



Professional Services Agreement Shared Use Path Feasibility Study

THIS AGREEMENT is made and entered into this 4th day of November, 2020 by and between CITY OF BISBEE, hereinafter referred to as the "City", and Kimley-Horn, hereinafter referred to as the "Consultant".

I. SCOPE OF SERVICES

Subject to the terms and conditions set forth in this agreement, Consultant shall provide all material, labor and transportation as described in Exhibit "A" Scope of Services.

II. COMPENSATION AND METHOD OF PAYMENT

In consideration for the performance of the services described in Attachment "A" the City shall pay the Consultant per task not to exceed a total of \$50,000.00.

The City will pay the Consultant following the submission of invoices(s) for the services and material rendered. No payment shall be issued prior to receipt of material or service and correct invoicing. Each invoice must bear written certification by an authorized City representative confirming the services and material for which payment is requested have been performed and received. The City agrees to pay all properly documented invoices, for accepted work and material within thirty (30) days of receipt.

All notices, invoices and payment shall be made in writing and may be given by personal delivery, mail or e-mail.

The designated recipients for such notices, invoices and payments are as follows:

Consultant: Kimley-Horn
Brent Crowther
333 East Westmore Road, Suite 280
Tucson, AZ 85705

City: City of Bisbee
Ashlee Coronado, City Clerk
1415 W. Melody Lane, Building G, Bisbee, AZ 85603
acoronado@bisbeeaz.gov
520-432-6012

III. DURATION

The Consultant shall not commence any billable work or provide any material or services under this Agreement until November 4, 2020, which shall be the commencement date of this Agreement. The term of this Agreement is through June 28, 2020.

IV. TERMINATION

A. The City may cancel this Agreement without penalty or further obligation pursuant to A.R.S. § 38-511 if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of the City is or becomes, at any time while the Agreement or any extension of the Agreement is in effect any employee of, or Consultant to any other party to this Agreement with respect to the subject matter of the Agreement. Such cancellation shall be effective when written notice from the City is received by the parties to this Agreement, unless the notice specifies a later time.

B. This Agreement may also be terminated at any time by mutual written consent, or by the City,

with or without cause, upon giving the thirty (30) days written notice to the Consultant. The City at its convenience, by written notice, may terminate this Agreement, in whole or in part. If this Agreement is terminated, the City shall be liable only for payment under the payment provisions of this Agreement for services rendered and accepted material received by the City before the effective date of termination.

- C. The City reserves the right to cancel the whole or any part of this Agreement due to failure of the Consultant to carry out any term, promise or condition of the Agreement. The City will issue a written ten (10) day notice of default to the Consultant for acting or failing to act any of the following, in the opinion of the City:
1. Consultant provides personnel who do not meet the requirements of the Agreement;
 2. Consultant fails to adequately perform the stipulations, conditions, or services/ specifications required in the Agreement;
 3. Consultant attempts to impose on the City personnel, materials, products, or workmanship that is not of an acceptable quality;
 4. Consultant fails to furnish the required service and/or product within the time stipulated in the Agreement;
 5. Consultant fails to make progress in the performance of the requirements of the Agreement and/or gives the City a positive indication that consultant will not or cannot perform to the requirements of the Agreement.

V. ENFORCEMENT, LAWS AND ORDINANCES

This agreement shall be enforced under the laws of the State of Arizona. Consultant must comply with all applicable federal, state, and local laws, ordinances, and regulations. Consultant shall ensure payment of all taxes, licenses, permits, and other expenses of any nature associated with the provision of services herein. Consultant shall maintain in current status all Federal, State and Local licenses and permits required for the operation of the business conducted by the Consultant.

VI. INDEPENDENT CONSULTANT

It is clearly understood that each party shall act in its individual capacity and not as an agent, employee, partner, joint ventures, or associate of the other. An employee or agent of one party shall not be deemed or construed to be the employee or agent of the other party for any purpose whatsoever.

The Consultant is advised that taxes or social security payments shall not be withheld from a City payment issued hereunder and that Consultant should make arrangements to directly pay such expenses, if any. The City will not provide any insurance coverage to the Consultant including Workmen's Compensation coverage.

VII. MODIFICATIONS

This Agreement may only be modified by a written amendment signed by the City and the Consultant.

VIII. WAIVER

The failure of either party of this Agreement to take affirmative action with respect to any conduct of the other which is in violation of the terms of this Agreement shall not be construed as a waiver thereof, or of any future breach or subsequent wrongful conduct.

