

Town of Lyons
PROFESSIONAL SERVICES AGREEMENT

Project/Services Name: 3RD AVENUE STORMWATER BRIC DESIGN PROJECT

This PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into this ____ day of _____ 20__, by and between the TOWN OF LYONS, COLORADO, a municipal corporation of the State of Colorado, with offices at 432 5th Avenue, Lyons, Colorado 80540 (the "**Town**"), and Drexel, Barrell & Co with offices at 1376 Miners Dr. Suite 107, Lafayette, CO 80026 (the "**Contractor**"). The Town and Contractor may be referred to collectively as the "Parties" or each individually as "Party".

RECITALS

WHEREAS, the Town requires certain professional services as more fully described in Exhibit A;

WHEREAS, the Town issued a Request for Proposals for the services which are the subject of this Agreement; and

WHEREAS, the time for submittal of proposals has passed, and the Town has evaluated all proposals; and

WHEREAS, the Town has identified the Contractor as the most qualified responsible bidder; and

WHEREAS, the Contractor represents that it possesses the necessary qualifications to perform these services; and

WHEREAS, the Town desires to contract with the Contractor subject to the terms of this Agreement.

NOW, THEREFORE, for the consideration herein expressed, it is agreed as follows by and between the Town and the Contractor that the Contractor shall perform the following:

1.0 SERVICES AND PURPOSE OF AGREEMENT

- 1.1 Services. The Town desires to achieve, secure, receive, or obtain certain service(s) or work product(s) as more specifically described in **Exhibit A** (the "Services"). **Exhibit A** describes the requirements and deliverables required by this Agreement and is attached hereto and incorporated herein by reference. As an independent contractor, the Contractor offers and agrees to perform and/or deliver the Services in accordance with the terms and conditions of this Agreement. The Parties recognize and acknowledge that, although the Town has requested certain general services to be performed or certain work product to be produced, the Contractor has offered to the Town the process, procedures, terms, and conditions under which the Contractor plans and proposes to achieve or produce the services and/or work product(s) and the Town, through this Agreement, has accepted such process, procedures, terms, and conditions as binding on the Parties.

- 1.2 Town Representative. The Town assigns Justin Doles, as the Town Representative for this Agreement. The Town Representative will monitor the Contractor's progress and performance under this Agreement and shall be available to the Contractor to respond to questions, assist in understanding Town policies, procedures, and practices, and supervise the performance of any Town obligations under this Agreement.
- 1.3 Changes to Services. Any changes to the Services that are mutually agreed upon between the Town and the Contractor shall be made in a formal writing referencing this Agreement and, only upon execution by both Parties of such formal writing, shall become an amendment to the Services described in this Agreement. To be effective, any written change must be signed by the Contractor and by the Town or by a person expressly authorized in writing to sign on behalf of the Town. Changes to the Services or to this Agreement shall not be made through oral agreement or electronic mail messages.
- 1.4 Meeting Attendance. The Contractor shall attend such meetings of the Town relative to the Scope of Work set forth in **Exhibit A** as may be requested by the Town. Any requirement made by the named representatives of the Town shall be given with reasonable notice to the Contractor so that a representative may attend.
- 1.5 Agreement to Comply with Requisite Provisions Based On Funding Source. If checked in Section 11.0 below, the Town will pay in whole or in part for the Services rendered hereunder with federal or State based grant funding. Contractor agrees to comply with all provisions set forth in any Attachment as noted and if checked.
- 1.6 Lawful Performance. It is further agreed that no party to this Agreement will perform contrary to any state, federal, or county law, or any of the ordinances of the Town of Lyons, Colorado.

2.0 COMPENSATION

- 2.1 Commencement of and Compensation for Services. Following execution of this Agreement by the Town, the Contractor shall be authorized to and shall commence performance of the Services as described in **Exhibit A**, subject to the requirements and limitations on compensation as provided by this Section 2.0 and its subsections. Compensation to be paid hereunder shall not exceed **One Hundred Fifty-Four Thousand Eight Hundred Eighty-Three Dollars and Zero Cents (\$154,883.00)** unless a larger amount is agreed to by and between the Parties in accordance with the amendment requirements of this Agreement.
 - A. Method of Compensation. The Contractor shall perform the Services and shall invoice the Town for work performed based on the rates and/or compensation methodology and amounts described in **Exhibit B** subject to the not to exceed amount set forth in this Section. **These invoices for payment should be emailed to ap@townoflyons.com or mailed to Town of Lyons, P.O. Box 49, Lyons, CO 80540.** Monthly, partial, progress payments shall be made by the Town to the Contractor for the percentage of the Scope of Work completed. Progress payments shall not constitute a waiver of the right of the Town to require the fulfillment of all material terms of this Agreement and the delivery of all

improvements embraced in this Agreement.

- B. Final Payment. Final payment may be requested by the Contractor upon completion and acceptance, by the Town, of all work or Services as set forth in Exhibit A. The total amount of final payment shall consist of the compensation set forth in paragraph 2.1, as adjusted in accordance with amendments approved per Section 2.3 of this Agreement, if applicable, less all previous payments to the Contractor.
- C. Extra Work. Should work beyond that described in Exhibit A be required, it will be paid for as extra work at a cost to be agreed upon in separate written agreement by the Town and the Contractor prior to commencement of the additional work. Such additional agreements shall be executed and approved by all persons required by Town purchasing ordinances or policies.
- D. Receipts. The Town, before making any payment, may require the Contractor to furnish at no additional charge releases or receipts from any or all persons performing work under this Agreement and/or supplying material or services to the Contractor, or any subcontractor if this is deemed necessary to protect the Town's interest. The Town, however, may in its discretion make payment in part or full to the Contractor without requiring the furnishing of such releases or receipts.
- 2.2 Reimbursable Expenses. If this Agreement is for lump sum compensation, there shall be no reimbursable expenses. If the Agreement is for compensation based on a time and materials methodology, the following shall be considered "reimbursable expenses" for purposes of this Agreement and may be billed to the Town without administrative mark-up but which must be accounted for by the Contractor and proof of payment shall be provided by the Contractor with the Contractor's monthly invoices:
- ☒ None
 - ☐ Vehicle Mileage (billed at not more than the prevailing per mile charge permitted by the IRS as a tax-deductible business expense)
 - ☐ Printing and Photocopying Related to the Services (billed at actual cost)
 - ☐ Long Distance Telephone Charges Related to the Services
 - ☐ Postage and Delivery Services
 - ☐ Lodging and Meals (but only with prior written approval of the Town as to dates and maximum amount)
- Any fee, cost, charge, or expense incurred by the Contractor not otherwise specifically authorized by this Agreement shall be deemed a non-reimbursable cost that shall be borne by the Contractor and shall not be billed or invoiced to the Town and shall not be paid by the Town.
- 2.3 Increases in Compensation or Reimbursable Expenses. Any increases or modification to the compensation or reimbursable expenses shall be subject to the approval of the Town and shall be made only by written amendment of this Agreement executed by both Parties.
- 2.4 Payment Processing. The Contractor shall submit invoices and requests for payment in a form acceptable to the Town. Invoices shall not be submitted more often than

once each month unless otherwise approved by this Agreement or in writing by the Town in accordance with the amendment requirements of this Agreement. Unless otherwise directed or accepted by the Town, all invoices shall contain sufficient information to account for all appropriate measure(s) of Contractor work effort (e.g., task completion, work product delivery, or time) and all authorized reimbursable expenses for the Services during the stated period of the invoice. Following receipt of a Contractor's invoice, the Town shall promptly review the Contractor's invoice. All Town payments for Services rendered pursuant to this Agreement shall be issued in the business name of Contractor only, and in no event shall any such payments be issued to an individual. In no event shall any Town payments to Contractor be in the form of or based upon a salary or an hourly wage rate.

- 2.5 Town Dispute of Invoice or Invoiced Item(s). The Town may dispute any Contractor compensation and/or reimbursable expense requested by the Contractor described in any invoice and may request additional information from the Contractor substantiating any and all compensation sought by the Contractor before accepting the invoice. When additional information is requested by the Town, the Town shall advise the Contractor in writing, identifying the specific item(s) that are in dispute and giving specific reasons for any request for information. The Town shall pay the Contractor within forty-five (45) days of the receipt of an invoice for any undisputed charges or, if the Town disputes an item or invoice and additional information is requested, within thirty (30) days of acceptance of the item or invoice by the Town following receipt of the information requested and resolution of the dispute. To the extent possible, undisputed charges within the same invoice as disputed charges shall be timely paid in accordance with this Agreement. Payment by the Town shall be deemed made and completed upon hand delivery to the Contractor or designee of the Contractor or upon deposit of such payment or notice in the U.S. Mail, postage pre-paid, addressed to the Contractor.

