

**AGREEMENT BETWEEN CLIENT AND
KIMLEY-HORN AND ASSOCIATES, INC. FOR PROFESSIONAL SERVICES**

THIS AGREEMENT is made this 19th day of March, 2024, by and between the CITY OF BISBEE, an Arizona municipal corporation ("the Client") and KIMLEY-HORN AND ASSOCIATES, INC. ("the Consultant"). Consultant and Client may hereinafter be referred to individually as a "Party" or collectively as the "Parties."

NAME OF PROJECT: Lavender Pit shared use path - Federal Award ID 07-79-07920; URI: 119309 ("the Project.")

The Client and the Consultant agree as follows:

- 1) Scope of Services and Additional Services. The Consultant will perform only the services specifically described in Exhibit "A," which is made a part of this Agreement ("the Services"). If requested by the Client and agreed to by the Consultant, the Consultant will perform Additional Services, which shall be governed by these provisions. Unless otherwise agreed to in writing, the Client shall pay the Consultant for the performance of any Additional Services an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including telecommunications, in-house reproduction, postage, supplies, Project related computer time, and local mileage. Other direct expenses will be billed at 1.15 times cost.
- 2) Client's Responsibilities. In addition to other responsibilities herein or imposed by law, the Client shall:
 - a) Designate in writing a person to act as the Client's representative. Such person shall have complete authority to transmit instructions, receive information, and make or interpret the Client's decisions, unless such decisions require City Council approval.
 - b) Provide all criteria and information as to the Client's requirements, objectives and expectations for the Project, and all standards of development, design, or construction.
 - c) Provide the Consultant all available studies, plans, or other documents pertaining to the Project, such as survey, engineering data, environmental information, etc., all of which the Consultant may rely upon. However, the Client does not guarantee the accuracy of such documents.
 - d) Arrange for access to the Project site and other property as required for the Consultant to perform services.
 - e) Review all documents or reports presented by the Consultant and communicate decisions pertaining thereto within a reasonable time so as not to delay the Consultant.
 - f) Furnish approvals and permits for all government authorities having jurisdiction over the Project and such approvals and consents from others as may be necessary.
 - g) Obtain any independent accounting, legal, cost estimating and feasibility services as the Client may require.
 - h) Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the Consultant's services, or any defect or nonconformance in any aspect of the Project.
- 3) Period of Services. This Agreement assumes conditions permitting orderly and continuous progress of the Project through completion of the Services. The Consultant shall begin work after receipt of a fully executed copy of this Agreement. The times for performance shall be extended as necessary for periods of delay or suspension resulting from circumstances the Consultant does not control. If such delay or suspension extends for more than six months for reasons beyond the Consultant's control, the rates of compensation provided for in this Agreement shall be renegotiated.
- 4) Compensation for Services.
 - a) The Consultant's compensation shall be as stated herein, unless otherwise provided in Exhibit A. The Client shall pay the Consultant an amount based upon the Consultant's then-current hourly

rates plus an amount to cover certain direct expenses including telecommunications, in-house reproduction, postage, supplies, Project related computer time, and local mileage. Other direct expenses will be billed at 1.15 times cost.

- b) If the Consultant's compensation is on an hourly basis, the Parties may have estimated in Exhibit A costs and expenses for the various portions of the scope of Services. Services undertaken or expenses incurred by the Consultant and agreed to in writing by the Client exceeding any estimates shall be the liability of the Client.

5) Method of Payment.

