



## CITY OF BISBEE PUBLIC WORKS DEPARTMENT

### Professional Services Agreement On Call Engineering Services

THIS AGREEMENT is made and entered into this 4th day of October, 2022 by and between CITY OF BISBEE, hereinafter referred to as the "City", and Kimley-Horn and Associates, Inc. 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 [insert payment amount and terms, or refer to an Exhibit "B" Fee Schedule].

The city will pay the Consultant following the submission of itemized 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 and Associates, Inc.  
Brent C. Crowther, VP  
7740 N. 16<sup>th</sup> Street, Suite 300  
Phoenix, AZ 85020

City: City of Bisbee  
Matthew Gurney, Public Works Director  
76 Erie Street  
Bisbee, AZ 85603

#### **III. DURATION AND RENEWAL**

The Consultant shall not commence any billable work or provide any material or services under this Agreement until Consultant receives a executed copy of the Professional Service Agreement and/or purchase order, or is otherwise directed to do so in writing by the City [Public Works Director or his designee]. The Consultant shall complete all work to the satisfaction of the City on or about [insert date] in accordance with the Scope of Services.

#### **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.

- General Aggregate \$1,000,000
- Products - Completed Operations Aggregate \$ 500,000
- Personal and Advertising Injury \$ 500,000
- Blanket Contractual Liability – Written & Oral \$ 500,000
- Each Occurrence \$ 500,000

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. Business Automobile Liability**

Bodily Injury and Property Damage for any owned, hired, and non-owned vehicles used in the performance of this Contract.

Combined Single Limit (CSL) \$500,000

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, involving automobiles owned, leased, hired or borrowed by the Contractor".

**3. 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.

**4. 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 \$ 500,000
- Annual Aggregate \$1,000,000

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 of lack of ordinary skill for those positions defined in the Scope of Work of this contract.

Section c. removed per  
10/12/2022 email from N.  
Williams  
See Attachment C  
"10/12/2022 Email

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 BisbeeCity 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 coverage's 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 WORKERS 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 C. Crowther  
Brent C. Crowther, VP Date

APPROVED BY:

Ken Budge 10/6/22  
Ken Budge Mayor Date

ATTEST:

Ashlee Coronado 10/6/22  
Ashlee Coronado, City Clerk Date

APPROVED AS TO FORM:

Joe Estes  
Joe Estes, City Attorney Date

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.

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"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."

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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 C. Crowther, VP Date

APPROVED BY:

Ken Budge 10/6/22  
Ken Budge Mayor Date

ATTEST:

Ashlee Coronado 10/6/22  
Ashlee Coronado, City Clerk Date

APPROVED AS TO FORM:

Joe Estes  
Joe Estes, City Attorney Date

**Attachment A  
Scope of Services**

**The City of Bisbee is accepting sealed bids (“Statement of Qualifications”) for on call Engineering; structural, mechanical, environmental, highway and civil. The city will be looking for services such as, but not limited to, retaining walls, drainages, sewer systems, roadway’s, and buildings.**

**ATTACHMENT B**

**Crowther, Brent**

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**From:** Nina Williams <NWilliams@bisbeeaz.gov>  
**Sent:** Wednesday, October 12, 2022 11:30 AM  
**To:** Crowther, Brent  
**Cc:** Matthew Gurney; Logan Dodd; Amanda Bramel; Carroll, Kim  
**Subject:** RE: Contract On-Call Engineering Services

**Categories:** External

Good Morning,

From our City Attorney:

I am good with the removal of the additional insured requirement for the professional liability policy – similar to the worker’s comp policy, those policies do not contain an additional insured requirement. With regard to the indemnification language, the contract already limits it to the full amount “permitted by law,” which would include any limitations provided for in A.R.S. 34-226, so specifically listing the limitations contained in A.R.S. 34-226 is redundant as the provision already limits the indemnification to that permitted by law. I do not have a problem including the following: “To the fullest extent permitted by law, including the provisions of A.R.S. 34-226, Consultant agrees to indemnify . . .”

You can share these comments with Kimley-Horn.

Thank you,  
Nina Williams, MMC  
Deputy City Clerk  
76 Erie Street  
Bisbee, AZ 85603  
Office 520-432-6011  
Main Line 520-432-6000

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**From:** Crowther, Brent <Brent.Crowther@kimley-horn.com>  
**Sent:** Tuesday, October 11, 2022 3:33 PM  
**To:** Nina Williams <NWilliams@bisbeeaz.gov>  
**Cc:** Matthew Gurney <MGurney@bisbeeaz.gov>; Logan Dodd <ldodd@bisbeeaz.gov>; Amanda Bramel <abramel@bisbeeaz.gov>; Carroll, Kim <kim.carroll@kimley-horn.com>  
**Subject:** RE: Contract On-Call Engineering Services

Nina

I hope you your week is going well!

We are in receipt of the proposed contract from the City of Bisbee for On-Call Engineering services, and are looking forward to continuing our work with the City of Bisbee. I wanted to bring to your attention two issues regarding the proposed contract:

1. The Proposed contract requires that the City be named as an additional insured under our professional liability insurance (PLI) policy. Please be advised that commercially available PLI carriers will not allow the City to be named as an additional insured on a professional liability policy. So that we can comply with the terms of this contract, we respectfully request that paragraph X.A.4.c be removed.
2. Arizona State Law (ARS-34-226) overrides the requirements laid out in paragraph IX of this contract. While this section could be re-written to comply with State law, we suggest that changing the first sentence as follows would clarify that this: "To the fullest extent permitted by law and subject to the limitations stated in ARS-34-226, Consultant agrees..."

We request your consideration of these two changes, so that we can execute a contract which follows State law and that we can comply with.

Thank you,

**Brent Crowther, PE, PTOE**

**Kimley-Horn**

Direct: 385-420-0941 | Mobile: 520-429-6868

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**From:** Nina Williams <[NWilliams@bisbeeaz.gov](mailto:NWilliams@bisbeeaz.gov)>

**Sent:** Thursday, October 6, 2022 3:16 PM

**To:** Crowther, Brent <[Brent.Crowther@kimley-horn.com](mailto:Brent.Crowther@kimley-horn.com)>

**Cc:** Matthew Gurney <[MGurney@bisbeeaz.gov](mailto:MGurney@bisbeeaz.gov)>; Logan Dodd <[ldodd@bisbeeaz.gov](mailto:ldodd@bisbeeaz.gov)>; Amanda Bramel <[abramel@bisbeeaz.gov](mailto:abramel@bisbeeaz.gov)>

**Subject:** Contract On-Call Engineering Services

Good Afternoon,

Attached please find the Contract for Kimley-Horn to be On-Call for the City of Bisbee. Once you have signed the document please send a copy back to me (email will work) for our records.

If you have any questions please let me know.

Thank you,

Nina Williams, MMC

Deputy City Clerk

76 Erie Street

Bisbee, AZ 85603

Office 520-432-6011

Main Line 520-432-6000