3.0 CONTRACTOR'S REPRESENTATIONS AND OFFERED PERFORMANCE

The Contractor offers to perform the Services in accordance with the following Contractor-elected practices and procedures. By this Agreement, the Town accepts such offer and the following are hereby made part of the terms and conditions of this Agreement:

- 3.1 General. The Contractor shall become fully acquainted with the available information related to the Services. The Contractor shall affirmatively request from the Town Representative and the Town such information that the Contractor, based on the Contractor's professional experience, should reasonably expect is available and which would be relevant to the performance of the Services. The Contractor shall promptly inform the Town concerning ambiguities and uncertainties related to the Contractor's performance that are not addressed by the Agreement. The Contractor shall provide all of the Services in a timely and professional manner. The Contractor shall comply with all applicable federal, state and local laws, ordinances, regulations, and resolutions.
- 3.2 Independent Contractor. The Contractor shall perform the Services as an independent contractor and shall not be deemed by virtue of this Agreement to have entered into any partnership, joint venture, employer/employee or other relationship with the Town. This Agreement does not require the Contractor to work exclusively for the Town. This Agreement shall not be interpreted as the Town dictating or directing the

Contractor's performance or the time of performance beyond a completion schedule and a range of mutually agreeable work hours, but shall be interpreted as the Contractor's offer and Town acceptance of terms and conditions for performance. The Contractor's business operations shall not be combined with the Town by virtue of this Agreement, and the Town will not provide any training to Contractor, its agents, or employees beyond that minimal level required for performance of the Services. The Parties acknowledge that the Contractor may require some assistance or direction from the Town in order for the Services to meet the Town's contractual expectations. Any provisions in this Agreement that may appear to grant the Town the right to direct or control Contractor or the Services shall be construed as Town plans or specifications regarding the Services.

- 3.3 Liability for Employment-Related Rights and Compensation. The Contractor shall be solely responsible for all compensation, benefits, insurance and employment-related rights of any person providing Services hereunder during the course of or arising or accruing as a result of any employment, whether past or present, with the Contractor, as well as all legal costs including attorney's fees incurred in the defense of any conflict or legal action resulting from such employment or related to the corporate amenities of such employment. The Contractor will comply with all laws, regulations, municipal codes, and ordinances and other requirements and standards applicable to the Contractor's employees, including, without limitation, federal and state laws governing wages and overtime, equal employment, safety and health, employees' citizenship, withholdings, reports and record keeping. **CONTRACTOR ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS CONTRACTOR OR SOME ENTITY OTHER THAN THE TOWN PROVIDES SUCH BENEFITS. CONTRACTOR FURTHER ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO WORKERS' COMPENSATION BENEFITS. CONTRACTOR ALSO ACKNOWLEDGES THAT IT IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON ANY MONEYS EARNED OR PAID PURSUANT TO THIS AGREEMENT.** To the maximum extent permitted by law, Contractor waives all claims against the Town for any Employee Benefits; the Contractor will defend the Town from any claim and will indemnify the Town against any liability for any Employee Benefits for the Contractor imposed on the Town ; and the Contractor will reimburse the Town for any award, judgment, or fine against the Town based on the position the Contractor was ever the Town 's employee, and all attorneys' fees and costs the Town reasonably incurs defending itself against any such liability.
- 3.4 Interaction with Public. The Contractor recognizes that its conduct during the performance of the Services hereunder reflects upon its reputation in the community as well as upon the public perception of the Town. Therefore, the Contractor offers and warrants to the Town that the Contractor, its agents and employees will conduct all of their interactions with the citizens and the public relating to the performance of the Services hereunder in such a manner as to provide customer service that reflects positively upon its reputation and the Town's public image.
- 3.5 Subcontractors. The Parties recognize and agree that subcontractors may be utilized by the Contractor for the performance of certain Services if and as described more particularly in **Exhibit A**; however, the engagement or use of subcontractors will not

relieve or excuse the Contractor from performance of any obligations imposed in accordance with this Agreement and Contractor shall remain solely responsible for ensuring that any subcontractors engaged to perform Services hereunder shall perform such Services in accordance with all terms and conditions of this Agreement.

- 3.6 Standard of Performance. In performing the Services, the Contractor warrants that it shall use that degree of care, skill, and professionalism ordinarily exercised under similar circumstances by highly competent members of the same profession practicing in the State of Colorado. The Contractor represents to the Town that the Contractor is, and its employees or subcontractors performing such Services are, properly licensed and/or registered within the State of Colorado for the performance of the Services (if licensure and/or registration is required by applicable law) and that the Contractor and employees possess the skills, knowledge, and abilities to perform the Services competently, timely, and professionally in accordance with this Agreement. In addition, the Contractor warrants and represents that it will provide the Services in accordance with more specific standards of performance as are included within **Exhibit A**. The Contractor represents, covenants and agrees that the Services will be provided to the Town free from any material errors. The Contractor's failure to meet or exceed any of the foregoing standards and warranties may be considered a material breach of this Agreement and may be grounds for termination of the Agreement pursuant to Section 4.0 below, in addition to any other remedies as provided in Section 9.0 below.
- 3.7 Review of Books and Records. The Contractor shall promptly comply with any written Town request for the Town or any of its duly authorized representatives to reasonably access and review any books, documents, papers, and records of the Contractor that are pertinent to the Contractor's performance under this Agreement for the purpose of the Town performing an audit, examination, or other review of the Services.
- 3.8 Licenses and Permits. The Contractor shall be responsible at the Contractor's expense for obtaining, and maintaining in a valid and effective status, all licenses and permits necessary to perform the Services unless specifically stated otherwise in this Agreement.
- 3.9 Affirmative Action. The Contractor warrants that it will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Contractor warrants that it will take affirmative action to ensure applicants are employed, and employees are treated during employment without regard to their race, color, religion, sex 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.
- 3.11 Duty to Warn. The Contractor agrees to call to the Town's attention errors in any drawings, plans, sketches, instructions, information, requirements, procedures, and/or other data supplied to the Contractor (by the Town or by any other party) that it becomes aware of and believes may be unsuitable, improper, or inaccurate in a material way. However, the Contractor shall not independently verify the validity, completeness or accuracy of such information unless included in the Services or otherwise expressly engaged to do so by the Town.

4.0 TERM AND TERMINATION

- 4.1 Term. This Agreement shall be effective on the date of mutual execution (the "Effective Date") and shall terminate at the earlier of the date on which all obligations of the parties have been met (to include all Services have been completed) or **11:59 p.m. on December 31st, 2026**, or on a prior date of termination as may be permitted by this Agreement; provided, however, that the Parties may mutually agree in writing to extend the term of this Agreement, subject to annual appropriation. Those provisions that survive termination, to include the indemnification obligations and any warranty obligations, shall remain in effect past termination.
- 4.2 Continuing Services Required. The Contractor shall perform the Services in accordance with this Agreement commencing on the Effective Date until such Services are terminated or suspended in accordance with this Agreement. The Contractor shall not temporarily delay, postpone, or suspend the performance of the Services without the written consent of the Town Board of Trustees, Town Administrator, the Town Representative, or other Town employee expressly authorized in writing to direct the Contractor's services.
- 4.3 Town Unilateral Termination. This Agreement may be terminated by the Town for any or no reason upon written notice delivered to the Contractor at least ten (10) days prior to termination. In the event of the Town's exercise of the right of unilateral termination as provided by this paragraph:
- A. Unless otherwise provided in any notice of termination, the Contractor shall provide no further services in connection with this Agreement after receipt of a notice of termination; and
- B. All finished or unfinished documents, data, studies and reports prepared by the Contractor pursuant to this Agreement shall be delivered by the Contractor to the Town and shall become the property of the Town; and
- C. The Contractor shall submit to the Town a final accounting and final invoice of charges for all outstanding and unpaid Services and reimbursable expenses performed prior to the Contractor's receipt of notice of termination and for any services authorized to be performed by the notice of termination as provided by Section 4.3(A) above. Such final accounting and final invoice shall be delivered to the Town within thirty (30) days of the date of termination; thereafter, no other invoice, bill, or other form of statement of charges owing to the Contractor shall be submitted to or accepted by the Town.
- 4.4 Termination for Non-Performance. Should a party to this Agreement fail to materially perform in accordance with the terms and conditions of this Agreement, this Agreement may be terminated by the performing party if the performing party first provides written notice to the non-performing party which notice shall specify the non-performance, provide both a demand to cure the non-performance and reasonable time to cure the non-performance, and state a date upon which the Agreement shall be terminated if there is a failure to timely cure the non-performance. For purpose of this Section 4.4, "reasonable time" shall be not less than five (5) business days. In the event of a failure to timely cure a non-performance and upon the date of the resulting

termination for non-performance, the Contractor shall prepare a final accounting and final invoice of charges for all performed but unpaid Services and authorized reimbursable expenses. Such final accounting and final invoice shall be delivered to the Town within fifteen (15) days of the date of termination; thereafter, no other invoice, bill, or other form of statement of charges owing to the Contractor shall be submitted to or accepted by the Town. Provided that notice of non-performance is provided in accordance with Section 4.4, nothing in this Section 4.4 shall prevent, preclude, or limit any claim or action for default or breach of contract resulting from non-performance by a Party.

