

CMAR

CMAR Subconsultants



COMPETITIVE SEALED PROPOSAL

**BACKUP POWER GENERATORS AND DIESEL FUEL
STORAGE AND DISPENSING SYSTEMS**

SMITHCO CONSTRUCTION, INC.



VOLUME 1 OF 2

PROPOSAL DOCUMENTS FOR

GMP 1: EARLY EQUIPMENT PACKAGE 1

JUNE 2023

ISSUED FOR PROPOSAL



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BACKUP POWER GENERATORS AND DIESEL FUEL STORAGE AND DISPENSING SYSTEMS

SMITHCO CONSTRUCTION, INC.

6 King Canyon Loop

Caballo NM, 87931

(575) 894-6161 | smithco@smithco.cc

GMP 1: EARLY EQUIPMENT PACKAGE 1

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SECTION 2- INVITATION FOR PROPOSALS

BACKUP POWER GENERATORS AND DIESEL FUEL STORAGE AND DISPENSING SYSTEMS SMITHCO CONSTRUCTION, INC. GMP 1: EARLY EQUIPMENT PACKAGE 1

Smithco Construction, Inc. has been selected by El Paso Water to act as the Construction Manager at Risk (CMAR) for the above referenced project. The contract team is El Paso Water (Owner), Arcadis (Owners Advisor), Bath Engineering Group, Freese & Nichols, Inc., Black & Veatch (Engineer), and Smithco Construction, Inc. (CMAR). Smithco's CMAR Team also includes subconsultants Longhorn Electric and Brown and Caldwell. Competitive Sealed proposals will be received by Smithco Construction, Inc. (CMAR) electronically via Civcast at <https://www.civcastusa.com/bids> until **2:00p.m., MST, on Friday June 23, 2023**. Proposals will NOT be publicly opened as this is a competitive sealed proposal.

The work under this contract shall be for furnishing all labor, materials, transportation, and services for the procurement of the following equipment:

New medium voltage packaged diesel standby generators, pad mounted sectionalizers, oil filled transformers, pad mounted switchgear, generator paralleling switchgear, batteries, electrical distribution equipment for the Fred Hervey WRP, Haskell WWTP, Hickerson WRP, and Jonathan Rogers WTP facilities as shown on drawings and described in Specifications, or otherwise required for a first-class operating facility.

Contract documents may be examined and obtained by accessing the following Civcast bidding website:

<https://www.civcastusa.com/bids> ID: GMP 1: EARLY EQUIPMENT PACKAGE 1

If you have trouble accessing the Contract Documents, please contact the Procurement Manager, Brenda Penner of Smithco Construction, Inc., at (575) 894-6161 or smithco@smithco.cc.

A Pre-Proposal Meeting will be conducted via Microsoft Teams at **10:00a.m., MST, on Thursday June 8, 2023**. Instructions for joining the meeting are provided below:

Microsoft Teams meeting

Join on your computer, mobile app or room device

[Click here to join the meeting](#)

Meeting ID: 217 908 677 913

Passcode: zCcCrF

[Download Teams](#) | [Join on the web](#)

Or call in (audio only)

[+1 347-991-6844](tel:+13479916844), [135287079#](tel:+135287079) United States, New York City

Phone Conference ID: 135 287 079#

[Find a local number](#) | [Reset PIN](#)

[Learn More](#) | [Meeting options](#)

A site visit will not be held for this proposal.

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Offerors shall not contact the Owner, Advisor, or Engineers directly. For questions regarding this solicitation, technical questions, or additional information, please submit through the Civcast bidding website under the Q/A tab. Questions received after **2:00p.m., MST, on Friday June 16, 2023** may not be answered.

Any proposal received after the time specified will be disqualified without any consideration. No proposal may be changed, amended, or modified after the above time and date. A proposal may, however, be withdrawn and resubmitted any time prior to the time set for receipt of proposals. All **proposals shall be valid for a period of 120-days** from the date proposals are open and no proposal may be withdrawn until after the expiration date. The CMAR will issue a notice of award to successful offeror. Work shall be completed no later than the dates identified on the proposal form.

