accordance with the NMUAA. The demand must be made within a reasonable time after the claim, dispute or other matter in question has arisen, or mediation has terminated, whichever event occurs last. In no event may the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

19.4 *Injunctive Relief.* Owner and Consultant consent and agree to the issuance of any temporary restraining order or preliminary injunction, by any Court sitting in Bernalillo County, New Mexico having jurisdiction, upon the application of any party to the arbitration. Such authority of a Court to order injunctive relief shall terminate upon completion of the appointment of an arbitrator(s) who will then have jurisdiction to issue orders for injunctive relief. Any party to the arbitration may apply to the arbitrator(s) for issuance of an injunction or similar relief, and such application shall be heard by the arbitrator(s) within ten (10) days after the application is filed. Any Court in Bernalillo County having jurisdiction to render an order confirming the award of the arbitrator(s) shall have jurisdiction to enter an order confirming the issuance of such injunction and making it an order of the Court.

19.5 *Consolidation and Joinder.* Owner and Consultant consent to the joinder in arbitration of any party necessary for the complete resolution of all disputes arising out of the performance of contracts pertaining to the Work of the Project, including but not limited to the Contractor and its subcontractors and suppliers and any other interested party. Owner and Consultant also consent to the consolidation of any arbitration under this Agreement with any other arbitration involving the performance of contracts pertaining to the Work of the Project.

19.6 *Dispute Resolution.* In the event Owner enters into a construction contract for the Project, Owner shall include a similar dispute resolution provision (with appropriate changes in the description of the parties) in its contract with the Contractor.

20. Project Suspension: If the Project is suspended for more than three (3) months or abandoned in whole or in part, Consultant shall be compensated for its Services performed prior to receipt of written notice from Owner of such suspension or abandonment, together with expenses then due. If the Project is resumed after being suspended for more than three (3) months, Consultant's compensation shall be subject to renegotiation. In the event fees cannot be agreed upon, Owner may select another consultant, and Consultant shall be entitled to no further fees.

21. Termination:

21.1 *Termination for Default.* If either party should fail to fulfill in timely and proper manner its obligations under this Agreement, or if either party should violate any of the covenants, agreements, or stipulations of this Agreement, such party, in addition to remedies available under the terms of this Agreement, thereupon shall have the right to terminate this Agreement by giving written notice to the other party of such termination and specifying the effective date thereof at least fifteen (15) days before the effective date of such termination. Consultant shall be responsible

for all direct and consequential costs and damages which may arise out of Consultant's failure to complete the Services in accordance with the schedule of Consultant's Services defined in or pursuant to this Agreement, provided however, Consultant shall not be responsible for damages caused by Owner's delay. Consultant shall not be entitled to delay damages against Owner for delay of the performance of this Agreement caused by Owner or any third parties.

21.2 *Termination Due to Abandonment.* In the event that the Project is abandoned by Owner, Owner may terminate this Agreement at any time by giving at least fifteen (15) days written notice to Consultant.

21.3 *Termination for Convenience of Owner.* Owner may terminate this Agreement, in whole or in part, without cause and for Owner's convenience at any time by giving at least fifteen (15) days written notice to Consultant.

21.4 *Termination Due to Non-Funding.* In the event the construction project funds out of which this Agreement is funded are depleted to the extent the funds are inadequate for Owner to make the payments required pursuant to this Agreement, Owner may terminate this Agreement by giving at least ten (10) days written notice to Consultant.

21.5 *Effect of Termination.* Upon Consultant's receipt of a notice of termination, Consultant shall promptly discontinue all Services affected, unless otherwise directed in writing by Owner. All finished or unfinished documents, data, sketches, calculations, summaries, estimates, records, schedules, studies, surveys, drawings, maps, models, photographs, reports, and such other information and data accumulated in the performance of Services under this Agreement, whether complete or in progress, prepared by Consultant under this Agreement shall become Owner's property regardless of the cause for termination. Consultant shall be entitled to receive compensation for actual work satisfactorily completed hereunder, including reimbursable expenses authorized by Owner which are then due, but shall not be entitled to recover any consequential damages, including, but not limited to, loss of anticipated profits, for any termination allowed pursuant to this Section. In the event of termination, Owner may take over the Work of the Project and continue the Project by contract with another party or with its own staff.