- 4.5 Unilateral Suspension of Services. The Town may suspend the Contractor's performance of the Services at the Town's discretion and for any reason by delivery of written notice of suspension to the Contractor which notice shall state a specific date of suspension. Upon receipt of such notice of suspension, the Contractor shall immediately cease performance of the Services on the date of suspension except: (1) as may be specifically authorized by the notice of suspension (e.g., to secure the work area from damage due to weather or to complete a specific report or study); or (2) for the submission of an invoice for Services performed prior to the date of suspension in accordance with this Agreement.
- 4.6 Delivery of Notice of Termination. Any notice of termination permitted by this Section 4.0 and its subsections shall be addressed to the person signing this Agreement on behalf of either Town or Contractor at the address shown below or such other address as either party may notify the other of and shall be deemed given upon delivery if personally delivered, or forty-eight (48) hours after deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested.

5.0 INSURANCE

Insurance Generally. Contractor agrees to procure and maintain, at its own cost, a policy or policies of insurance sufficient to insure against all obligations assumed by the Contractor pursuant to this Agreement. Contractor shall not commence work under this Agreement until it has obtained all said insurance required by the Contract Documents and such insurance has been approved by the Town. The Contractor shall not allow any subcontractor to commence work on this project until all similar insurance required of the subcontractor has been obtained and approved. For the duration of this Agreement, the Contractor must continuously maintain the insurance coverage required in this section, with the minimum insurance coverage listed below:

- ☒ Worker's Compensation in accordance with the Worker's Compensation Act of the State of Colorado and any other applicable laws for any employee engaged in the performance of Work under this contract.
- ☒ Comprehensive General Liability insurance with minimum combined single limits of One Million Dollars (\$1,000,000.00) each occurrence and of two million Dollars (\$2,000,000.00) aggregate, plus an additional amount sufficient to pay related attorneys' fees and defense costs. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual,

independent contractors, products, and completed operations. The policy shall include coverage for explosion, collapse, and underground hazards. The policy shall contain a severability of interests provision.

- ☒ Comprehensive Automobile Liability insurance with minimum combined single limits for bodily injury and property damage of not less than One Million Dollars (\$1,000,000.00) each occurrence with respect to each of the Contractor's owned, hired and non-owned vehicles assigned to or used in performance of the Services. The policy shall contain a severability of interests provision. Such insurance coverage must extend to all levels of subcontractors. Such coverage must include all automotive equipment used in the performance of the Agreement, both on the work site and off the work site, and such coverage shall include non-ownership and hired cars coverage. Such insurance shall be endorsed to name the Town as Certificate Holder and name the Town, and its elected officials, officers, employees and agents as additional insured parties.
- ☒ Professional Liability (errors and omissions) Insurance with a minimum limit of coverage of One Million Dollars (\$1,000,000) per claim and annual aggregate. Such policy of insurance shall be obtained and maintained for one (1) year following completion of all Services under this Agreement. Such policy of insurance shall be endorsed to include the Town as a Certificate Holder.

The Required Insurance shall be procured and maintained with insurers with an A- or better rating as determined by Best's Key Rating Guide. All Required Insurance shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Contractor.

5.1 Additional Requirements for All Policies. In addition to specific requirements imposed on insurance by this Section 5.0 and its subsections, insurance shall conform to all of the following:

- A. For both Contractor Insurance and Required Insurance, all policies of insurance shall be primary insurance, and any insurance carried by the Town, its officers, or its employees shall be excess and not contributory insurance to that provided by the Contractor; provided, however, that the Town shall not be obligated to obtain or maintain any insurance whatsoever for any claim, damage, or purpose arising from or related to this Agreement and the Services. The Contractor shall not be an insured party for any Town-obtained insurance policy or coverage.
- B. For both Contractor Insurance and Required Insurance, the Contractor shall be solely responsible for any deductible losses.
- C. For Required Insurance, no policy of insurance shall contain any exclusion for bodily injury or property damage arising from completed operations.
- D. For Required Insurance, every policy of insurance shall provide that the Town will receive notice no less than thirty (30) days prior to any cancellation, termination, or a material change in such policy or in the alternative, the Contractor shall provide such notice as soon as reasonably practicable and in no event less than thirty (30) days prior to any cancellation, termination, or a material change in such policy.

- 5.2 Failure to Obtain or Maintain Insurance. The Contractor's failure to obtain and continuously maintain policies of insurance in accordance with this Section 5.0 and its subsections shall not limit, prevent, preclude, excuse, or modify any liability, claims, demands, or other obligations of the Contractor arising from performance or non-performance of this Agreement. Failure on the part of the Contractor to obtain and to continuously maintain policies providing the required coverage, conditions, restrictions, notices, and minimum limits shall constitute a material breach of this Agreement upon which the Town may immediately terminate this Agreement, or, at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the Town shall be repaid by Contractor to the Town immediately upon demand by the Town, or at the Town's sole discretion, the Town may offset the cost of the premiums against any monies due to the Contractor from the Town pursuant to this Agreement.
- 5.3 Insurance Certificates. **Prior to commencement of the Services, the Contractor shall submit to the Town certificates of insurance for all Required Insurance and all necessary endorsements.** Insurance limits, term of insurance, insured parties, and other information sufficient to demonstrate conformance with this Section 5.0 and its subsections shall be indicated on each certificate of insurance. **Certificates of insurance shall reference the Project/Services Name as identified on the first page of this Agreement.** The Town may request and the Contractor shall provide within three (3) business days of such request a current certified copy of any policy of Required Insurance and any endorsement of such policy. The Town may, at its election, withhold payment for Services until the requested insurance policies are received and found to be in accordance with the Agreement.

6.0 CLAIMS, INDEMNIFICATION, HOLD HARMLESS AND DEFENSE

- 6.1 Notices of Claim. A Party shall notify the other Party immediately and in writing in the event that a Party learns of a third-party claim or an allegation of a third-party claim arising or resulting from the Parties' performance or failure to perform pursuant to this Agreement. The Parties shall reasonably cooperate in sharing information concerning potential claims.
- 6.2 Claims Challenging Town Law, Ordinance, Rule, or Policy/Procedure. In the event any claim is asserted by a third party against the Town and/or the Contractor alleging that any law, statute, ordinance, rule or approved Town policy or procedure is unlawful, unconstitutional or otherwise improper, then:
- A. The Contractor shall not be entitled to and shall not defend such claim; and
 - B. The Town may, at its sole discretion, elect to defend, not defend, settle, confess, compromise, or otherwise direct the manner in which such claim is addressed; and
 - C. The Contractor shall reasonably cooperate with the Town in any Town defense of such claim although the Contractor shall bear any cost or expense incurred by the

Contractor in such cooperation, including but not limited to the Contractor's cost and expense incurred in consultation with its own legal counsel; and

D. Only if authorized by law and without waiving the provisions of the Colorado Constitution or the Colorado Governmental Immunity Act, the Town shall indemnify and hold Contractor harmless for any damages, liability, expenses, or court awards, including costs and attorney's fees that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by any third party, including but not limited to, any person, firm, partnership, or corporation, in connection with or arising out of such claim.

6.3 Indemnification for Certain Claims. For any claim not within the scope of Section 6.2 above, Contractor expressly agrees to indemnify and hold harmless the Town, and any of its council members, board members, commissioners, officials, officers, agents, Contractors, attorneys, or employees from any and all damages, liability, expenses, or court awards, including costs and attorney's fees that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by any third party, including but not limited to, any person, firm, partnership, or corporation, in connection with or arising out of any intentional, reckless, negligent or tortious conduct, error, omission, or act of commission by Contractor or any of its employees, agents, or others acting on Contractor's behalf in performance of the Services. Nothing in this Agreement shall be construed as constituting a covenant, promise, or agreement by the Contractor to indemnify or hold the Town, its elected officials, board members, commissioners, officials, officers, agents, contractors, attorneys, or employees harmless for any negligence solely attributable to the Town, its elected officials, boards, commissions, officials, officers, agents, Contractors, attorneys, or employees. The Contractor's obligation to indemnify pursuant to this Section shall survive the completion of the Services and shall survive the termination of this Agreement.