IX. INDEMNIFICATION

To the fullest extent permitted by law, Consultant agrees to indemnify, and hold harmless the City of Bisbee, a body politic and corporate of the State of Arizona, its board members, officers,

employees, agents and other officials from all claims, damages, losses, and expenses, including but not limited to attorney's fees, reasonable court costs, or other alternative dispute resolution costs arising out of, resulting from, or otherwise but for the performance or furnishing of work or services under this Agreement, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, death, or personal injury, or property damage, including the loss of use or diminution in value resulting there from; but only to the extent caused in whole or in part by the actual or alleged negligent acts, errors, or omissions of Consultant, or anyone for whose acts Consultant may be liable. The City of Bisbee reserves the right, but not the obligation, to participate in defense without relieving Consultant of any obligation hereunder.

The amount and type of insurance required shall not in any way be construed as limiting the scope of the indemnification set forth above.

X. INSURANCE

Contractor and subcontractors shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors.

The insurance requirements herein are minimum requirements for this Contract and in no way, limit the indemnity covenants contained in this Contract. The City in no way warrants that the minimum limits contained herein are sufficient to protect the Contractor from liabilities that might arise out of the performance of the work under this contract by the Contractor, his agents, representatives, employees or subcontractors and Contractor is free to purchase additional insurance as may be determined necessary.

A. MINIMUM SCOPE AND LIMITS OF INSURANCE: Contractor shall provide coverage with limits of liability not less than those stated below. An excess liability policy or umbrella liability policy may be used to meet the minimum liability requirements provided that the coverage is written on a "following form" basis.

1. Commercial General Liability – Occurrence Form

Policy shall include bodily injury, property damage and broad form contractual liability coverage.

Per Occurrence:	\$1,000,000
Products - Completed Operations Aggregate	\$ 2,000,000
Personal and Advertising Injury	\$ 1,000,000
Blanket Contractual Liability -Written & Oral	\$ 1,000,000
Pollution	\$ 1,000,000

a. The policy shall be endorsed to include the following additional insured language: "The City of Bisbee, its departments, agencies, boards, officers, officials, agents and employees shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the Contractor".

2. Worker's Compensation and Employers' Liability

Workers' Compensation	Statutory
Employers' Liability	
Each Accident	\$500,000
Disease - Each Employee	\$500,000
Disease - Policy Limit	\$500,000

- a. This requirement shall not apply when a contractor or subcontractor is exempt under A.R.S.23-901, **AND** when such contractor or subcontractor executes the appropriate sole proprietor waiver form. (Note: this requirement is deemed waived based on the Contractor's warrant that Contractor is a single-member LLC with no employees and treated as a sole proprietorship for insurance purposes).

3. Professional Liability (Errors and Omissions Liability)

The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the Scope of Services of this contract.

Each Claim	\$1,000,000
Annual Aggregate	\$2,000,000

- a. In the event that the professional liability insurance required by this Contract is written on a claims-made basis, Contractor warrants that any retroactive date under the policy shall precede the effective date of this Contract; and that either continuous coverage will be maintained or an extended discovery period will be exercised for a period of two (2) years beginning at the time work under this contract is completed.
- b. The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the Scope of Work of this contract.
- c. The policy shall be endorsed to include the following additional insured language: "The City of Bisbee, its departments, agencies, boards, officers, officials, agents and employees shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the Contractor, involving automobiles owned, leased, hired or borrowed by the Contractor".

B. ADDITIONAL INSURANCE REQUIREMENTS: The policies shall include, or be endorsed to include, the following provisions:

- 1. On insurance policies where the City of Bisbee is named as an additional insured, the City of Bisbee shall be an additional insured to the full limits of liability purchased by the Contractor even if those limits of liability are in excess of those required by this Contract. Contractor shall provide the City with certificates naming it as an additional insured.
- 2. The Contractor's insurance coverage shall be primary insurance and non-contributory with respect to all other available sources.
- 3. Coverage provided by the Contractor shall not be limited to the liability assumed under the indemnification provisions of this Contract.

C. NOTICE OF CANCELLATION: With the exception of (10) day notice of cancellation for non-payment of premium, any changes material to compliance with this contract in the insurance policies above shall require (30) days written notice to the City of Bisbee. Such notice shall be sent directly to the Bisbee City Public Works Department, 118 Arizona Street, Bisbee, Arizona 85603.