END OF SECTION



SECTION 3 - INSTRUCTIONS TO OFFERORS

BACKUP POWER GENERATORS AND DIESEL FUEL STORAGE AND DISPENSING SYSTEMS

SMITHCO CONSTRUCTION, INC.

GMP 1: EARLY EQUIPMENT PACKAGE 1

Offeror must furnish a letter of guarantee from its Bonding agent to illustrate it can supply the required supply bond for the amount submitted on this project.

By submission of the proposal, the Offeror states he or she fully understands the requirements of the Contract Documents and agrees to comply with all requirements thereof.

Complete sets of Contract Documents must be used in preparing Proposals, neither the CMAR, Owner nor the Engineer assumes any responsibility for errors or misinterpretations resulting from the use of incomplete sets of Contract Documents.

It is anticipated that the project will have an NTP on or before **September 2023**, and scope of work substantially completed no later than that shown in the CMAR's Schedule which will be based on Offerors proposed lead times submitted with this proposal. Failure to meet proposed delivery dates will result in CMAR exercising Offerors supply bond.

Proposals must be submitted on the forms provided in the contract documents unless otherwise stated.

Proposals shall conform to the requirements of spec sections 26 23 13.13 and 26 13 26. A copy of each of the above specification sections shall be submitted as part of the proposal with each paragraph check-marked to indicate compliance or marked to indicate requested deviation.



The Owner and CMAR have selected a Competitive Sealed Proposal (CSP) process for determining the best value of the proposals received. The major elements of the scoring criteria look at quality of product, scope of offer, experience/capacity of the Offeror, maintenance and availability of spare parts, project personnel, and financial/legal standing of the Offerors. The CSP criteria and weighted score are as follows:

Original Equipment Manufacturer (OEM)	
Evaluation Criteria	Weight %
1. Financial Capacity – Z SCORE (Outlined Below)	Pass/Fail
2. Generators Country of Origin Declaration w/Certificate of Origin	10
3. Does Offeror offer a Local Service department as part of the acquisition?	5
4. Does Offeror offer a Local Parts department as part of the acquisition?	5
5. Are the services above owned by the Offeror’s company?	10
6. Delivery Schedule	15
7. Value Added Items in Proposal	5
8. Optional cost adder to extend warranty by 1 year, up to a total of 5 years	5
9. Price	40
10. Optional cost adder to extend Preventative Maintenance services by 1 year	5
Total	100

In the case that a Value-Added Reseller (VAR) is submitting an offer, the CSP criteria and weighted score are as follows:

Value-Added Reseller (VAR)	
Evaluation Criteria	Weight %
1. Financial Capacity – Z SCORE (Outlined Below)	Pass/Fail
2. Diesel Engine Country of Origin Declaration w/Certificate of Origin	5
a. Alternator Country of Origin Declaration w/Certificate of Origin	5
b. ATS Country of Origin Declaration w/Certificate of Origin	5
c. System Master Controls & Switchgear Country of Origin Declaration w/Certificate of Origin	5
3. Does Offeror offer a Local Service department as part of the acquisition?	5
4. Does Offeror offer a Local Parts department as part of the acquisition?	5
5. Are the services above owned by the Offeror’s company?	10
6. Delivery Schedule	20
7. Value Added Items in Proposal	5
8. Optional cost adder to extend warranty by 1 year, up to a total of 5 years	5
9. Price	25
10. Optional cost adder to extend Preventative Maintenance services by 1 year	5
Total	100

The Team conducting the review and making the best value selection will be made up of representatives from the CMAR and its subconsultants.

Selection Criteria: CMAR will rank Offers that are determined to be responsive and responsible according to the above method.