- a) Invoices will be submitted periodically for services performed and expenses incurred. Payment of each invoice will be due within 30 days of receipt. The Client shall also pay any applicable sales tax. All retainers will be held by the Consultant and applied against the final invoice. Interest will be added to accounts not paid within 30 days at the maximum rate allowed by law. If the Client fails to make any payment due the Consultant under this Agreement within 30 days after the Consultant's transmittal of its invoice, the Consultant may, after giving 7 days' notice to the Client, suspend services and withhold deliverables until all amounts due are paid in full.
- b) If the Client relies on payment or proceeds from a third-party to pay Consultant and Client does not pay Consultant's invoice within 60 days of receipt, Consultant may communicate directly with such third-party to secure payment.
- c) If the Client objects to any charge on an invoice submitted by the Consultant, the Client shall so advise the Consultant in writing giving its reasons within 14 days of receipt of the invoice. If the Client objects to only a portion of the invoice, payment for all other portions remains due.
- d) If the Consultant initiates legal proceedings to collect payments for services, it may recover, in addition to all amounts due and payable, its reasonable attorneys' fees, reasonable experts' fees, and other expenses related to the proceedings.
- e) The Client agrees that payments issued to the Consultant are not subject to any contingency or condition once issued. The Consultant may negotiate payment of any check tendered by the Client, even if the words "in full satisfaction" or words intended to have similar effect appear on the check without such negotiation being an accord and satisfaction of any disputed debt and without prejudicing any right of the Consultant to collect additional amounts.

- 6) Use of Documents. All documents, data, and programs prepared by the Consultant are related exclusively to the services described in this Agreement. They are not intended or represented to be suitable for use or reuse by the Client or others on extensions of this Project or on any other project. Any modifications by the Client to any of the Consultant's documents, or any use, partial use or reuse of the documents without written authorization by the Consultant will be at the Client's sole risk and without liability to the Consultant, and the Client shall indemnify, defend and hold the Consultant harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, resulting therefrom. The Consultant's electronic files and source code remain the property of the Consultant and shall be provided to the Client only if expressly requested by the Client in writing. Any electronic files not containing an electronic seal are provided only for the convenience of the Client and use of them is at the Client's sole risk. In the case of any defects in the electronic files or any discrepancies between them and the hardcopy of the documents prepared by the Consultant, the hardcopy shall govern.

- 7) Intellectual Property. Consultant may use or develop its proprietary software, patents, copyrights, trademarks, trade secrets, and other intellectual property owned by Consultant or its affiliates ("Intellectual Property") in the performance of this Agreement. Unless explicitly agreed to in writing by both Parties to the contrary, Consultant maintains all interest in and ownership of its Intellectual Property and conveys no interest, ownership, license to use, or any other rights in the Intellectual Property to Client. Any enhancements of Intellectual Property made during the performance of this Agreement are solely owned by Consultant and its affiliates. If Consultant's services include providing Client with access to or a license for Consultant's (or its affiliates') proprietary software of technology, Client agrees to the terms of the Software License Agreement set forth at <https://www.kimley->

horn.com/khts-software-license-agreement ("the License Agreement") which terms are incorporated herein by reference.

