

Example Agreement



Albuquerque Bernalillo County
Water Utility Authority

Engineering Services Agreement

WUA PROJECT NAME

WUA Project No. XXXX.XX

[Consultant Firm Name]

WUA Contract No. _____

Engineering Services Agreement

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ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY
ENGINEERING SERVICES AGREEMENT

[WUA Project Name]

THIS AGREEMENT, made and entered into on the date last entered below by the signatories hereto, is by and between the Albuquerque Bernalillo County Water Utility Authority, a political subdivision of the state of New Mexico, hereinafter referred to as the "Owner", and [Consultant firm name], [Consultant firm address], [City], [State] [Zip Code], a [state of incorporation] corporation, hereinafter referred to as the "Engineer."

WITNESSETH:

WHEREAS, on [enter date] the Owner's Board of Directors approved the Executive Director's recommendation that the Engineer provide the Owner with professional services relating to the project described in Article II of this Agreement; and

WHEREAS, funding has been appropriated for the Owner's Capital Implementation Program, Project Number [xxxxxxx] entitled [Project Name]; and

WHEREAS, the Owner desires to engage the Engineer to render professional engineering services in connection with the Project, and the Engineer is willing to provide such services; and

WHEREAS, the Engineer represents that the person who has executed this Agreement on behalf of the Engineer has the authority to bind the Engineer to this Agreement pursuant to Section 61-23-21B., NMSA 1978; and

WHEREAS, the Engineer represents that, in accordance with the Engineering and Surveying Act, Sections 61-23-1, et seq., NMSA 1978, the following named person or persons are professional engineer(s) who will be in responsible charge of and directly responsible for the services required of the Engineer under this Agreement and shall hereinafter be referred to as the "Project Engineer(s)":

[Engineer's name], PE New Mexico Certificate Number xxxxx

NOW, THEREFORE, in consideration of the premises and covenants hereinafter contained, the parties hereto hereby agree as follows:

ARTICLE I
DEFINITIONS

- A. Chief Operating Officer means the Chief Operating Officer of the Owner, or his successor.
- B. Contractor means the construction contractor or contractors awarded the contract by the Owner for the construction of the Project.
- C. Engineer means the firm, named in this Agreement, which employs a currently registered Engineer of New Mexico or the individual named in this Agreement who is currently registered as an Engineer of New Mexico. In the instance of a firm, the term "Engineer" shall include the Project Engineer(s) listed in this Agreement.
- D. Estimated Construction Cost means the total estimated cost for the construction of the Project, excluding fees, taxes and costs for legal and engineering or any other design professional

services, right-of-way and land acquisition, administrative services, project contingency funds, all costs which are the responsibility of the Owner, or any cost for which design effort or activity by the Engineer is incidental.

- E. Executive Director means the Executive Director of the Owner, or his successor.
- F. Project Manager means the person designated as the Owner's representative.

ARTICLE II DESCRIPTION OF PROJECT

The "Project" is defined in paragraph 2 of Article XXI of this Agreement.

ARTICLE III SCOPE OF SERVICES

The Engineer shall perform professional services relevant to the Project in accordance with the terms and conditions set forth herein, and as provided in Exhibit I, Engineer's Scope of Services, which is attached hereto and by this reference is incorporated herein and made a part of this Agreement as though set forth in full. 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.

ARTICLE IV COMPENSATION

- A. BASIC FEES. RESERVED, see Article XXI
- B. PAYMENT SCHEDULE FOR BASIC FEE. RESERVED, see Article XXI
- C. PAYMENT FOR ADDITIONAL SERVICES. RESERVED, see Article XXI
- D. GROSS RECEIPTS TAX/NON-TAXABLE TRANSACTIONS. The Engineer may add any applicable gross receipts tax to the fees and other payments payable hereunder. The Engineer shall use and require the use of non-taxable transaction certificates by consultants and suppliers whenever allowed by law. In all events, the Engineer shall not include gross receipts taxes paid to others as a part of the base dollar amount upon which the Engineer calculates its gross receipts taxes when billing the Engineer's fees and expenses to the Owner.