All Offerors will be required to submit a statement of qualifications and provide specific company information meeting the requirements of the contract documents. The CMAR may conduct investigations as considered necessary to establish the responsibility, safety ratings, qualifications, and financial ability of the Offerors, proposed Subcontractors, and other persons and organization's ability to do the work in accordance with the Contract Documents, to the CMAR's satisfaction and performed within the prescribed time. The CMAR may reject the proposal of any Offeror who does not meet any such evaluation to the Owner's, Engineer's and/or CMAR's satisfaction.

The right is hereby reserved to accept or reject any or all proposals or parts thereto, to waive any informality in any proposal, and reject the proposals of any persons who have been delinquent or unfaithful to any contract with Owner, Engineer and/or CMAR. Contract negotiations will be offered to the first best value selection Offeror. If unable to negotiate, the next best rated Offeror will be selected.

1. Financial Capacity – (Pass/Fail)

Each Offeror shall complete the Qualification and Financial Disclosure Statement Attachment D and provide a copy of its financial statement, including its balance sheet and income statement, for its most recent fiscal year-end. CMAR will review the Financial Information and will award a pass or a fail to the Offeror.

Each Offeror can be awarded either a pass or fail. Offeror that fail to comply with the financial capacity could be deemed non-responsive. A Z-score is a numerical measurement of a value's relationship to the mean (average) of a group of values, measured in terms of standard deviations from the mean. If a Z-score is 0, it indicates that the data point's score is identical to the mean score. A Z-score of 1.0 indicates a value that is one standard deviation from the mean. Z-scores may be positive or negative, with a positive value indicating the score is above the mean and a negative score indicating it is below the mean. The Z-score is based on five key financial ratios found on a company's financial statement.

The Z-score formula is: $\zeta = 1.2A + 1.4B + 3.3C + 0.6D + 1.0E$

where:

Zeta (ζ) = Z-score

A = Working Capital/Total Assets

B = Retained Earnings/Total Assets

C = Earnings Before Interest and Taxes (EBIT)/Total Assets

D = Market Value of Equity/Book Value of Total Liabilities

E = Sales/Total Assets

CMAR will assign a pass score to the Offeror with a positive Z-score, while the Offeror with a negative Z-score may receive a Fail score.



2. Generator's Country of Origin Declaration w/Certificate of Origin

The Offeror shall submit a Certificate of Origin for the equipment being proposed. Failure to submit the equipment's Certificate of Origin will result in Offeror receiving a score of Zero "0" for this scoring criteria.

a. Alternator Country of Origin Declaration w/Certificate of Origin (VAR Only)

The Offeror shall submit a Certificate of Origin for the proposed alternator. Failure to submit the equipment's Certificate of Origin will result in Offeror receiving a score of Zero "0" for this scoring criteria.

b. Automatic Transfer Switch (ATS) Country of Origin Declaration w/Certificate of Origin (VAR Only)

The Offeror shall submit a Certificate of Origin for the proposed Automatic Transfer Switch. Failure to submit the equipment's Certificate of Origin will result in Offeror receiving a score of Zero "0" for this scoring criteria.

c. System Master Controls & Switchgear Country of Origin Declaration w/Certificate of Origin (VAR Only)

The Offeror shall submit a Certificate of Origin for the proposed Controls and Switchgear. Failure to submit the equipment's Certificate of Origin will result in Offeror receiving a score of Zero "0" for this scoring criteria.

3. Local Service Department

The Offeror shall identify the locations of their closest service departments. Per specification section 262313.13 section 1.8 -B, service departments located within the 35-mile radius to EPW main office will receive the full points for these criteria.

4. Local Parts Department

The Offeror shall identify the locations of their closest parts department. Per specification section 26 23 13.13 section 1.8 -B, parts departments located within the 35-mile radius to EPW main office will receive the full points for these criteria.

5. Company Owned Service and Parts Departments

The Offeror shall indicate whether the service and parts departments identified above are owned by the Offeror.