D. ACCEPTABILITY OF INSURANCE: Insurance is to be placed with insurers duly licensed or authorized to do business in the state of Arizona and with an "AM.

Best" rating of not less than A- VII. The City in no way warrants that the above-required minimum insurer rating is sufficient to protect the Contractor from potential insurer insolvency.

- E. **VERIFICATION OF COVERAGE:** Contractor shall furnish the City with certificates of insurance (ACORD form or equivalent approved by the City) as required by this Contract. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

All certificates and any required endorsements are to be received and approved by the City before work commences. Each insurance policy required by this Contract must be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of the project. Failure to maintain the insurance policies as required by this Contract or to provide evidence of renewal is a material breach of contract.

All certificates required by this Contract shall be sent directly to the Bisbee City Public Works Department, Bisbee, Arizona 85603. **The City project/contract number and project description shall be noted on the certificate of insurance.** The City reserves the right to require complete, certified copies of all insurance policies required by this Contract at any time.

- F. **SUBCONTRACTORS:** Contractors' certificate(s) shall include all subcontractors as additional insured's under its policies or Contractor shall furnish to the City separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to the minimum requirements identified above.
- G. **APPROVAL:** Any modification or variation from the insurance requirements in this Agreement shall be made by the Contracting Agency in consultation with the Risk Management Department, whose decision shall be final. Such action will not require a formal Agreement amendment, but may be made by administrative action.

XI. MISCELLANEOUS PROVISIONS

- A. No assignment of this Agreement or sub-agreement shall be made by the Consultant with any other party for furnishing any of the services herein contracted for without the advance written approval of the Public Works Department. All sub-consultants shall comply with Federal and State laws and regulations which are applicable to the services covered by the sub-agreement and shall include all the terms and conditions set forth herein which shall apply with equal force to the sub-agreement, as if the sub-consultant were the Consultant referred to herein. The Consultant is responsible for Agreement performance whether or not sub-consultants are used.
- B. The Consultant shall establish and maintain procedures and controls that are acceptable to the City for the purpose of assuring that no information contained in its records or obtained from the City or from others in carrying out its functions under the Agreement shall be used by or disclosed by it, its agents, officers, or employees, except as required to efficiently perform duties under the Agreement. Persons requesting such information must be referred to the City.
- C. All services, information, computer program elements, reports, and other deliverables which may have a potential patent or copyright value and which are created under this Agreement shall be the property of the City and shall not be used by the Consultant or any other person except with the prior written permission of the City.
- D. This Agreement is subject to the provisions of A.R.S. § 38-511.
- E. The Consultant shall comply with all applicable provisions of the Americans with Disabilities Act (Public Law 101-336, 42 U.S.C. 12101-12213) and applicable Federal regulations under the Act.

XII. LEGAL ARIZONA WORKES ACT COMPLIANCE

Consultant hereby warrants that it will at all times during the term of this Agreement comply with all federal immigration laws applicable to Consultant's employment of its employees , and with the requirements of A.R.S. § 23-214(A) (together the "State and Federal Immigration Laws"). The Consultant shall further ensure that each sub-consultant who performs any work for the Consultant under this Agreement likewise complies with the State and Federal Immigration Laws.

The City shall have the right at any time to inspect the books and records of the Consultant and any sub-consultant in order to verify such party's compliance with the State and Federal Immigration Laws.

Any breach of the Consultant's or any sub-consultant's warranty of compliance with the State and Federal Immigration Laws, or of any other provision of this section, shall be deemed to be a material breach of this Agreement subjecting the Consultant to penalties up to and including suspension or termination of this Agreement. If the breach is by a sub-consultant, and the sub-agreement is suspended or terminated as a result, the Consultant shall be required to take such steps as may be necessary to either self-perform the services that would have been provided under the sub-agreement or retain a replacement sub-consultant, (subject to City approval if MWBE preferences apply) as soon as possible so as not to delay project completion.

The Consultant shall advise each sub-consultant of the City's rights, and the sub-consultant's obligations, under this Section by including a provision in each sub-agreement substantially in the following form:

"The sub-consultant hereby warrants that it will at all times during the term of this Agreement comply with all federal laws applicable to the sub-consultant's employee and the requirements of A.R.S. § 23-214(A). The sub-consultant further agrees that the City may inspect the sub-consultant's books and records to insure that the sub-consultant is in compliance with these requirements. Any breach of this paragraph by the sub-consultant will be deemed to be a material breach of this Agreement subjecting the sub-consultant to penalties up to and including suspension or termination of this Agreement."