ARTICLE V OWNERSHIP AND USE OF DOCUMENTS

- A. Original construction document drawings, calculations, technical data, and data related specifically to the Project, designs, specifications, notes (including field notes), project manuals, and related documents and other work developed in the performance of this Agreement by the Engineer shall vest in and shall become the sole property of the Owner whether the Project for which they are made is constructed or not. Production costs of such materials are included within the Engineer's basic fee. With respect to computer programs and computer data, the Owner, at its option and at its cost, may require that the Engineer provide any and all computer licensing agreements necessary to permit the Owner to use computer programs and data related to the Project. As part of the Basic Fee, the Engineer 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 the Owner prior to completion of the performance or termination of this Agreement. Electronic data delivered to and accepted by the Owner shall not

include the professional stamp or signature of an engineer or architect. Owner agrees that Engineer 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.

- B. All documents, including drawings and specifications prepared by the Engineer pursuant to this Agreement, are instruments of service in respect to the Project. They are not intended or represented by the Engineer to be suitable for reuse by the Owner on any other project except as provided in paragraph E below.
- C. The original drawings may be marked by the Owner or the Engineer to designate the restrictions of use of these documents as set forth in this Article.
- D. 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 the Engineer. However, the Engineer may use these documents as reference and research materials and as representations of the design of the Project, including photographs of the work among the Engineer's promotional and professional materials, provided however that such documents and materials shall not include the Owner's confidential or proprietary information in the event the Owner has previously advised the Engineer in writing of matters that the Owner considers confidential or proprietary. The Owner shall provide professional credit for the Engineer in promotional materials for the Project if so requested, in writing, by the Engineer.
- E. The Owner acknowledges that the Engineer's construction documents, including the accepted electronic versions of such documents, are instruments of professional service. Nevertheless, the plans and specifications prepared under this Agreement shall become the property of the Owner upon completion of the work and payment in full of all fees due the Engineer. Unless provided otherwise in Article XXI, the Owner agrees, to the fullest extent permitted by law, to indemnify and hold the Engineer harmless from any claim, liability or cost arising or allegedly arising out of any unauthorized modification or misuse of the construction documents by the Owner or any person or entity that acquires or obtains the plans and specifications from or through the Owner. This indemnity provision is subject to Section 56-7-1 NMSA 1978, as amended.
- F. The Owner shall make accessible to the Engineer, but not copy, all of its maps, records, reports, or other data pertinent to the services to be performed by the Engineer pursuant to this Agreement, and also make accessible any other maps, records, or other materials available to the Owner from any other public agency or body.
- G. In the event the Owner requires additional copies of the documents prepared under this Agreement, prior to the Engineer's delivery of the original documents to the Owner, the Engineer agrees to promptly provide copies upon request and the Owner agrees to reimburse the Engineer for reasonable costs of reproduction, not to exceed actual costs of reproduction including labor costs expended in providing the requested copies.

ARTICLE VI ACCOUNTING PROCEDURES AND RECORDS REQUIRED

- A. Records of expenses by the Engineer and its consultants pertaining to all services provided (other than lump sum fees) under this Agreement shall be kept on the basis of generally accepted accounting principles and shall be available at mutually convenient times to the Owner or the Owner's authorized representative, but only upon the request of the Executive Director. The 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 the Owner to recover excessive or illegal payments.

- B. Required records of expenses shall be kept by the Engineer and its consultants and shall be available to the Owner until all applicable statutes of limitation have run, and this Article VI shall survive and continue beyond the termination of any other terms of this Agreement.
- C. In the event the Owner audits the Engineer's records, pursuant to this Article, the Engineer shall make available to the Owner for examination all of the Engineer's records with respect to all matters covered by this Agreement and shall permit the Owner to audit, examine, and make copies, excerpts or transcripts at its own expense from all such records, including, but not limited to all contracts; invoices; materials; payrolls; records of personnel, to the extent allowed by law; conditions of employment; and other data relating to all matters covered by this Agreement. The Engineer and its sub-consultants shall not be compensated under this Agreement for its time or any costs incurred in complying with this paragraph.