- 8) **Opinions of Cost.** Because the Consultant does not control the cost of labor, materials, equipment, or services furnished by others, methods of determining prices, or competitive bidding or market conditions, all opinions rendered as to costs, including but not limited to the costs of construction and materials, are solely based on its judgment as a professional familiar with the industry. The Consultant cannot and does not guarantee that proposals, bids or actual costs will not vary from opinions of cost prepared by it. If at any time the Client wishes greater assurance as to the amount of any cost, it shall employ an independent cost estimator. Consultant's services required to bring costs within any limitation established by the Client will be paid for as Additional Services.
- 9) **Termination.** The obligation to provide further services under this Agreement may be terminated by either Party upon seven days' written notice in the event of substantial failure by the other Party to perform in accordance with the terms hereof or upon thirty days' written notice for the convenience of the the Client. The Consultant will be paid for all services performed to the effective date of termination, all expenses subject to reimbursement, and other reasonable expenses incurred by the Consultant as a result of such termination.
- 10) **Standard of Care.** The standard of care applicable to Consultant's services will be the degree of care and skill ordinarily exercised by consultants performing the same or similar services in the same locality at the time the services are provided. No warranty, express or implied, is made or intended by the Consultant's performance of services, and it is agreed that the Consultant is not a fiduciary with respect to the Client.
- 11) **LIMITATION OF LIABILITY.** In recognition of the relative risks and benefits of the Project to both the Client and the Consultant, the risks are allocated such that, to the fullest extent allowed by law, and notwithstanding any other provisions of this Agreement or the existence of applicable insurance coverage, that the total liability, in the aggregate of the Consultant and the Consultant's officers, directors, employees, agents, and subconsultants to the Client or to anyone claiming by, through or under the Client, for any and all claims, losses, costs or damages whatsoever arising out of or in any way related to the services under this Agreement from any cause or causes, including but not limited to, the negligence, professional errors or omissions, strict liability or breach of contract or any warranty, express or implied, of the Consultant or the Consultant's officers, directors, employees, agents, and subconsultants shall not exceed twice the total compensation received by the Consultant under this Agreement or \$150,000, whichever is greater. Higher limits of liability may be negotiated for additional fee. This Section is intended solely to limit the remedies available to the Client or those claiming by or through the Client, and nothing in this Section shall require the Client to indemnify the Consultant.
- 12) **Insurance.** Without limiting any obligations or liabilities of Consultant, Consultant shall purchase and maintain, at its own expense, hereinafter stipulated minimum insurance with insurance companies duly licensed by the State of Arizona (admitted insurer) with an AM Best, Inc. rating of A or above or an equivalent qualified unlicensed insurer by the State of Arizona (non-admitted insurer) with policies and forms satisfactory to the Client. The required insurance shall be endorsed to indicate it is primary, non-contributory insurance with respect to performance of this Agreement and in the protection of the Client as an Additional Insured.
 - a) **Commercial General Liability:** Consultant shall maintain "occurrence" form Commercial Liability Insurance with an unimpaired limit of not less than \$1,000,000 for each occurrence, \$2,000,000 Products and Completed Operations Annual Aggregate, and a \$2,000,000 General Aggregate Limit.
 - b) **Professional Liability:** Consultant shall maintain Professional Liability insurance covering negligent errors and omissions arising out of the services performed by Consultant, or anyone employed by Consultant, or anyone for whose negligent acts, mistakes, errors and omissions Consultant is legally liable, with an unimpaired liability insurance limit of \$2,000,000 each claim and \$2,000,000 annual aggregate.

- c) Vehicle Liability: Consultant shall maintain Business Automobile Liability Insurance with a limit of \$1,000,000 each occurrence on Consultant's owned, hired, and non-owned vehicles assigned to or used in the performance of Consultant's services under this Agreement.
 - d) Workers' Compensation Insurance: Consultant shall maintain Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over Consultant's employees engaged in the performance of services under this Agreement.
 - e) Additional Coverage: To the fullest extent permitted by law, if Consultant maintains higher insurance limits than the minimums shown above, the Client requires and shall be entitled to coverage for the higher limit maintained.
- 13) Mutual Waiver of Consequential Damages. In no event shall either Party be liable to the other for any consequential, incidental, punitive, or indirect damages including but not limited to loss of income or loss of profits.
- 14) Construction Costs. Under no circumstances shall the Consultant be liable for extra costs or other consequences due to changed conditions, or for costs related to the failure of contractors to perform work in accordance with the plans and specifications. Consultant shall have no liability whatsoever for any costs arising out of the Client's decision to obtain bids or proceed with construction before the Consultant has issued final, fully approved plans and specifications. The Client acknowledges that all preliminary plans are subject to substantial revision until plans are fully approved and all permits obtained
- 15) Certifications. All requests for the Consultant to execute certificates, lender consents, or other third-party reliance letters must be submitted to the Consultant at least 14 days prior to the requested date of execution. The Consultant shall not be required to execute certificates, consents, or third-party reliance letters that are inaccurate, that relate to facts of which the Consultant does not have actual knowledge, or that would cause the Consultant to violate applicable rules of professional responsibility.
- 16) Dispute Resolution. All claims arising out of this Agreement shall be submitted first to mediation in accordance with the American Arbitration Association as a condition precedent to litigation. Any mediation or civil action must be commenced within one year of the accrual of the cause of action asserted but in no event later than allowed by applicable statutes.
- 17) Construction Phase Services.
- a) The Consultant will make visits to the project site in accordance with Consultant's scope of services to determine, in general, if the work is proceeding in accordance with the construction contract.
 - b) If the Consultant prepares construction documents and the Consultant is not retained to make periodic site visits, the Client assumes all responsibility for interpretation of the documents and for construction observation, and the Client waives any claims against the Consultant in any way connected thereto.
 - c) The Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, sequence, schedule, safety programs, or safety practices, nor shall Consultant have any authority or responsibility to stop or direct the work of any contractor. The Consultant's visits will be for the purpose of endeavoring to provide the Client a greater degree of confidence that the completed work of its contractors will generally conform to the construction documents prepared by the Consultant. Consultant neither guarantees the performance of contractors, nor assumes responsibility for any contractor's failure to perform its work in accordance with the contract documents.
 - d) The Consultant is not responsible for any duties assigned to it in the construction contract that are not expressly provided for in this Agreement. The Client agrees that each contract with any contractor shall state that the contractor shall be solely responsible for job site safety and for its means and methods; that the contractor shall indemnify the Client and the Consultant for all claims and liability arising out of job site accidents; and that the Client and the Consultant shall be made additional insureds under the contractor's general liability insurance policy.