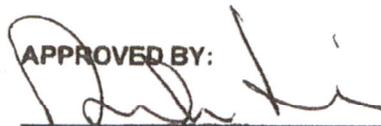
Any additional costs attributable directly or indirectly to remedial action under this Section shall be responsibility of the Consultant. In the event that remedial action under this Section results in delay to one or more tasks on the critical path of the Consultant's approved construction or critical milestones schedule, such period of delay shall be deemed excusable delay for which the Consultant shall be entitled to an extension of time, but not costs.

This Agreement represents the entire agreement between the CITY and the CONSULTANT relating to this requirement and shall prevail over any and all previous verbal and written agreements.

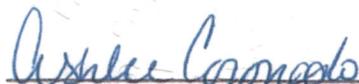
CONSULTANT:


Brent Crowther, Project Manager _____ Date

APPROVED BY:


David M. Smith, Mayor _____ Date

ATTEST:

 11/4/20
Ashlee Coronado, City Clerk Date

APPROVED AS TO FORM:

 11/3/20
James Ledbetter, City Attorney _____ Date

XII. LEGAL ARIZONA WORKES ACT COMPLIANCE

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Any additional costs attributable directly or indirectly to remedial action under this Section shall be responsibility of the Consultant. In the event that remedial action under this Section results in delay to one or more tasks on the critical path of the Consultant's approved construction or critical milestones schedule, such period of delay shall be deemed excusable delay for which the Consultant shall be entitled to an extension of time, but not costs.

This Agreement represents the entire agreement between the CITY and the CONSULTANT relating to this requirement and shall prevail over any and all previous verbal and written agreements.

CONSULTANT:

Brent Crowther, Project Manager Date

APPROVED BY:

David M. Smith, Mayor Date

ATTEST:

Ashlee Coronado, City Clerk Date 11/4/20

APPROVED AS TO FORM:

James Ledbetter, City Attorney Date 11/3/20

Exhibit A

SPECIFICATIONS, SCOPE OF WORK OR REQUIREMENTS

1. GENERAL

- 1.1 The Consultant shall be responsible for the professional quality and technical accuracy of planning services provided to the City under the Contract that results from this solicitation. The specified services furnished during the life of the Contract shall be rendered by the Planner and/or his sub-consultants registered to conduct business in the State of Arizona.
- 1.2 The Consultant, or principal member of a firm, shall be professionally competent and familiar with USDA Rural Economic Development Grant programs and have sufficient staff available, and shall be capable of performing the services herein described.
- 1.3 The specified services rendered during the term of the Contract shall be delivered by personnel pre-approved by the City, and the City reserves pre-approval rights for any personnel/sub-consultant substitutions. The services provided shall be performed promptly and diligently.
- 1.4 The Consultant shall be required to meet strict deadlines. Repeated failure to meet these deadlines will be cause for termination by the City.
- 1.5 The Consultant understands and accepts that this is neither an exclusive scope of work, nor a commitment that services will be required by the City. The City reserves the right to contract with other consultants, and to request service assignments where the City solely determines that the situation justifies other such contract and service assignments.

2. GENERAL SERVICE SCOPE DESCRIPTION

- 2.1 The basic planning services anticipated under this Contract primarily involve the development of feasibility study for a Shared Use Trail as outlined in the USDA RBDG application submitted by the City of Bisbee, and funded by the USDA. **The Consultant will be expected to adhere to all federal compliance requirements as a contractor receiving federal funds including OMB 2 CFR 200 and all requirements outlined in the USDA contract for funding.**

Required Elements of the Work and Deliverables

- 2.1.1. **Evaluate the demand for a Shared Use Trail and impact upon existing and new commercial/retail development**
 - a. Evaluate the demographic and socioeconomic characteristics of Bisbee and the surrounding region, related tourism trends
 - b. Compare the area's characteristics to markets (region and nationwide) successfully supporting similar facilities.
 - c. Identify competitive facilities in the region to determine market saturation.

- d. Identify the factors that will differentiate Bisbee and this project from comparable facilities in the regional/national market. Determine how Bisbee can offer a new/distinct amenity to the market.