ARTICLE VII SUSPENSION AND TERMINATION OF AGREEMENT

- A. **PROJECT SUSPENSION.** If the Project is suspended for more than three (3) months or abandoned in whole or in part, the Engineer shall be compensated for its services performed prior to receipt of written notice from the 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, the Engineer's compensation shall be subject to renegotiation. In the event fees cannot be agreed upon, the Owner may select another engineer, and the Engineer shall be entitled to no further fees.
- B. **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. The Engineer shall be responsible for all direct and consequential costs and damages which may arise out of the Engineer's failure to complete the services in accordance with the schedule of Engineer's services defined in or pursuant to this Agreement, provided however, the Engineer shall not be responsible for damages caused by the Owner's delay. The Engineer shall not be entitled to delay damages against the Owner for delay of the performance of this Agreement caused by the Owner or any third parties.
- C. **TERMINATION DUE TO ABANDONMENT.** In the event that the Project is abandoned by the Owner, the Owner may terminate this Agreement at any time by giving at least fifteen (15) days written notice to the Engineer.
- D. **TERMINATION FOR CONVENIENCE OF THE OWNER.** The Owner may terminate this Agreement, in whole or in part, without cause and for the Owner's convenience at any time by giving at least fifteen (15) days written notice to the Engineer.
- E. **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 the Owner to make the payments required pursuant to this Agreement, the Owner may terminate this Agreement by giving at least ten (10) days written notice to the Engineer.

- F. **EFFECT OF TERMINATION.** Upon Engineer's receipt of a notice of termination, the Engineer shall promptly discontinue all services affected, unless otherwise directed in writing by the 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 the Engineer under this Agreement shall become the Owner's property regardless of the cause for termination. The Engineer shall be entitled to receive compensation for actual work satisfactorily completed hereunder, including reimbursable expenses authorized by the 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 Article. In the event of termination for convenience, the Owner may take over the work of the Project and continue the Project by contract with another party or with its own staff.
- G. **GIVING NOTICE.** The time required to give notice in this Article VII shall begin to run from and including the date of the postmark of the letter of termination or the date of personal delivery.

ARTICLE VIII **STANDARD OF CARE**

The Engineer agrees that it and its employees shall possess the experience, knowledge, and character necessary to qualify them individually for the particular duties they perform in connection with the services to be performed under this Agreement. These services shall be performed in accordance with the standards of the profession. The Engineer further agrees that it will require its consultants, sub-consultants, joint venturers, and agents to agree with the Engineer that they possess the experience, knowledge, and character necessary to qualify them individually for the particular duties that are performed in connection with the services to be performed for the Engineer on the Project. Such agreement by consultants, sub-consultants, joint venturers, and agents shall further provide that the services required of them shall be performed in accordance with standards of their profession and shall not be construed as a diminution of the Engineer's liability and responsibilities to the Owner.

ARTICLE IX **INDEMNIFICATION**

- A. The Engineer agrees to indemnify, and hold harmless the Owner and its officers, agents and employees from and against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by or arise out of the acts or omissions of the Engineer, its officers, agents or employees in the performance of this Agreement. Nothing in the Agreement shall be construed to require the Engineer to indemnify and hold harmless the 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 the Owner or its officers, agents and employees. Receipt by the Owner of the Engineer's services under this Agreement and Owner authorization for the Engineer to proceed with the various phases of services shall not be construed as approval of the Engineer's work product by the Owner or as the giving of instructions or directions by the Owner. This indemnification provision is subject to the limitations and provisions of Section 56-7-1 NMSA 1978.
- B. The Engineer's time and expenses spent in defending allegations in claims or lawsuits arising from the acts or omissions of the Engineer shall be at the Engineer's own expense. The Engineer shall cooperate with the Owner in defending claims and lawsuits arising out of the acts or omissions of the Engineer. This will not require of the Engineer analyses, computations, and other engineering work, which is not in the scope of this Agreement.