6.4 Defense of Claims.

- A. Claims Against Both the Town and Contractor. In the event any claim is asserted by a third party against both the Town and Contractor arising out of any Party's performance of the Services which claim is not within the scope of Section 6.2 above, the Town shall be entitled to elect to defend such claim on behalf of both the Town and Contractor subject to the provisions governing indemnification set forth in this Section. In the event that the Town elects to defend such claim, the Town shall consult with Contractor in such defense but the Town is entitled to exercise its independent discretion in the manner of defense, including but not limited to the selection of litigation counsel and the discretion to settle, confess, compromise, or otherwise direct and dispose of any claim. In the event that the Town elects to defend such claim, Contractor may at its own cost and expense elect to assume the defense of Contractor, in which case Contractor shall bear its own attorneys' fees, costs, and expenses in such defense and such fees, costs, and expenses shall not be subject to indemnification pursuant to this Section.
- B. Claims Against Only One Party. In the event of any claim asserted by a third party against only one Party to this Agreement arising out of any Party's performance of the Services which claim is not within the scope of Section 6.2 above, the Party shall be

entitled to elect to defend such claim on behalf of such Party subject to the provisions governing indemnification set forth in this Section. Where appropriate, the defending Party may also elect to join the other Party through third-party practice or otherwise in accordance with the Colorado Rules of Civil Procedure or other applicable rules, in which case the joined Party may defend such claim subject to indemnification pursuant to this Section. In the event that a Party elects to intervene voluntarily in any claim asserted against the other Party arising out of any Party's performance of the Services or any claim that any law, statute, ordinance, rule or approved Town policy or procedure is unlawful, unconstitutional or otherwise improper, the intervening Party shall bear its own attorneys' fees, costs, and expenses in such intervention and such fees, costs, and expenses shall not be subject to indemnification pursuant to this Section.

7.0 RECORDS AND OWNERSHIP OF DOCUMENTS

- 7.1 Retention and Open Records Act Compliance. All records of the Contractor related to the provision of Services hereunder, including public records as defined in the Colorado Open Records Act ("CORA"), and records produced or maintained in accordance with this Agreement, are to be retained and stored in accordance with the Town's records retention and disposal policies. Those records which constitute "public records" under CORA are to be at the Town offices or accessible and opened for public inspection in accordance with CORA and Town policies. Public records requests for such records shall be processed in accordance with Town policies. Contractor agrees to allow access by the Town and the public to all documents subject to disclosure under applicable law. Contractor's willful failure or refusal to comply with the provisions of this Section shall result in the immediate termination of this Agreement by the Town. For purposes of CORA, the Town Clerk is the custodian of all records produced or created as a result of this Agreement. Nothing contained herein shall limit the Contractor's right to defend against disclosure of records alleged to be public.
- 7.2 Town's Right of Inspection. The Town shall have the right to request that the Contractor provide to the Town a list of all records of the Contractor related to the provision of Services hereunder retained by the Contractor in accordance with this subsection and the storage location and method. Contractor agrees to allow inspection at reasonable times by the Town of all documents and records produced or maintained in accordance with this Agreement.
- 7.3 Ownership. Any work product, materials, and documents produced by the Contractor pursuant to this Agreement shall become property of the Town of Lyons upon delivery and shall not be made subject to any copyright unless authorized by the Town. Other materials, methodology and proprietary work used or provided by the Contractor to the Town not specifically created and delivered pursuant to the Services outlined in this Agreement may be protected by a copyright held by the Contractor and the Contractor reserves all rights granted to it by any copyright. The Town shall not reproduce, sell, or otherwise make copies of any copyrighted material, subject to the following exceptions: (1) for exclusive use internally by Town staff and/or Town contractors; or (2) pursuant to a request under the Colorado Open Records Act, C.R.S. § 24-72-203, to the extent that such statute

applies; or (3) pursuant to law, regulation, or court order. The Contractor waives any right to prevent its name from being used in connection with the Services.

- 7.4 Return of Records to Town. At the Town's request, upon expiration or termination of this Agreement, all records of the Contractor related to the provision of Services hereunder, including public records as defined in the Colorado Open Records Act ("CORA"), and records produced or maintained in accordance with this Agreement, are to be returned to the Town in a reasonable format and with an index as determined and requested by the Town.

8.0 FORCE MAJEURE

Neither the Contractor nor the Town shall be liable for any delay in, or failure of performance of, any covenant or promise contained in this Agreement, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to extent that, such delay or failure is caused by "force majeure." As used in this Agreement, "force majeure" means acts of God, acts of the public enemy, acts of terrorism, unusually severe weather, fires, floods, epidemics, quarantines, strikes, labor disputes and freight embargoes, to the extent such events were not the result of, or were not aggravated by, the acts or omissions of the non-performing or delayed party.

9.0 REMEDIES

In addition to any other remedies provided for in this Agreement, and without limiting its remedies available at law, the Town may exercise the following remedial actions if the Contractor substantially fails to perform the duties and obligations of this Agreement. Substantial failure to perform the duties and obligations of this Agreement shall mean a significant, insufficient, incorrect, or improper performance, activities or inactions by the Contractor. The remedial actions include:

- A. Suspend the Contractor's performance pending necessary corrective action as specified by the Town without the Contractor's entitlement to an adjustment in any charge, fee, rate, price, cost, or schedule; and/or
- B. Withhold payment to the Contractor until the necessary services or corrections in performance are satisfactorily completed; and/or
- C. Deny payment for those services which have not been satisfactorily performed, and which, due to circumstances caused by the Contractor, cannot be performed, or if performed would be of no value to the Town; and/or
- D. Terminate this Agreement in accordance with this Agreement; and/or
- E. ☐ Other remedies as may be provided by attached addendum or addenda.

The foregoing remedies are cumulative and the Town, in its sole discretion, may exercise any or all of the remedies individually or simultaneously.

10.0 MISCELLANEOUS PROVISIONS

- 10.1 No Waiver of Rights. A waiver by any Party to this Agreement of the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by either Party. The Town's approval or acceptance of, or payment for, services shall not be construed to operate as a waiver of any rights or benefits to be provided under this Agreement. No covenant or term of this Agreement shall be deemed to be waived by the Town except in writing signed by the Town Board of Trustees or by a person expressly authorized to sign such waiver, and any written waiver of a right shall not be construed to be a waiver of any other right or to be a continuing waiver unless specifically stated.
- 10.2 No Waiver of Governmental Immunity. Nothing in this Agreement shall be construed to waive, limit, or otherwise modify any governmental immunity that may be available by law to the Town, its officials, employees, contractors, or agents, or any other person acting on behalf of the Town and, in particular, governmental immunity afforded or available pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10 of the Colorado Revised Statutes.
- 10.3 Binding Effect. The Parties agree that this Agreement, by its terms, shall be binding upon the successors, heirs, legal representatives, and assigns; provided that this Section 10.3 shall not authorize assignment.
- 10.4 No Third-Party Beneficiaries. Nothing contained in this Agreement is intended to or shall create a contractual relationship with, cause of action in favor of, or claim for relief for, any third party, including any agent, sub-consultant or subcontractor of Contractor. Absolutely no third-party beneficiaries are intended by this Agreement. Any third party receiving a benefit from this Agreement is an incidental and unintended beneficiary only.
- 10.5 Article X, Section 20/TABOR. The Parties understand and acknowledge that the Town is subject to Article X, § 20 of the Colorado Constitution ("TABOR"). The Parties do not intend to violate the terms and requirements of TABOR by the execution of this Agreement. It is understood and agreed that this Agreement does not create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and, therefore, notwithstanding anything in this Agreement to the contrary, all payment obligations of the Town are expressly dependent and conditioned upon the continuing availability of funds beyond the term of the Town's current fiscal period ending upon the next succeeding December 31. Financial obligations of the Town payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available in accordance with the rules, regulations, and resolutions of Town of Lyons, and other applicable law. Upon the failure to appropriate such funds, this Agreement shall be terminated.
- 10.6 Governing Law, Venue, and Enforcement. This Agreement shall be governed by and interpreted according to the law of the State of Colorado. Venue for any action arising under this Agreement shall be in the appropriate court for Boulder County, Colorado. To reduce the cost of dispute resolution and to expedite the resolution of disputes under this Agreement, the Parties hereby waive any and all right either

may have to request a jury trial in any civil action relating primarily to the enforcement of this Agreement. The Parties agree that the rule that ambiguities in a contract are to be construed against the drafting party shall not apply to the interpretation of this Agreement. If there is any conflict between the language of this Agreement and any exhibit or attachment, the language of this Agreement shall govern.

- 10.7 Survival of Terms and Conditions. The Parties understand and agree that all terms and conditions of the Agreement that require continued performance, compliance, or effect beyond the termination date of the Agreement shall survive such termination date and shall be enforceable in the event of a failure to perform or comply.
- 10.8 Assignment and Release. All or part of the rights, duties, obligations, responsibilities, or benefits set forth in this Agreement shall not be assigned by the Contractor without the express written consent of the Town. Any written assignment shall expressly refer to this Agreement, specify the particular rights, duties, obligations, responsibilities, or benefits so assigned, and shall not be effective unless approved by the Town through the authorizing agent executing this Agreement. No assignment shall release the Contractor from performance of any duty, obligation, or responsibility unless such release is clearly expressed in such written document of assignment.
- 10.9 Interpretation and Mutual Negotiation. It is the intent of the Parties that this Agreement shall in all instances be interpreted to reflect the Contractor's status as an independent contractor with the Town and that in no event shall this Agreement be interpreted as establishing an employment relationship between the Town and either Contractor or Contractor's employees, agents, or representatives. The Parties agree that this Agreement is the result of mutual negotiation between the Parties and that the Agreement shall not be construed against the Town on grounds relating to drafting, revision, review, or recommendation by any agent or representative of the Town. The Parties further agree that all warranties in this Agreement are made by the Contractor to induce the Town to accept the Contractor's offer to enter into this Agreement and have been incorporated into the Agreement at the Contractor's request.
- 10.10 Paragraph Captions. The captions of the paragraphs and sections are set forth only for the convenience and reference of the Parties and are not intended in any way to define, limit or describe the scope or intent of this Agreement.
- 10.11 Agreement Controls. In the event a conflict exists between this Agreement and any term in any exhibit attached or incorporated into this Agreement, the terms in this Agreement shall supersede the terms in such exhibit.
- 10.12 Integration and Amendment. This Agreement represents the entire and integrated agreement between the Town and the Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral. Any amendments to this Agreement must be in writing and be signed by both the Town and the Contractor.