Deliverable – Report #1 on Conditions, Characteristics & Demand

2.1.2. Evaluate and make preliminary recommendations for the potential location of a Shared Use Trail including but not limited to:

- a. The Lavender Pit Corridor
- b. Publicly held real estate including parcels owned by the State of Arizona, City of Bisbee and Cochise County
- c. Privately held real estate including commercial and industrial parcels

Deliverable – Report #2 on Location Evaluation

2.1.3. Evaluate the Economic Impact a Shared Use Trail would have on the City of Bisbee

- a. Summarize the direct and indirect economic and fiscal impacts generated by the construction and operation of the project if determined viable.
- b. Evaluate and estimate the retail, restaurant, and accommodation demand in the Bisbee area generated by the project.
- c. Evaluate and estimate demand and the net impact to existing retail – identifying any potential for cannibalization.
- d. Estimate annual tax proceeds to the City of Bisbee from the project and associated, non-project economies impacted by the development.

Deliverable – Report #3 on Economic Impact

2.1.4. Determine Community Support for a Shared Use Trail

- a. Conduct a minimum of two public input events to determine interest in and support for the development of the project.
- b. Determine interest and support among commercial and industrial businesses, tourism based industries, and residents.
- c. Determine interest and support from local governments, local and regional economic development councils, and State commerce and economic development interests.

Deliverable – Report #4 on Community Support

2.1.5. Make recommendations regarding feasibility of a Shared Use Trail

- a. Summarize previous reports
- b. Conduct SWOT analysis
- c. Identify approach and implementation strategies
- d. Identify next steps in design-planning requirements and cost estimates
- e. Determine feasibility of project with preliminary location recommendations

Deliverables – Report #5 Draft and Final Report

- 2.2 All deliverables will be made in both electronic and paper formats and include photos, drawings, historic documentation, and other elements as are applicable to the scope of work. The City will retain all rights to the deliverables including photos, illustrations, and other documents.
- 2.3 The City of Bisbee expects to use the Feasibility Study as a guide for determining if the project merits continued investment of time and resources. It will serve to inform current and future partners as to the economic and educational impact of such a project and provide guidance as to next steps. It is expected that the feasibility study will be a central and integral part of any funding endeavor. Specifically, it will be used to illustrate demand, economic impact, and support for a Shared Use Trail.
- 2.6 The end use of the feasibility study will result in the determination of future action the location, design, and construction of a Shared Use Trail.

3. GENERAL CONSULTANT SERVICES

The Consultant agrees to the following:

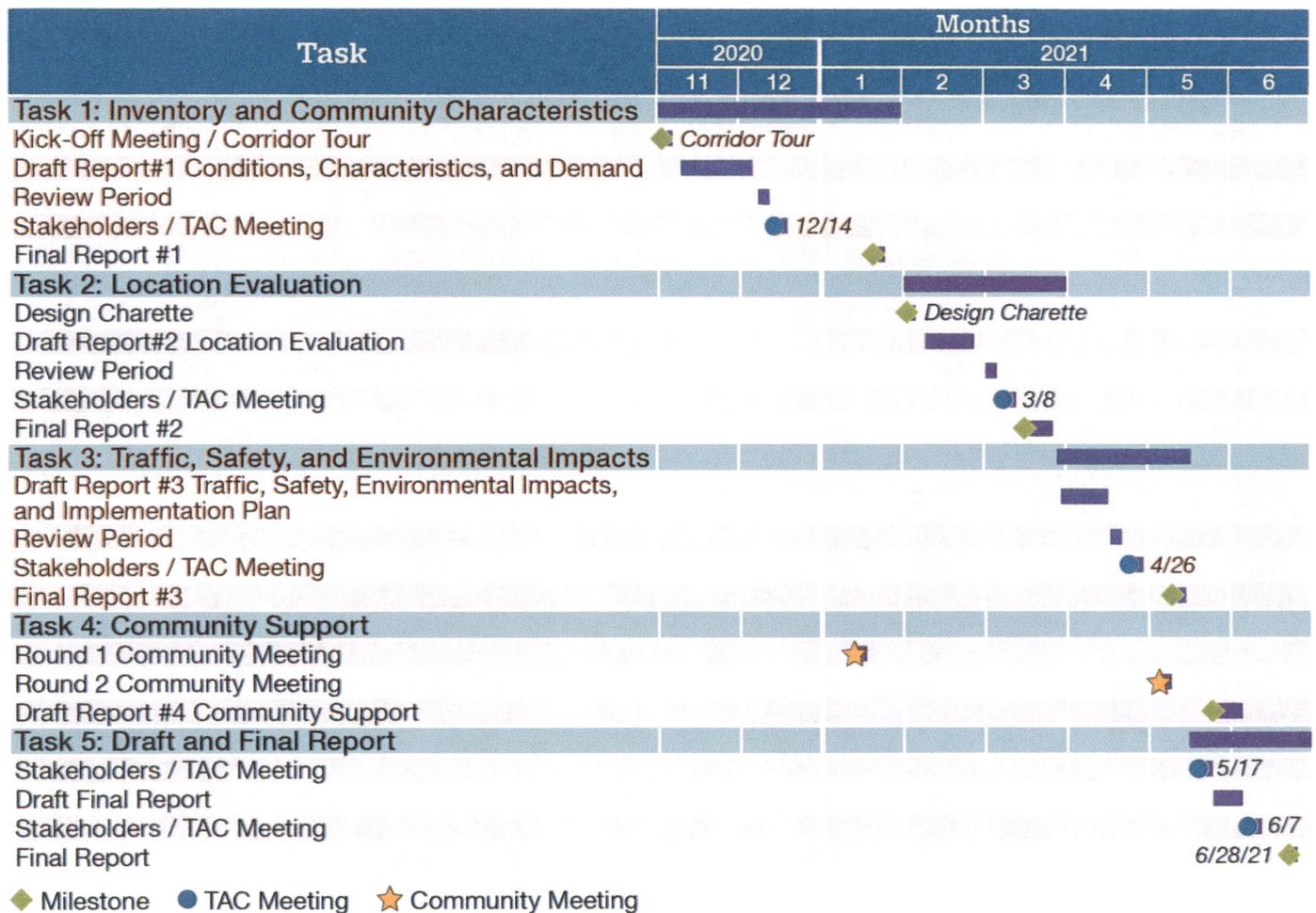
- 3.1 The Consultant shall attend all project and public meetings with the City and its project partners.
- 3.2 The Consultant shall prepare a work schedule and a not-to-exceed fee proposal for the scope of work requested by the City. The proposal shall be reviewed by the City Manager and accepted by the City prior to proceeding with any work associated with this service project. The proposal shall provide for the completion of services by June 28, 2021.
- 3.3 The Consultant shall make all reports and illustrations in a version of software compatible with software currently in use by the City.



Project Schedule with Labor Cost, Direct Cost, and Indirect Cost Proposal

Schedule

Frequent communication and clear definition of the responsibilities of team members are critical elements in maintaining schedules. With that in mind, our project-specific schedule below identifies critical project milestones and deliverable dates. We then will actively manage our team resources to meet the agreed-upon schedule and keep your project on track.





November 5, 2020

Nina Williams, CMC
Deputy City Clerk
City of Bisbee
915 S. Tovreaville Road #4601
P.O. Box 4601
Bisbee, AZ 85603-4601
520-432-6011

RE: *Shared Use Path Feasibility Study, Executed Contract*

Ms. Williams,

Kimley-Horn and Associates, Inc. (Kimley-Horn) is pleased to be selected for the City of Bisbee Shared Use Path Feasibility Study.

Attached is our executed agreement. The purpose of this email is to document our understanding of Section IX. Indemnification.

The first line of Section IX. Reads "To the fullest extent permitted by law, Consultant agrees to indemnify...".

Kimley-Horn interprets "permitted by law" to be inclusive of *A.R.S. 34-226. State preemption; indemnity agreements in construction and design professional services contracts void; definitions.* A.R.S. 24-226 states that the contracting agent may require the design professional to indemnify and hold harmless the agent, and its officers and employees, from liabilities, damages, losses and costs, including reasonable attorney fees and court costs, but only to the extent caused by the negligence, recklessness or intentional wrongful conduct of such contractor, subcontractor or design professional or other persons employed or used by such contractor, subcontractor or design professional in the performance of the contract or subcontract.

Thank you again for selecting Kimley-Horn for this important project.

Sincerely,

A handwritten signature in black ink that reads "Brent Crowther".

Brent Crowther
Vice President/Sr. Associate
Brent.crowther@kimley-horn.com
Tel: 520-352-8632