6. Delivery Schedule

The Offeror shall provide a delivery schedule. The shortest delivery schedule amongst Offerors will be awarded all points for these criteria. All other Offerors will be awarded a rating value calculated by dividing the weeks identified in the fastest delivery schedule by the Offeror's proposed weeks and multiplying that ratio times total points available.

7. Value Added Items

The Offeror shall provide suggested deviations from the technical documents that will have beneficial cost and/or schedule impacts on the equipment. Technical deviations will be evaluated by the CMAR, Owner, and Design teams for acceptability and to ensure performance is not affected.



8. Optional cost adder to extend warranty by 1 year, up to a total of 5 years

The Offeror shall provide an optional cost to extend the warranty by 1 year (up to 5 total years). Failure to submit pricing on optional extended warranties will result in a score of zero "0" for these criteria.

9. Price

The Offeror with the lowest price will be awarded all points. All other Offerors will be awarded a rating value calculated by dividing the low price by the Offeror's proposal and multiplying that ratio times total points available. Note that a detailed scope review will be performed on all submitted proposals and allowances may be added to offerings to compare offerings evenly.

10. Optional Cost Adder to Extend Preventative Maintenance Services by 1 year

The Offeror shall provide an optional cost to extend vendor PM services by 1 year. Failure to submit pricing on optional extended warranties will result in a score of zero "0" for these criteria.

END OF SECTION



SECTION 4 - PROPOSAL FORM

BACKUP POWER GENERATORS AND DIESEL FUEL STORAGE AND DISPENSING SYSTEMS

This Proposal is submitted to Smithco Construction, Inc.

GMP 1: EARLY EQUIPMENT PACKAGE 1

Item No.	Specification Section/Description	UOM	Quantity	Unit Price	Extended Amount
<u>Jonathan Rogers Water Treatment Plant</u>					
1.	26 23 13.13 Diesel Engine Driven Generator Sets	Each	3		
2.	26 13 26 Medium-Voltage Metal-Clad Switchgear	Lump Sum	1		
<u>Haskell Street Wastewater Treatment Plant</u>					
3.	26 23 13.13 Diesel Engine Driven Generator Sets	Each	3		
4.	26 13 26 Medium-Voltage Metal-Clad Switchgear	Lump Sum	1		
<u>Fred Hervey Water Reclamation Plant</u>					
5.	26 23 13.13 Diesel Engine Driven Generator Sets	Each	3		
6.	26 13 26 Medium-Voltage Metal-Clad Switchgear	Lump Sum	1		
<u>Hickerson Water Reclamation Facility</u>					
7.	26 23 13.13 Diesel Engine Driven Generator Sets	Each	3		
8.	26 13 26 Medium-Voltage Metal-Clad Switchgear	Lump Sum	1		
Total Proposed Amount					



Proposal Options					
A.	Furnish 100% Equipment Supply Bond	Lump Sum	1	. _____ % or \$ _____.	
B.	Extended Warranty	Years	5		
C.	Extend Preventative Maintenance Services	Year	1		

Offerors Qualifications Criteria		
1.	Offerors Z-Score (Pass/Fail)	Z-Score: _____
2.	Country of Origin Declaration	Generators: _____ Alternator: _____ Switchgear: _____ System Master Controls: _____
3.	Location of Local Service and Parts Department	Service_Center: _____ Parts_Center: _____ Does Offeror own the above services: _____ YES _____ NO
4.	Delivery Schedule	Submittals: _____ weeks from approval Generators: _____ weeks from approval Switchgear: _____ weeks from approval
5.	Commercial Exceptions (if Yes, please explain)	_____ NO _____ YES
6.	Technical Exceptions (detailed on marked up specification)	_____ NO _____ YES

*No proposal may be changed, amended, or modified after the above time and date. A proposal may, however, be withdrawn and resubmitted any time prior to the time set for receipt of proposals. All **proposals shall be valid for a period of 120-days** from the date proposals are open and no proposal may be withdrawn until after the expiration date.*