ARTICLE X
FINAL PAYMENT

The Engineer, by its acceptance of final payment of the amounts due under this Agreement, releases the 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 the Engineer may have. All representations, including standard of care issues made in this Agreement will survive final payment and termination or completion of this Agreement.

ARTICLE XI
GENERAL AND SPECIAL PROVISIONS

- A. COMPLIANCE WITH LAWS. The Engineer agrees to perform this Agreement in compliance with all applicable Federal, State, and local codes, regulations, ordinances and laws.
- B. GOVERNING LAW. This Agreement shall be governed exclusively by the provisions hereof and by the laws of the State of New Mexico.
- C. CONTRACT FOR CONSTRUCTION - ENGINEER'S STATUS. The extent of the Engineer's duties and responsibilities, the Engineer's relationship with the Contractor, and the limitations of the Engineer's authority during the construction phase of the project shall be in accordance with the General Conditions contained in the City of Albuquerque Standard Specifications for Public Works Construction and all Supplemental General Conditions thereto, which are in effect on the date of Owner's execution of this Agreement or such other or additional General Conditions of the contract between the Owner and the Contractor for construction of the Project, all of which are incorporated herein as though set forth in full. Such General Conditions and supplements thereto shall not be modified without the Engineer's written consent, to the extent such changes affect the engineering services required by this Agreement.
- D. INDEPENDENT CONTRACTOR STATUS. The Engineer, and its agents and employees, are independent contractors performing professional and technical services for the Owner and are not employees of the Owner. The Engineer, and its agents and employees, shall not as a result of this Agreement, accrue leave or retirement, be entitled to insurance or bonding benefits or coverage, be entitled to the use of Owner's vehicles, or receive any other benefits afforded to employees of the Owner.
- E. TERM. The Term of this Agreement may not exceed four (4) years, including all extensions and renewals. The Term (unless otherwise specified in Article XXI of this Agreement) shall commence on the date executed by the Owner. The Engineer shall perform the services required by this Agreement as expeditiously as is consistent with professional skill and care and the orderly progress of the Project. Failure of the Engineer to perform in such a manner shall constitute a basis for termination and/or withholding of payment until timely performance is achieved by the Engineer. For purposes of this paragraph, the failure of the Engineer to meet the project schedule of Exhibit III of this Agreement or any extension thereof authorized by the Owner shall be a failure to perform expeditiously and consistently with professional skill and care.
- F. TIME OF ESSENCE. All time limits stated in this Agreement are of the essence in the performance of this Agreement.

G. ENGINEER'S CHANGE OF STATUS.

1. ASSIGNMENT OF CONTRACT. Neither party shall assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written consent of the other party.
2. JOINT VENTURE. In the event the Engineer proposes to perform this Agreement as part of a joint venture, all such joint venture agreements shall be reviewed by and meet the requirements of the Chief Operating Officer and be incorporated as an exhibit into this Agreement. Such joint venture agreements shall clearly identify the duties and responsibilities of each joint venturer as such duties and responsibilities relate to the performance of this Agreement.
3. MERGERS, DISSOLUTION, SUCCESSORS, AND ASSIGNS. The Engineer agrees that during the term hereof it will maintain its existing business structure and will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another business structure or permit one or more other business structures to consolidate or merge into it, unless the surviving, resulting, or transferee business structure, as the case may be, (a) is capable of performing and agrees in writing to perform all of the obligations of the Engineer hereunder; (b) qualifies to do business in the State of New Mexico, including providing a legal registered engineer of New Mexico as Project Engineer; and (c) the Chief Operating Officer approves of the firm or individual Engineer, or new Engineer, if any, who is to proceed with the performance of this Agreement. The terms and provisions hereof shall extend to and be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto. The failure of the Engineer to comply with the foregoing provisions of this paragraph shall constitute a default of this Agreement by the Engineer.
4. PROJECT ENGINEER/CHANGE OF STATUS. The Chief Operating Officer shall have sole discretion to determine whether the Project Engineer(s) or which of them, or the firm named as Engineer in this Agreement shall continue to have all contract rights under this Agreement and continue to represent the Owner under this Agreement in all instances where all or some of the Project Engineer's cease to be associated with the firm named in this Agreement.
5. SUBCONTRACTING. In the event the Engineer subcontracts out any portion of its duties or responsibilities under this Agreement or if the Engineer hires sub-consultants to assist it with its duties or responsibilities under this Agreement, the Engineer shall require that all terms of this Agreement applicable to the sub-consultant, subcontractor, or joint venturer shall be incorporated into any contract or agreement entered into with such sub-consultant, subcontractor, or joint venturer, and the Owner shall be entitled to receive a copy of all such contracts or agreements from the Engineer.