- 10.13 Severability. Invalidation of any of the provisions of this Agreement or any paragraph, sentence, clause, phrase, or word herein or the application thereof in any given circumstance shall not affect the validity of any other provision of this Agreement.
- 10.14 Incorporation of Exhibits. Unless otherwise stated in this Agreement, exhibits, applications, or documents referenced in this Agreement shall be incorporated into this Agreement for all purposes. In the event of a conflict between any incorporated exhibit and this Agreement, the provisions of this Agreement shall govern and control.
- 10.15 Notices. Unless otherwise specifically required by a provision of this Agreement, any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified mail or registered mail, postage and fees prepaid, addressed to the Party to whom such notice is to be given at the address set forth below or at such other address as has been previously furnished in writing, to the other Party. Such notice shall be deemed to have been given when deposited in the United States Mail properly addressed to the intended recipient.

If to the Town :

If to Contractor:

Town Administrator Lyons Town Hall PO Box 49 432 5th Ave, Lyons, CO 80540	Drexel, Barrell & Co Attn: Cameron Knapp, P.E. 1376 Miners Dr. Suite 107, Lafayette, CO 80026
With Copy to: Attn: Town of Lyons Town Attorney Wilson Williams Fellman Dittman 1314 Main Street, Suite 101 Louisville, CO 80027	With Copy to:

- 10.16 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which shall constitute one and the same document. In addition, the Parties specifically acknowledge and agree that electronic signatures shall be effective for all purposes, in accordance with the provisions of the Uniform Electronic Transactions Act, Title 24, Article 71.3 of the Colorado Revised Statutes.

11.0 ATTACHMENTS

11.1 Attachments. The following are attached to and incorporated into this Agreement by reference:

- ☒ Scope of Work (**Exhibit A**)
- ☒ Compensation (**Exhibit B**)
- ☒ Federal Emergency Management Agency ("FEMA") Grant Program Requirements for Procurement Contracts (**Attachment C**)
- ☐ Building Resilient Infrastructure and Communities ("BRIC") Grant Program Requirements for Procurement Contracts

- ☐ Colorado Community Development Block Grant Disaster Recovery Program ("CDBG-DR") Requirements for Contracts (**Attachment ____**)
- ☐ Economic Development Administration ("EDA") Requirements for Procurement Contracts (**Attachment ____**)
- ☐ Patent Rights for Small Business Firms and Non-Profit Organizations (**Attachment ____**)
- ☒ Contractor's Certificate(s) of Insurance
- ☒ Contractor Proof of Professional Licensing
- ☒ Other: Contractor's Proposal. In the event of conflicting information, most beneficial outcome to the Town shall prevail.

11.2 Applicability of Davis-Bacon Act and Other Terms in Attachments. If the Town is receiving CDBG-DR Funds and/or funding from the EDA for the Project that is the subject of this Agreement, then both funding sources require certain terms and conditions to be integrated into this Agreement through the Attachments. However, certain terms of the required Attachments apply to construction contracts only.

- A. ☒ If this box is checked, this Agreement is a contract for professional services for the Town of Lyons and certain terms or provisions in the required Attachments to this Agreement do not apply because this Agreement is not a construction contract. Terms and provisions in the Attachments setting forth requirements for the following do not apply to this Agreement:
- The Davis-Bacon Act, § 40 U.S.C. 3141 – 3148, as supplemented by U.S. Department of Labor regulations (29 CFR, Part 5); and
 - Any other term or provision applicable only to construction contracts.
- B. Provisions Required by Law Deemed Inserted. Each and every provision of law and clause required by law to be inserted in this Agreement shall be deemed to be inserted herein and the Agreement shall be read and enforced as though it were included herein, and if through mistake or otherwise any provision is not inserted, or is not correctly inserted, then upon the application of either Party the Agreement shall forthwith be physically amended to make such insertion or correction.
- C. Agreement to Execute Other Required Documents. Contractor and all subcontractors, by entering into the Agreement, understand and agree that funding for the Project is provided under federal and/or state programs with

specific contracting requirements. To the extent any such requirement is not otherwise set forth herein, Contractor agrees to execute such amendments or further agreements as may be necessary to ensure that the Town funding for the Work is provided

- D. Compliance with Laws. If the Agreement is funded in whole or in part with CDBG funds through the Town's Community Development Block Grant Program as administered by the Colorado Division of Local Government, Department of Local Affairs and/or with funds administered by the Division of Homeland Security and Emergency Management in the Department of Public Safety, then Contractor shall comply with those regulations and restrictions normally associated with federally-funded programs and any other requirements that the state may prescribe, whether or not herein recited. The Contractor shall comply with all applicable laws, ordinances and codes of the state and local government.

12.0 AUTHORITY

The individuals executing this Agreement represent that they are expressly authorized to enter into this Agreement on behalf of Town of Lyons and the Contractor and bind their respective entities.

REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK

SIGNATURE PAGE FOLLOWS

THIS AGREEMENT is executed and made effective as provided above.

TOWN OF LYONS, COLORADO:

Approval by Town Board of Trustees

☐ Not Required

By: _____
Hollie Rogin, Mayor

Approval by Town Administrator

☐ Not Required

ATTEST:

Dolores M. Vasquez, CMC, Town Clerk

By: _____
Victoria Simonsen, Town Administrator

Date Executed by the Town of Lyons

APPROVED AS TO FORM (*Excluding Exhibits*)

☐ Not Required

For Town Attorney's Office

CONTRACTOR:

By: _____

Printed name: _____

Its: _____

STATE OF _____)
COUNTY OF _____) ss.

The foregoing Professional Services Agreement was acknowledged before me this ____ day of _____, 20____, by _____ as _____ of _____, a _____.

Witness my hand and official seal.

My commission expires: _____.

Notary Public
(Required for all contracts (C.R.S. § 8-40-202(2)(b)(IV)))

EXHIBIT A – SCOPE OF WORK

I. GENERAL INFORMATION

A. Introduction/Request:

The Town of Lyons (Owner, Town) is requesting a proposal for qualifications and a schedule from qualified consultants for work related to design, environmental assessment, bid preparation, and permitting.

The proposal shall include 1) a proposal providing qualifications for anticipated labor resources and design product and 2) a schedule for completing the work. All work shall be performed in accordance with applicable Federal, State, CDOT and local specifications and regulations. A standard contract for this work will be completed between the selected consultant and the Town of Lyons and a draft contract accompanies this request.

B. Project Components

1. Scope of Work: Design services including and not limited to environmental assessment, permitting assistance, BCA, public outreach and bid set for the 3rd Ave Stormwater project.
2. Project Term:
 - a. *Anticipated Design Start*: October 27, 2025
3. The term of the work and agreement will commence upon execution of the agreement which is anticipated by **October 24, 2025** and will terminate on **May 31, 2025**.

C. Billing

1. Due to grant funding source, it is imperative the consultant provide monthly billings that include:
 - a. Billing Summary that is formatted similar to the contract fee schedule and provides cost and budget detail including:
 - Cost allocation by task/subtask
 - Budget by task/subtask
 - Prior billing
 - Period billing
 - Cost to date
 - Remaining budget
 - Percentage complete
 - b. Billing Backup providing:
 - Employee name
 - Employee title
 - Fully burdened billing rate
 - Hours billed
 - Total cost
2. Allowable Additional Costs
 - a. The designer is not allowed additional cost expenses such as: mileage, presentation materials, printing, special mailings, services related to long-distance telephones and any other out-of-pocket expenses. All costs must be included in the proposed fully burdened rates.