- 18) Hazardous Substances. Consultant shall not be a custodian, transporter, handler, arranger, contractor, or remediator with respect to hazardous substances and conditions. Consultant's services will be limited to analysis, recommendations, and reporting, including, when agreed to, plans and specifications for isolation, removal, or remediation. The Consultant shall notify the Client of unanticipated hazardous substances or conditions of which the Consultant actually becomes aware. The Consultant may stop affected portions of its services until the hazardous substance or condition is eliminated.
- 19) Assignment and Subcontracting. Nothing under this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than the Client and the Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of the Client and the Consultant and not for the benefit of any other party. The Client shall not assign, sublet or transfer any rights under or interest in this Agreement, or any claim arising out of the performance of services by Consultant, without the written consent of the Consultant, which consent shall not be unreasonably withheld. The Consultant reserves the right to augment its staff with subconsultants as it deems appropriate due to Project logistics, schedules, or market conditions. If the Consultant exercises this right, the Consultant will maintain the agreed-upon billing rates for services identified in the contract, regardless of whether the services are proved by in-house employees, contract employees, or independent subconsultants.
- 20) Confidentiality. The Client consents to the Consultant's use and dissemination of photographs of the Project and to its use of facts, data and information obtained by the Consultant in the performance of its services. If, however, any facts, data or information are specifically identified in writing by the Client as confidential, the Consultant shall use reasonable care to maintain the confidentiality of that material.
- 21) Compliance With Federal and State Laws. The Consultant understands and acknowledges the applicability to it of the American with Disabilities Act, the Immigration Reform and Control Act of 1986, the Drug Free Workplace Act of 1989 and the Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards, which is attached hereto as Exhibit "B." Under the provisions of A.R.S. § 41-4401, Consultant hereby warrants to the Client that the Consultant and each of its subcontractors ("Contractors") will comply with, and are contractually obligated to comply with, all Federal Immigration laws and regulations that relate to their employees and A.R.S. §23-214(A) (hereinafter "Contractor Immigration Warranty"). A breach of the Contractor Immigration Warranty shall constitute a material breach of this Agreement and shall subject the Consultant to penalties up to and including termination of this Agreement at the sole discretion of the Client. The Client retains the legal right to inspect the papers of any Consultant or Contractor who works on this Agreement to ensure that the Consultant or Contractor is complying with the Contractor Immigration Warranty. Consultant agrees to assist the Client in regard to any such inspections. The Client may, at its sole discretion, conduct random verification of the employment records of the Consultant and of any Contractors to ensure compliance with this Contractor Immigration Warranty. Consultant agrees to assist the Client in regard to any random verifications performed. Neither the Consultant nor any Contractor shall be deemed to have materially breached the Contractor Immigration Warranty if the Consultant or Contractor establishes that it has complied with the employment verification provisions prescribed by sections 274A and 274B of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. §23-214, Subsection A. The provisions of this Article must be included in any contract the Consultant enters into with any and all of its Contractors who provide services under this Agreement or any subcontract. "Services" are defined as furnishing labor, time or effort in the State of Arizona by a Consultant or Contractor.
- 22) Nondiscrimination. Consultant shall not discriminate against any person on the basis of race, religion, color, age, sex, disability, or national origin in the performance of this Agreement, and shall comply with the terms and intent of Title VII of the Civil Rights Act of 1964, P.L. 88-354 (1964), and with the American with Disabilities Act of 1990. In addition, shall include similar requirements of subcontractors in any contracts entered into for performance of obligations under this Agreement.