H. CONTRACT INTERPRETATION.

1. SEVERABILITY. If any clause or provision in this Agreement is illegal, invalid, or unenforceable under present or future laws effective during the term of this Agreement, then and in that event, it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby.
2. WAIVER. No provision of this Agreement shall be deemed to have been waived by either party unless such waiver is in writing, signed by the party making the waiver and addressed to the other party, nor shall any custom or practice which may evolve between

the parties in the administration of the terms of this Agreement be construed to waive or lessen the right of either party to insist upon the performance of the other party in strict accordance with the terms of this Agreement. Further, the waiver by any party of a breach by the other party of any term, covenant, or condition hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant, or condition thereof.

3. GENDER, SINGULAR/PLURAL. Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.
4. CAPTIONS AND SECTION HEADINGS. The captions and section headings contained in this Agreement are for convenience of reference only, and in no way limit, define, or enlarge the terms, scope, and conditions of this Agreement.
5. MULTIPLE ORIGINALS. This document may be executed in counterparts, each of which shall be deemed an original.
6. ENTIRE AGREEMENT. This Agreement represents the entire contract between the parties and, except as otherwise provided herein, may not be amended, changed, modified, or altered without the written consent of the parties hereto. This Agreement incorporates all of the conditions, agreements, and understandings between the parties concerning the subject matter of this Agreement, and all such conditions, understandings, and agreements have been merged into this written Agreement. No prior condition, agreement, or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this written Agreement.
7. INTERCHANGEABLE TERMS. For purposes of all provisions within this Agreement and all attachments hereto, the terms "Agreement" and "Contract" shall have the same meaning and shall be interchangeable.
8. WORDS AND PHRASES. Words, phrases, and abbreviations, which have well-known technical or trade meanings used in the Contract Documents (as defined in the contract between the Owner and the Contractor for construction of the Project) shall be used according to such recognized meanings. In the event of a conflict, the more stringent meaning shall govern.
9. RELATIONSHIP OF CONTRACT DOCUMENTS. All documents attached to this Agreement or incorporated into this Agreement are complementary, and any requirement of one contract document shall be as binding as if required by all.
10. EXHIBITS, CERTIFICATES, DOCUMENTS INCORPORATED AND ATTACHMENTS. All certificates, documents, exhibits, attachments, riders, and addenda referred to in this Agreement, including the exhibits referred to in this Agreement, as well as those listed hereinafter and those which are within the standard of care of the industry, are hereby incorporated into this Agreement by reference 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 following exhibits are attached hereto and incorporated herein as though set forth in full:

- Exhibit I: Engineer's Scope of Services
- Exhibit II: Owner's Responsibilities
- Exhibit III: Project Schedule
- Exhibit IV: Basic Hourly Fee Schedule

- I. 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

The name and address of the Engineer is given in paragraph 3 of Article XXI of this Agreement.

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.