II. GENERAL SCOPE OF SERVICES

A. General Scope

1. Provide administrative functions to ensure the success of the project.
2. Complete an environmental assessment to obtain environmental clearances.
3. Collect need data for updated design, including and not limited to records research, survey, utility identification, drainage report, hydraulic and hydrology modeling, SWMP and Geotech investigations, sub surface utility investigations
4. Provide 30% plans, specs and opinion of cost for Town review.
5. Provide 90% plans, specs and opinion of cost for Town review
6. Provided 100% stamped engineered drawings/plans, specs, opinion of cost for bid.
7. Conduct all meetings with all relevant parties and in a timely manner prepare and issue minutes and correspondence.
8. Prepare and coordinate IFB.
9. Provide Benefit Cost Analysis (BCA)
10. Assist and coordinate public outreach

III. SPECIFIC SCOPE OF SERVICES

Perform all tasks related to stormwater design and bid package preparation. The work is more specifically described as follows and the respondent is requested to provide a detailed proposal based on the following scope of services:

A. Site Assessment

1. The Consultant will visit the project site and evaluate the conditions of surface and piped drainage. Consultant will complete a detailed report with observations and pictures of the site for submittal to the Town.
2. Perform a design working session to meet onsite to discuss project goals and objectives, consider alternatives and create a preliminary plan of the proposed design.
3. Survey
 - a. Site Design Survey
 - b. Geotech investigations
 - c. ROW services
 - d. Subsurface Utility Engineering (SUE)
 - SUE meeting the requirements of Colorado SB18-167 including the production of a SUE plan set stamped and signed by a licensed engineer in the State of Colorado. It is assumed that there are no significant utility conflicts in the vicinity of the planned improvements.

B. Construction Plans

1. Schedule, coordinate and provide communications for all Town reviews.
 - a. Kick off meeting
 - b. Complete 30% design plans, specs and opinion of cost for the Town review.
 - c. Complete 90% design plans, specs and reviews at 90% for Town review coordinate all meetings and communications.
2. Design services for the stormwater design including bid preparation.
 - a. Survey (Topo, improvements, utilities, R.O.W., easements, etc.)
 - b. Geotechnical Investigation and Report (soil characterization, design values, pavement recommendations, etc.)
 - c. Subsurface Utility Engineering (SUE)
 - d. Utilities
 - e. Design Criteria Establishment
 - f. Landscape Design
 - g. Environmental
 - h. Drainage Report
 - i. Hydraulic & Hydrology Modeling
 - j. SWMP (Storm Water Management Plan)
 - k. Drainage Design
3. Complete 100% design plans based on current codes and standards and Town criteria. The consultant shall use the Town's "Local" Street section but with rollover curb and attached sidewalk as the basis for any necessary roadway modifications or improvements.
4. Prepare Opinions of Probable Cost (OPC) prior to bid preparation.
5. The consultant will be required to prepare a construction bid package that includes the plans and specifications for the final bidding product.
6. Consultant will manage the bidding process including
 - a. Set up a bid form for the Town that may be unit price or lump sum or a combination of both
 - b. The Town will provide many of the documents in the boiler plate format. The Town will provide the space for any meetings.
 - c. Incorporate documents required by funding agencies and the Town in bid documents.

d.Final bid documents to be in electronic format so that Town can post on Bidnet Direct.

C. Permitting

1. Confirm status of permits and approvals prior to bidding.

D. Right of Way

1. Complete survey to identify ROW

E. Environmental Assessment

1. Assist the Town with obtaining all required environmental clearances from appropriate agencies per funding requirements.
2. Attend weekly progress meetings with the Town, Contractor, and invited stakeholders as needed
3. In-field and office engineering design modifications as-needed.
4. Review and respond to RFI's (Request for Information)

F. Public Outreach

1. Coordination and assistance of public outreach and feedback

G. Benefit Cost Analysis (BCA)

1. Provide Benefit Cost Analysis

Exhibit B

Drexel, Barrell & Co.											
Final Fee Proposal - Town of Lyons											
DESIGN SERVICES FOR 3RD AVENUE STORMWATER PROJECT											
	Project Manager (KNAPP)	Peer Review (QA/QC) (LINGREEN)	Survey Manager (SELDERS)	Hydraulics/Drainage Engineer (IBLINGS)	Project Engineer (BUTLER)	CAD Technician (O'LAUGHLIN)	Survey CAD Tech (FINNEY)	Field Surveyor (ECKERT)	Sub-consultant	Task Total Fee	
Description											
Billing rate per hour	200	190	215	190	170	120	125	145	N.A.		
PROJECT INITIATION & MANAGEMENT	Estimate of DBC Hours								Fee		
Kick off Meeting & Site visit	2			2	2					\$1,120	
Project Management	12									\$2,400	
Progress Meetings	12									\$2,400	
Sub Consultant Management & Coordination	6									\$1,200	
										\$7,120	
SITE ASSESSMENT	Estimate of DBC Hours								Fee		
General Data Gathering & Working Session	6			2						\$1,580	
Topographic & ROW Mapping	2		8				8	24		\$6,600	
Environmental Clearances & Reports (Bio., Hazardous Materials)									\$14,888	\$14,888	
Subsurface Utility Engineering (Assumes 10 potholes)									\$12,255	\$12,255	
Geotechnical Report (Assumes 5 bores at 10' deep. ROW fees paid by Town)									\$16,040	\$16,040	
Cost Benefit Analysis	8			4	6					\$3,380	
Permitting Assistance	6									\$1,200	
Public Outreach	6									\$1,200	
										\$57,143	
Construction Plans & Specifications	Estimate of DBC Hours								Fee		
Construction Drawings											
30% CD's	22	2		8	32	32				\$15,580	
90%CD's	32	6		24	44	32				\$23,420	
100% CD's	20	4		8	40	32				\$16,920	
Construction Specifications	12				24					\$6,480	
Landscape Design & Plans									\$4,000	\$4,000	
SWMP Plans & Report	4				7	5				\$2,590	
Drainage Report (Hydrology/Hydraulics)	8			24	32	4				\$12,080	
Opinion of Probable Cost	8				8					\$2,960	
										\$84,030	
Bidding Phase Services	Estimate of DBC Hours								Fee		
Bid Package & Advertising	4			2	4					\$1,860	
Bid Questions & Addenda	4				2					\$1,140	
Pre-Bid Conference & Walk	2		2							\$830	
Bid Tabulation, Evaluation & Selection	4									\$800	
Conformed Documents	4				4	4				\$1,960	
										\$6,590	
TOTAL										\$154,883	

ATTACHMENT A
FEDERAL EMERGENCY MANAGEMENT AGENCY (“FEMA”)-
BUILDING RESILIENT INFRASTRUCTURE AND COMMUNITIES (“BRIC”)
GRANT PROGRAM REQUIREMENTS FOR PROCUREMENT CONTRACTS

The work or services under the contract to which this Attachment A is attached (“Agreement”) are funded in whole or in part through a grant from the Federal Emergency Management Agency’s Grant Program which requires compliance with all the provisions contained in this Attachment to the Agreement and all other applicable Federal and State laws and regulations. If the Agreement is between the Town and the “Consultant,” the term “Contractor” as used herein shall mean the “Consultant.” The provisions below are incorporated into and made part of the Agreement.

1.0 PERFORMANCE AND PAYMENT BONDS (44 C.F.R. § 13.36(H)(2) AND (3)): Contractor must provide both a performance bond and a payment bond acceptable to the Town, each for one hundred percent (100%) of the Contract Price.

2.0 EQUAL EMPLOYMENT OPPORTUNITY: If this Agreement is for compensation in excess of \$10,000.00 (Contract Price > \$10,000), during the performance of this Agreement, the Contractor agrees as follows:

- A. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex 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 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.
- B. 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 considerations for employment without regard to race, color, religion, sex, or national origin.
- C. 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.
- D. 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.
- E. 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.
- F. 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.

- G. The Contractor will include the portion of the sentence immediately preceding subparagraph (1) and the provisions of subparagraphs (1) through (7) 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.”

3.0 COPELAND ANTI-KICKBACK ACT (44 C.F.R. SECTION 13.36(i)(4)):

- A. Contractor. The Contractor shall comply with 18 U.S.C. § 874, 40 U.S.C. § 3145, and the requirements of 29 C.F.R. pt. 3 as may be applicable, which are incorporated by reference into this contract.
- B. Subcontracts. The Contractor or subcontractor shall insert in any subcontracts the clause in subparagraph (1) above and such other clauses as the FEMA may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these Contract clauses.
- C. Breach. A breach of the subparagraph contract clauses (1) or (2) above may be grounds for termination of the Contract, and for debarment as a contractor and subcontractor as provided in 29 C.F.R. § 5.12.

4.0 COMPLIANCE WITH CONTRACT WORK HOURS AND SAFETY STANDARDS ACT: If this Agreement is for compensation in an amount greater than \$100,000.00 (Contract Price > \$100,000), the following shall apply:

- A. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- B. Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (1) of this section the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.

- C. Withholding for unpaid wages and liquidated damages. The Town shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this section.
- D. Subcontracts. The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraph (1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in subparagraphs (1) through (4) of this section.