22. Formal Notices: All notices herein provided to be given, or which may be given, by either party to the other shall be deemed to have been fully given when made in writing and deposited in the United States mail, postage prepaid. In the instance of termination of this Agreement, notice shall be sent by certified mail, addressed as follows:

Albuquerque Bernalillo County Water Utility Authority
One Civic Plaza NW, Room 5012
Albuquerque, New Mexico 87102

Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed to either party may be changed by written notice given by such party to the other as hereinabove provided. In addition, nothing contained herein shall preclude the transmission of routine correspondence, messages and information between the respective parties to this Agreement, either at the Project site or at the home offices of either party, or by an official of either party or their representatives.

23. Construction and Severability: If any part of this Agreement is held to be invalid or unenforceable, such holding will not affect the validity or enforceability of any other part of this Agreement so long as the remainder of the Agreement is reasonably capable of completion.

24. Enforcement: Consultant agrees to pay to Owner all costs and expenses including reasonable attorneys' fees incurred by Owner in exercising any of its rights or remedies in connection with the enforcement of this Agreement.

25. Entire Agreement: The RFP, Consultant's Proposal submitted in response to the RFP, and all Exhibits and other documents attached or referred to in this Agreement, or within the standard of care of the industry, are hereby incorporated into and made a part hereof as though set forth in full in this Agreement to the extent they are consistent with its conditions and terms. The terms RFP, Proposal, and Agreement as used herein, include all Addenda, modifications, amendments and supplements to these documents unless otherwise stated. In the event of a conflict, the documents shall have precedence as follows: the Exhibits to the Agreement, the Agreement, the RFP and the Proposal.

This Agreement and incorporated documents contain the entire agreement of the parties and supersede any and all other agreements or understandings, oral or written, whether previous to the execution hereof or contemporaneous herewith.

26. Applicable Law: This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New Mexico, and the ordinances, rules and regulations of the Water Authority.

27. Approval Required: This Agreement shall not become effective or binding until approved by the Executive Director of the Water Authority.

IN WITNESS WHEREOF, Owner and Consultant have executed this Agreement as of the date first above written.

**ALBUQUERQUE BERNALILLO
COUNTY WATER UTILITY
AUTHORITY**

CONSULTANT: SMITH ENGINEERING

Approved By:

By: _____

Title: _____

Mark S. Sanchez, Executive Director

Date: _____

Date: _____

New Mexico Architect/Engineer Certificate No:
20435

Recommended By:

Elizabeth Anderson, Chief Planning Officer

Date: _____

Reviewed by:

Charles Kolberg, General Counsel

Date: _____

EXHIBITS

EXHIBIT A – SCOPE OF SERVICES

EXHIBIT B – CONSULTANT’S PERSONNEL

EXHIBIT C -- WATER AUTHORITY FEDERAL FUNDING CONTRACT ADDENDUM

EXHIBIT C:

Water Authority – Federal Funding Contract Addendum

This addendum hereby incorporates into the Agreement between the Water Authority and the Consultant additional requirements pursuant to Appendix II to Part 200 - Contract Provisions for Non-Federal Entity Contracts Under Federal Awards, 2 CFR 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

The following provisions, as applicable, are considered an enforceable part of the Agreement:

1. Administrative, contractual, or legal remedies in instances where Consultants violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
2. Termination for cause and for convenience including the manner by which it will be effected and the basis for settlement.
3. § 60-1.4 Equal opportunity clause.

(a) Government contracts.

During the performance of this contract, the Consultant agrees as follows:

(1) The Consultant will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The Consultant will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Consultant agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The Consultant will, in all solicitations or advertisements for employees placed by or on behalf of the Consultant, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The Consultant will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee

who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the Consultant's legal duty to furnish information.

(4) The Consultant will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the Consultant's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The Consultant will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The Consultant will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the Consultant's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Consultant may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The Consultant will include the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Consultant will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the Consultant becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Consultant may request the United States to enter into such litigation to protect the interests of the United States.

(b) Federally assisted construction contracts.

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant

orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(c) Subcontracts. Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) Inclusion of the equal opportunity clause by reference. The equal opportunity clause may be included by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director of OFCCP may designate.

(e) Incorporation by operation of the order. By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the Consultant is written.

(f) Adaptation of language. Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

4. In accordance the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"), Construction contractors must pay wages to laborers and mechanics at a

rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, Construction contractors must pay wages not less than once a week. When both federal and state minimum wage rates apply to certain classes of laborers, then the higher of the two wage rates shall apply.

5. Consultant must comply with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled.
6. Pursuant to 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5), contracts in excess of \$100,000 that involve the employment of mechanics or laborers, each contractor must compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
7. Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended - Contracts of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387).
8. Contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

9. As appropriate and to the extent consistent with law, the Contractor should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products).

(b) For purposes of this section:

(1) “Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) “Manufactured products” means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.