- J. ETHICS AND CAMPAIGN PRACTICES. The Engineer agrees to provide any board, committee, commission or officer appointed or authorized by the Board of Directors of the Owner or by any state or federal official or agency that is appointed or authorized by law to investigate ethics or campaign practices ("Ethics Board") with any records and/or information pertaining in any manner to this Agreement, whenever such records or information are within the Engineer's custody, are germane to an investigation authorized by the Ethics Board, and are requested by the Ethics Board. The Engineer further agrees to appear as a witness before the Ethics Board as required by the Ethics Board in hearings concerning ethics or campaign practices charges heard by the Ethics Board. The Engineer agrees to require that all sub-consultants employed by the Engineer for services performed for this Agreement shall agree to comply with the provisions of this paragraph. The Engineer and its sub-consultants shall not be compensated under this Agreement for its time or any costs incurred in complying with this paragraph.
- K. CONFLICT OF INTEREST. The Engineer warrants that it currently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement. The Engineer further covenants that, in the performance of this Agreement, no person having any such interest shall be employed by the Engineer. The Engineer 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 the Owner provides construction phase inspection that is independent of the Engineer. The Engineer certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a current or former "public officer or employee" have been followed.
- L. LIMIT ON AUTHORITY. The Engineer agrees not to purport to bind the Owner to any obligation not assumed herein by the Owner, unless the Engineer has express written authority to do so, and then only within the strict limits of that authority.

- M. **ADMINISTRATION OF THE AGREEMENT.** The Executive Director, or authorized representative, shall administer this Agreement for the Owner and the Engineer agrees to follow the Owner's Capital Implementation Program procedures which are in effect on the date of the Owner's execution of this Agreement.
- N. **DISCLOSURE.** The Engineer hereby affirms that within the two (2) years preceding the execution of this Agreement, neither the Engineer nor any of the Engineer's officers, agents or employees have made or agreed to make any valuable gift whether in the form of service, loan, thing or promise to any person or the immediate family of any person who has the duty to recommend, the right to vote upon, or any other direct influence on the selection of firms or persons to provide professional architectural, engineering, landscape architectural, and other related services to the Owner. The Engineer has filed a Campaign Contribution Disclosure Form in accordance with Section 13-1-191.1 NMSA 1978 with the Owner during the selection process.
- O. **LEGAL SERVICES.** The Engineer shall not be entitled to receive payment pursuant to the terms of this Agreement or otherwise for legal services the Engineer procures or employs for any matter related to the study, design, and/or the construction of the Project except when advance written approval, which specifies the scope of such legal services, is given by the Owner's Attorney.
- P. **REAL PROPERTY APPRAISAL AND ACQUISITION.** The Engineer shall not be entitled to receive payment pursuant to the terms of this Agreement or otherwise for providing services of real property appraisal or acquisition and is expressly prohibited from obtaining appraisals of real property or instituting or causing to be instituted any negotiations or legal proceeding of any nature related to the acquisition of real property as part of the Engineer's services under this Agreement.
- Q. **SUBSEQUENT CONFLICTS OF INTEREST.** The Engineer agrees to not serve in the capacity of engineer, consultant, expert, or expert witness for any party to litigation or pending litigation holding an adverse position to, or claim against, the Owner on the same subject matter for which the Engineer performs services pursuant to the terms of this Agreement.

ARTICLE XII INSURANCE

The Engineer shall procure and maintain at its expense until final payment by the Owner for services covered by this Agreement, insurance in the kinds and amounts hereinafter provided with insurance companies authorized to do business in the State of New Mexico, covering all operations under this Agreement, whether performed by it or its agents. Before commencing to perform services, the Engineer shall furnish to the Owner a certificate or a certificate in a form satisfactory to the Owner showing that it has complied with this Article. All certificates of insurance or policies shall provide that thirty (30) days written notice be given to the Owner before a policy is cancelled, materially changed or not renewed. Such certificate(s) is required in addition to a copy of each insurance policy required in paragraph E below. Various types of required insurance may be written in one or more policies. Kinds and amounts of insurance required are as follows:

- A. **COMMERCIAL GENERAL LIABILITY INSURANCE INCLUDING AUTOMOBILE.** Commercial general liability and automobile insurance policies with liability limits in amounts not less than \$1,000,000.00 combined single limit of liability for bodily injury, including death, and property damage in any one occurrence, for each policy.