- 23) Cancellation. All Parties are hereby put on notice that this Agreement is subject to cancellation for conflicts of interest, pursuant to A.R.S. § 38-511.
- 24) Boycott of Israel. Pursuant to A.R.S. § 35-393.01, Consultant certifies that it is not engaged in a boycott of Israel as of the effective date of this Agreement, and agrees for the duration of this Agreement to not engage in a boycott of Israel.
- 25) Forced Labor of Ethnic Uyghurs Prohibited. By entering into this Agreement, Consultant certifies and agrees Consultant does not currently use and will not use for the term of this Agreement: (i) the forced labor of ethnic Uyghurs in the People's Republic of China; or (ii) any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China; or (iii) any contractors, subcontractors or suppliers that use the forced labor or any goods or services produced by the forced labor of ethnic Uyghurs in the People's Republic of China.
- 26) Miscellaneous Provisions. This Agreement is to be governed by the law of the State where the Project is located. This Agreement contains the entire and fully integrated agreement between the Parties, and supersedes all prior and contemporaneous negotiations, representations, agreements, or understandings, whether written or oral. Except as provided in Section 1, this Agreement can be supplemented or amended only by a written document executed by both Parties. Any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. If Client requires Consultant to register with or use an online vendor portal for payment or any other purpose, any terms included in the registration or use of the online vendor portal that are inconsistent or in addition to these terms shall be void and shall have no effect on Consultant or this Agreement. Any provision in this Agreement that is unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such unenforceability without invalidating the remaining provisions or affecting the enforceability of the provision in any other jurisdiction. The non-enforcement of any provision by either Party shall not constitute a waiver of that provision or affect the enforceability of that provision or the remainder of this Agreement.

CITY OF BISBEE

SIGNED:

PRINTED NAME: Ken Budge

TITLE: Mayor

DATE: March 19, 2024

KIMLEY-HORN AND ASSOCIATES, INC.

SIGNED:

PRINTED NAME: Tim Rhine

TITLE: Authorized Signer/Project Manager

DATE: March 20, 2024

ATTEST:

Ashlee Coronado, City Clerk
Ashlee Coronado, City Clerk

APPROVED AS TO FORM:

Joseph D. Estes, City Attorney
Pierce | Coleman

Request for Information

Please return this information with your signed contract; failure to provide this information could result in delay in starting your project

Client Identification

Full, Legal Name of Client	City of Bisbee		
Mailing Address for Invoices	76 Erie Street Bisbee, AZ 85603		
Federal ID Number	86-6000235		
Contact for Billing Inquiries	Keri Bagley, finance Director		
Contact's Phone and e-mail	520-432-6008 KBagley@bisbeeaz.gov		
Client is (check one)	Owner	<input checked="" type="checkbox"/> Agent for Owner	Unrelated to Owner

Project Funding Identification – List Funding Sources for the Project

Federal Award : EDA Award Na 07-79-07920 City of Bisbee
Shared Use Path

Attach additional sheets if there are more than 4 parcels or more than 4 owners