5.0 NOTICE OF STATE AND FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) REPORTING REQUIREMENTS AND REGULATIONS:

- A. General. The Town is using Public Assistance grant funding awarded by FEMA to the State of Colorado and/or the Town to pay, in whole or in part, for the costs incurred under this Agreement. As a condition of Public Assistance funding under major disaster declaration FEMA-DR-4145, FEMA requires the State and thus the Town to provide various financial and performance reporting.
 - (1) It is important that the Contractor is aware of these reporting requirements, as the Town may require and the Contractor agrees to provide certain information, documentation, and other reporting in order to satisfy reporting requirements to the State of Colorado which, in turn, will enable the State of Colorado to satisfy reporting requirements to FEMA.
 - (2) Failure of the State of Colorado to satisfy reporting requirements to FEMA is a material breach of the FEMA-State Agreement, and could result in loss of federal financial assistance awarded to fund this Contract.
- B. Applicable Regulations and Policy. The applicable regulations, FEMA policy, and other sources setting forth these reporting requirements are as follows:
 - (1) 44 C.F.R. § 13.40 (Monitoring and Reporting Program Performance)
 - (2) 44 C.F.R. § 13.41 (Financial Reporting)
 - (3) 44 C.F.R. § 13.50(b) (Reports)
 - (4) 44 C.F.R. § 206.204(f) (Progress Reports)
 - (5) FEMA Standard Operating Procedure No. 9570.14, Public Assistance Program Management and Grant Closeout Standard Operating Procedure (Dec. 2013)
 - (6) FEMA-State (or Tribal) Agreement

- C. Financial Reporting. The State of Colorado is required to submit to the following financial reports to FEMA:
- (1) Initial Report. An initial Federal Financial Report (SF 425) no later than 30 days after FEMA has approved the first Public Assistance project under FEMA-DR-4145.
 - (2) Quarterly Reports. Following submission of the initial report, quarterly Federal Financial Reports until submission of the final report described in the following subparagraph. Reports are due on January 30, April 30, July 30, and October 30.
 - (3) Final Report. A final Federal Financial Report within 90 days of the end of the period of performance for the Public Assistance grant.
- D. Performance Reporting. The State of Colorado is required to submit to the following financial reports to FEMA:
- (1) Initial Report. An initial performance report no later than 30 days after FEMA has approved the first Public Assistance project under FEMA-DR-4145.
 - (2) Quarterly Reports. Following submission of the initial report, quarterly performance reports until submission of the final report described in the following subparagraph. Reports are due on January 30, April 30, July 30, and October 30.
 - (3) Final Report. A final performance report within 90 days of the end of the period of performance for the Public Assistance grant.

6.0 ACCESS TO RECORDS: The following access to records requirements apply to this Agreement:

- A. The Contractor agrees to provide the Town, the State of Colorado, the FEMA Administrator, the Comptroller General of the United States, or any of their authorized representatives access to any books, documents, papers, and records of the Contractor which are directly pertinent to this Contract for the purposes of making audits, examinations, excerpts, and transcriptions.
- B. The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- C. The Contractor agrees to provide the Town, the State, the FEMA Administrator or their authorized representatives access to construction or other work sites pertaining to the work being completed under this Agreement.

7.0 RETENTION OF RECORDS: The Contractor agrees to maintain all books, records, accounts and reports required under this Contract for a period of not less than three years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case Contractor agrees to maintain same until the Town, the State of Colorado, the FEMA Administrator, the Comptroller General of the United States, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related to the litigation or settlement of claims.

8.0 CLEAN AIR ACT: If this Agreement is for compensation in excess of \$150,000.00 (Contract Price > \$150,000):

- A. The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.
- B. The Contractor agrees to report each violation to the Town and understands and agrees that the Town will, in turn, report each violation as required to assure notification to the State of Colorado, Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.
- C. The Contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with federal assistance provided by FEMA.

9.0 FEDERAL WATER POLLUTION CONTROL ACT: If this Contract is for compensation in excess of \$150,000.00 (Contract Price > \$150,000):

- A. Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq.
- B. Contractor agrees to report each violation to the Town and understands and agrees that the Town will, in turn, report each violation as required to assure notification to the State of Colorado, Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.
- C. Contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with federal assistance provided by FEMA.

10.0 ENERGY CONSERVATION: The Contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

11.0 SUSPENSION AND DEBARMENT: This Section applies if this Agreement/Contract or any subcontract awarded hereunder is for a “covered transaction” to include:

- (a) This Contract or any subcontract awarded hereunder is awarded in the amount of at least \$25,000, or
 - (b) This Contract or any subcontract awarded hereunder requires the approval of FEMA, regardless of amount.
- A. If this Contract or any subcontract awarded hereunder is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000, the Contractor is required to verify that none of the Contractor or any subcontractor as the case may be, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935). By signing this Agreement, the Contractor certifies, to the best of its knowledge and belief, that it and its principals:
- (1) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by a federal department or agency;
 - (2) have not within a five-year period preceding this Agreement had one or more public transactions (federal, State or local) terminated for cause or default; and

(3) have not within a five-year period preceding this proposal been convicted of or had a civil judgment rendered against them for (a) the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, State or local) transaction or contract under public transaction, or (b) violation of federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property

- B. The Contractor must comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.
- C. This certification is a material representation of fact relied upon by the Town. If it is later determined that the Contractor did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, in addition to remedies available to the State of Colorado and the Town), the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.
- D. The Contractor agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C throughout the period of this Contract. The Contractor further agrees to include a provision requiring such compliance in its lower tier covered transactions.”

12.0 AMERICANS WITH DISABILITIES ACT: The Contractor shall be in compliance with the appropriate areas of the Americans with Disabilities Act of 1990 as enacted and from time to time amended and any other applicable federal regulation. A signed, written certificate stating compliance with the Americans with Disabilities Act may be requested at any time during the life of any purchase order or contract and with any new purchase order or contract issued by the Town.

13.0 DAVIS BACON/PREVAILING WAGES: Check the Applicable Provision Below:

☐ Contractor/subcontractor is responsible for complying with the Davis Bacon Act (40 U.S.C. §§276a to 276a-7) as supplemented by Department of Labor regulations at 29 CFR pt.5, determining the applicable prevailing wage requirements pertaining to Contractor/Subcontractor’s Work, and will strictly comply with the requirements. Contractor/Subcontractor will keep complete and accurate records containing the name, address, the occupational title or titles for the work performed, the rate of pay, daily and weekly hours worked for each occupational title, deductions made, and actual wages paid for work performed by each worker. Subcontractor will submit the required compliance form and a reasonable number of certified copies of current payroll records on the proper form. Receipt of the information will be a condition precedent to making any payments to the Contractor/Subcontractor.

OR

☒ Davis-Bacon Act wage rates as determined by the U.S. Department of Labor shall not apply for the construction of this project. (Stafford Act does not require Davis-Bacon Wage Act compliance if the Work is funded only with FEMA emergency funding.)

14.0 PROVISIONS REQUIRED BY LAW DEEMED INSERTED: Each and every provision of law and clause required by law to be inserted in this Agreement shall be deemed to be inserted herein and the Agreement shall be read and enforced as though it were included herein, and if through mistake or otherwise any provision is not

inserted, or is not correctly inserted, then upon the application of either party the Agreement shall forthwith be physically amended to make such insertion or correction.

15.0 AGREEMENT TO EXECUTE OTHER REQUIRED DOCUMENTS: Contractor and all subcontractors, by entering into the Agreement, understand and agree that funding for the Work is provided under federal and/or state programs with specific contracting requirements. To the extent any such requirement is not otherwise set forth herein, Contractor agrees to execute such amendments or further agreements as may be necessary to ensure that the Town funding for the Work is provided.

16.0 CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN'S BUSINESS ENTERPRISE AND LABOR SURPLUS: The Contractor and subcontractors will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible including, but not limited to, the following:

- (a) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- (b) Ensuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources;
- (c) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises;
- (d) Establishing delivery schedules, where the requirements of the contract permit, which encourage participation by small and minority businesses and women's business enterprises; and
- (e) Using the services and assistance of the U.S. Small Business Administration, the Minority Business Development Agency of the U.S. Department of Commerce, and State and local governmental small business agencies.

17.0 COPYRIGHTS: The Contractor acknowledges and agrees that the federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for federal government purposes: (a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and (b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

18.0 BYRD ANTI-LOBBYING AMENDMENT: If this Contract is for compensation in excess of \$100,000.00 (Contract Price > \$100,000), the following shall apply:

- A. Contractor represents and acknowledges that it has filed the required certification that it has not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant, or any other award covered by 31 U.S.C. 1352.
- B. The Contractor or subcontractor shall obtain the certification set forth in subparagraph (A) of this section from any subcontractors and will insert in any subcontracts a clause requiring the subcontractors to obtain this certification from any lower tier subcontractors.

- C. The prime Contractor shall be responsible for compliance with the clauses set forth in subparagraphs (1) and (2) of this section by any subcontractor or lower tier subcontractor.

19.0 PROCUREMENT OF RECOVERED MATERIALS: If the Town constitutes “a political subdivision of a state” as defined in 2 C.F.R. §200.322, Contractor agrees to comply with the requirements of Section 6003 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. In accordance with Section 6002, Contractor must:

(1) Procure 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 in the preceding fiscal year exceeded \$10,000;

(2) Procure solid waste management services in a manner that maximizes energy and resource recovery;
and

(3) Must have established an affirmative procurement program for the procurement of recovered materials identified in the EPA guidelines.