The policies of insurance shall be in effect for the term of this Agreement and include coverage for all operations performed for the Owner by the Engineer, coverage for the use of all owned, non-owned, and hired automobiles, vehicles and other equipment both on and off work, and

contractual liability coverage shall not exclude the indemnification provisions (including but not limited to Article IX) of this Agreement. The Owner shall be named an additional insured on the Commercial General Liability Insurance policy.

- B. **WORKERS' COMPENSATION INSURANCE.** Workers' Compensation Insurance in accordance with the provisions of the Workers' Compensation Act, Sections 52-1-1, et seq., NMSA 1978.
- C. **PROFESSIONAL LIABILITY INSURANCE.**
1. Professional liability insurance in an amount of not less than \$1,000,000.00 in the aggregate, provided however, that there shall not be a per claim limit of less than \$1,000,000.00. Such policy shall be in effect for the term of this Agreement ("Basic Professional Liability Insurance");
 2. A Basic Professional Liability Insurance policy for "claims made" coverage shall satisfy the requirements of this section, only when coverage is provided for the entire time of the performance of this Agreement and for one year thereafter; and
 - (a) For occurrences or claims that may arise during the term of the policy, the Basic Professional Liability Insurance policy shall allow the Engineer to extend the time in which a claim may be made after cancellation of the policy for one year or for a period equal to the time remaining during which insurance is required by this Agreement, whichever period is longer; and
 - (b) Each new Basic Professional Liability Insurance policy shall provide for an inception (or retroactive) date that is the same as the effective date of this Agreement, provided that subsections of C.2.(a) and C.2.(b) will not both be required as long as continuous coverage is provided for the time set forth above.
- D. **COSTS OF INSURANCE AND INCREASED LIMITS.** In the event the Owner elects to require additional insurance coverage, the premium cost directly incurred by the Engineer for the additional coverage shall be a direct reimbursable expense, which shall be paid by the Owner. If, during the term of this Agreement, the Owner requires the Engineer to increase the minimum limits of any insurance required herein, an adjustment in the Engineer's compensation will be made in the amount of the actual cost of additional insurance attributable directly to this Agreement.
- E. The Owner reserves the right to review copies of all required insurance policies and/or amendments or replacement policies at any time.

ARTICLE XIII DISCRIMINATION PROHIBITED

In performing the services required hereunder, the Engineer shall not discriminate against any individual on the basis of race, color, religion, gender, national origin, ancestry, age, disability, medical condition or sexual orientation.

ARTICLE XIV MULTI-PHASE CONSTRUCTION CONTRACTS

Where multi-phase construction contracts, other than multi-phase construction contracts that are specifically provided for in this Agreement, are deemed to be in the best interest of the Owner and are so

ordered in writing by the Owner, then a supplement to this Agreement shall be negotiated between the Engineer and the Owner.

ARTICLE XV
DISPUTE RESOLUTION

- A. **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. The Owner and the Engineer 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 paragraph B of this Article. In the event the dispute is submitted to arbitration, the parties may enter into a written agreement to stay arbitration pending completion of mediation.
- B. **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 Construction Industry Arbitration Rules ("Rules") of the American Arbitration Association ("AAA") 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 or in the County in which the construction site, which is the subject of this Agreement, is located. In the event this Agreement requires a study phase only, the arbitration proceedings shall be held only in Bernalillo County. 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 Rules. Without limiting the generality of the foregoing, the arbitrator(s) shall have the power to issue orders for injunctive relief. Notice of demand for arbitration must be filed in writing with the other parties subject to this Article and with the AAA. 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.
- C. **INJUNCTIVE RELIEF.** The Owner and the Engineer 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 with AAA. 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.
- D. **CONSOLIDATION AND JOINDER.** The Owner and the Engineer 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 Engineer and its subcontractors and sub-consultants and the Contractor and its subcontractors and

suppliers. The Owner and the Engineer 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.

- E. DISPUTE RESOLUTION. In the event the Owner enters into a construction contract for the Project, the Owner shall require this dispute resolution provision (with appropriate changes in the description of the parties) in its contract with the Contractor.

ARTICLE XVI
CONSTRUCTION CONTRACTOR INDEMNIFICATION

The Owner will require in the general conditions of any construction contract, language which states that the Contractor is required to indemnify and save harmless the Owner and the Engineer and their officers, agents, and employees from and against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by or arise out of the acts or omissions of the Contractor, its officers, agents or employees in the performance of the work of the Contractor. The Owner shall require the Contractor to name the Owner and the Engineer as additional insureds on the Contractor's commercial general liability insurance policy.

ARTICLE XVII
HAZARDOUS MATERIALS

Unless otherwise stated in Article XXI, in providing its services hereunder, the Engineer shall not be responsible for identification, handling, containment, abatement, or in any other respect, of any asbestos or hazardous material if such is present in connection with the Project. In the event that the Owner becomes aware of the presence of asbestos or hazardous material at the job site, the Owner shall be responsible for complying with all applicable federal and state rules and regulations, and shall immediately notify the Engineer, who shall then be entitled to cease any of its services that may be affected by such presence, without any liability to the Engineer arising therefrom. If the Engineer becomes aware of the presence of asbestos or hazardous material at the job site, the Engineer shall immediately cease any of its services that may be affected by such presence, without any liability arising therefrom, and inform the Owner of the presence of such materials. The Engineer will work with the Owner, where possible, to help find the appropriate personnel, whether it be the Owner's staff, the Engineer's staff, or another consultant, who can help the Owner with the determination of what to do with the asbestos and/or hazardous materials.

ARTICLE XVIII
RELY ON DATA

The Engineer shall indicate to the Owner the information needed for rendering of services hereunder. The Owner shall provide to the Engineer such information as is available to the Owner and the Owner's consultants and contractors, and the Engineer shall be entitled to rely upon the accuracy and completeness thereof. The Engineer shall review information provided by the Owner and others and shall give the Owner an opinion of the risk associated with reliance on such information. The Owner understands that it is impossible to eliminate all risk, because of the inherent limitation of the techniques available to develop the information, and/or because of errors, omissions or inaccuracies, which may exist in the information. This article does not modify Article VIII of this Agreement.

ARTICLE XIX
CONSTRUCTION JOB SITE SAFETY

The Engineer shall endeavor to guard the Owner against defects and deficiencies in the work of the Contractor and to give prompt notice to the Owner if the Engineer observes or otherwise becomes

aware of any fault or defect in the Contractor's work or non-conformance with the construction contract documents on the basis of on-site observations as an Engineer. The Engineer shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Contractor's work. The Engineer shall not be responsible for the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the work, and shall not be responsible for the Contractor's failure to carry out his work in accordance with the construction contract documents.

ARTICLE XX
APPROVAL REQUIRED

This Agreement shall not become binding or effective until approved by the Owner's Executive Director or his authorized representative.

ARTICLE XXI
OTHER PROVISIONS

The attached Article XXI contains all of the additions, deletions, or modifications to the above Articles I through XX and to any exhibits to this Agreement that have been agreed upon by the parties. Except as provided in Article III, any additions, deletions or modifications that are not contained in Article XXI shall not be binding or enforceable.

IN WITNESS WHEREOF, the Owner and the Engineer have executed this Agreement as of the day and year last entered below.

ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY

ENGINEER:
[Consultant firm name]

Mark S. Sanchez, Executive Director

By: _____
[authorized signatory]

Date: _____

Title: _____

Recommended By:

Date: _____

New Mexico Engineer Certificate No _____

John M. Stomp III, P.E.
Chief Operating Officer

State Taxation and Revenue Department Taxpayer
Identification Number: _____

Federal Taxpayer Identification Number:

Date: _____