20. RIGHTS TO INVENTIONS MADE UNDER A CONTRACT OR AGREEMENT: Check the Applicable Provision Below:

- ☐ [If checked, Attachment D is incorporated into this Agreement by reference.] The federal award meets the definition of “funding agreement” under 37 C.F.R. §401.2(a) and this contract is between the Town and a small business firm or nonprofit organization regarding the substitution of parties, assignment, or performance of experimental, developmental, or research work under such funding agreement, the Town shall comply with the requirements of 37 C.F.R. Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperating Agreements,” and any implementing regulations issued by the awarding agency.
- ☒ The federal award does not qualify as a “funding agreement” and/or is not a contract with small business firm or nonprofit organization for the purpose of the substitution of parties, assignment, or performance of experimental, developmental, or research work under such funding agreement.

21.0 TERMINATION FOR CAUSE AND CONVENIENCE (2 C.F.R. PART 20, APPENDIX II §

A

Contracts must address termination for cause and for convenience by the recipient or subrecipient, including the manner by which termination will occur and the basis for settlement.

21.1 APPLICABILITY

This contract provision is required for contracts and purchase orders exceeding \$10,000.⁷ For contracts at or below \$10,000, FEMA suggests including a termination for cause provision, but this is not required.

21.2 ADDITIONAL CONSIDERATIONS

FEMA recommends that termination clauses be actionable and specific. For example, a termination clause that allows for 60-day notice of termination for a contract with a 30-day duration may not be actionable.

Additionally, if a contract allows for due oral or written notice of termination, it should specify what is considered due oral or written notice.

22.0 PROHIBITION OF CONTRACTING FOR COVERED TELECOMMUNICATIONS EQUIPMENT OR SERVICES

Section 889(b)(1) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY 2019 NDAA) and 2 C.F.R. § 200.216, as implemented by FEMA Policy 405-143-1, Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services, prohibit the obligation or expending of federal award funds on certain telecommunication products or from certain entities for national security reasons. Effective August 13, 2020, FEMA recipients and subrecipients, as well as their contractors and subcontractors, may not obligate or expend any FEMA award funds to:

- a. Procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system;
- b. Enter, extend, or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system; or
- c. Enter, extend, or renew contracts with entities that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

22.1 APPLICABILITY

As of November 12, 2020, all FEMA recipients and subrecipients, and their contractors and subcontractors, are required to include this contract provision in all FEMA-funded contracts and subcontracts, including any purchase orders.

22.2 SUGGESTED LANGUAGE

The following provides a sample contract clause: “Prohibition on Contracting for Covered Telecommunications Equipment or Services.

- (a) Definitions. As used in this clause, the terms backhaul; covered foreign country; covered telecommunications equipment or services; interconnection arrangements; roaming; substantial or essential component; and telecommunications equipment or services have the meaning as defined in FEMA Policy 405-143-1, Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services, as used in this clause—
- (b) Prohibitions.
 - 1) Section 889(b) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, and 2 C.F.R. § 200.216 prohibit the head of an executive agency on or after Aug. 13, 2020, from obligating or expending grant, cooperative agreement, loan, or loan guarantee funds on certain telecommunications products or from certain entities for national security reasons.
 - 2) Unless an exception in paragraph (c) of this clause applies, the contractor and its subcontractors may not use grant, cooperative agreement, loan, or loan guarantee funds from the Federal Emergency Management Agency to:
 - i. Procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system;
 - ii. Enter, extend, or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system;
 - iii. Enter, extend, or renew contracts with entities that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any

system; or

iv. Provide, as part of its performance of this contract, subcontract, or other contractual instrument, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

(c) Exceptions.

1) This clause does not prohibit contractors from providing—

i. A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or Contract Provisions Guide 25 ii. Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

2) By necessary implication and regulation, the prohibitions also do not apply to:

i. Covered telecommunications equipment or services that: a. Are not used as a substantial or essential component of any system; and b. Are not used as critical technology of any system.

ii. Other telecommunications equipment or services that are not considered covered telecommunications equipment or services

(d) Reporting requirement.

1) In the event the contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the contractor is notified of such by a subcontractor at any tier or by any other source, the contractor shall report the information in paragraph (d)(2) of this clause to the recipient or subrecipient, unless elsewhere in this contract are established procedures for reporting the information.

2) The Contractor shall report the following information pursuant to paragraph (d)(1) of this clause:

i. Within one business day from the date of such identification or notification: The contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.

ii. Within 10 business days of submitting the information in paragraph (d)(2)(i) of this clause: Any further available information about mitigation actions undertaken or recommended. In addition, the contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services. (e) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph

(e), in all subcontracts and other contractual instruments.”

23.0 DOMESTIC PREFERENCES FOR PROCUREMENTS

The recipient or subrecipient should, to the greatest extent practicable and consistent with law, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. This includes, but is not limited to, iron, aluminum, steel, cement, and other manufactured products.

23.1 APPLICABILITY

For procurements made under grant awards or declarations issued on or after November 12, 2020, all FEMA recipients and subrecipients are required to include in all contracts and purchase orders for work or products a contract provision encouraging domestic preference for procurements.⁵⁷ Programs receiving federal financial assistance for infrastructure projects may also be subject to the Build America, Buy America Act preferences set forth in 2 C.F.R. Part 184.

23.2 SUGGESTED LANGUAGE

The following provides a sample contract clause: “Domestic Preference for Procurements. The Contractor should, to the greatest extent practicable and consistent with law, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. This includes, but is not limited to, iron, aluminum, steel, cement, and other manufactured products. For purposes of this clause: 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.”

24.0 BUILD AMERICA, BUY AMERICA ACT

The Build America, Buy America Act (BABAA) requires all federal agencies, including FEMA, to ensure that no federal financial assistance for “infrastructure” projects is provided unless all the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.

24.1 APPLICABILITY

The BABAA domestic preference requirements are applicable to infrastructure projects funded under subject FEMA financial assistance program awards issued on or after Jan. 2, 2023, as well as new funding FEMA obligates to existing awards or through renewal awards where the new funding is obligated on or after Jan. 2, 2023.

The BABAA contract provision and self-certification are required for contracts and subcontracts for infrastructure projects that are subject to the BABAA requirements unless the requirement is waived.⁶⁰ For additional information on types of BABAA waivers, please refer to FEMA’s website at “Buy America” Preference in FEMA Financial Assistance Programs for Infrastructure | FEMA.gov.

24.2 SUGGESTED LANGUAGE

The following provides a sample contract clause:

“Build America, Buy America Act (BABAA).

Contractors and their subcontractors who apply or bid for an award for an infrastructure project subject to the domestic preference requirement in the Build America, Buy America Act shall file the required certification to (insert name of recipient/subrecipient) with each bid or offer for an infrastructure project, unless a domestic preference requirement is waived by FEMA. Contractors and subcontractors certify that no federal financial assistance funding for infrastructure projects will be provided unless all the iron, steel, manufactured projects, and construction materials used in the project are produced in the United States. BABAA, Pub. L. No. 117-58, §§ 70901-52. Contractors and subcontractors shall also disclose any use of federal financial assistance for infrastructure projects that does not ensure compliance with BABAA domestic preference requirements. Such disclosures shall be forwarded to the recipient who, in turn, will forward the disclosures to FEMA, the federal agency; subrecipients will forward disclosures to the passthrough entity, who will, in turn, forward the disclosures to FEMA.”

24.3 REQUIRED SELF-CERTIFICATION

For FEMA financial assistance programs subject to BABAA, contractors and subcontractors must sign and submit the following certification to the next tier (e.g., subcontractors submit to the contractor; contractors submit to the recipient or subrecipient) for each bid or offer for an infrastructure project that has not been waived by a BABAA waiver:⁶¹ “The undersigned certifies, to the best of their knowledge and belief, that:

The Build America, Buy America Act (BABAA) requires that no federal financial assistance for “infrastructure” projects is provided “unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” Section 70914 of Public Law No. 117-58, §§ 70901-52.

The undersigned certifies that for the (insert name of project) that the iron, steel, manufactured products, and construction materials used in this contract are in full compliance with the BABAA requirements including:

1. All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
2. All manufactured products purchased with FEMA financial assistance must be produced in the United States. For a manufactured product to be considered produced in the United States, the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55% of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.
3. All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

The (insert name of contractor or subcontractor), certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the (insert name of contractor or subcontractor) understands and agrees that the provisions of 31 U.S.C. Chap. 38, Administrative Remedies for False Claims and Statements, apply to this certification and disclosure, if any.”

Signature of (insert name of contractor or subcontractor) Authorized Official

Name and Title of (insert name of contractor or subcontractor) Authorized Official

Date

Accepted by Contractor on

_____, 20__

By: _____

Title

Accepted by Town of Lyons on

_____, 20__

By: _____

Title