Acknowledgment of Addendums: _____

Offerors Contact Information

Company: _____
 Address: _____
 Point of Contact: _____
 Phone: _____ Email: _____

Signed By: _____ **Date:** _____

Printed Name: _____ **Title:** _____

END OF SECTION



SECTION 5 – PROPOSAL SUBMISSION CHECK LIST

BACKUP POWER GENERATORS AND DIESEL FUEL STORAGE AND DISPENSING SYSTEMS

SMITHCO CONSTRUCTION, INC.

GMP 1: EARLY EQUIPMENT PACKAGE 1

To be considered responsive, the following must accompany your proposal:

- Completed Proposal Form
- Bonding Letter
- Completed Qualification and Financial Disclosure Statement
- Z-Score Calculation Sheet
- Certificates of Origin
- Purchase Agreement with proposed redlines
- Copy of Specs indicating suggested deviations or compliance

END OF SECTION

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Attachment A – Supply Bond Form

Bond Number: _____

SUPPLY BOND

KNOW ALL PERSONS BY THESE PRESENTS, That we _____ of _____, hereinafter referred to as the Principal, and _____, as Surety, are held and firmly bound unto _____ of _____, hereinafter referred to as the Obligee, in the sum of _____ Dollars (\$ _____), for the payment of which we bind ourselves, our legal representatives, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has entered into a contract with Obligee, dated _____ day of _____, _____, for _____.

NOW, THEREFORE, if Principal shall faithfully perform such contract or shall indemnify and save harmless the Obligee from all cost and damage by reason of Principal's failure so to do, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

SIGNED, SEALED AND DATED this _____ day of _____, _____.

(Principal)

By _____ (Seal)

(Surety)

By _____ (Seal)
Attorney-in-Fact

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Attachment B – Sample Purchase Agreement



Smithco Construction Inc
 6 King Canyon Loop
 PO Box 45
 Caballo, NM 87931
 smithco@smithco.cc

Purchase Agreement

Project Name - Project No.

Project Street Address
 Project City, State & ZIP

Purchase Agreement No.

Date:

Respond By:

Seller:

Delivery POC:

Buyer: Smithco Construction Inc
 6 King Canyon Loop
 PO Box 45
 Caballo, NM 87931 (575)
 894-6161
 smithco@smithco.cc

Ship To: c/o Smithco Construction, Inc.

Delivery Date:

Delivery Method:

The materials/services to be furnished by Seller and the price to be paid therefore shall be as follows:

Item	UM	QTY	Unit Price	Price SubTotal
------	----	-----	------------	----------------

Total Price:

Instructions:

NO FRIDAY OR WEEKEND DELIVERIES.
NOTIFY DELIVERY POUNT OF CONTACT 24 HOURS PRIOR TO ARRIVAL
CRATE, PACKAGE AND COVER SHIPMENT FOR OUTDOOR STORAGE IN ACCORDANCE WITH MANUFACTURERS
RECOMMENDATIONS.

All invoices should reference the purchase agreement number and be sent to ap@smithco.cc.

IN WITNESS WHEREOF, the parties hereto have executed this agreement.

Date: _____ Date: _____

Vendor

Smithco Construction Inc

Signature

Signature

Name and Title

Name and Title

In consideration of the mutual covenants contained herein, the parties agree as follows:

1. Seller agrees to furnish the materials/services described above as may be required for the completion of that portion of the project known as Ft. Bliss Stormwater Diversion. To the extent applicable to Buyer's materials described below, all such materials/services shall be provided at the prices set forth above and , in strict compliance with the terms of this agreement and the prime contract between Smithco Construction, Inc ("Buyer") and the Owner, including all indemnities, warranties, drawings, specifications, special provisions, technical requirements, all addenda, amendments or modifications thereto, and all other documents that form or are made a part of the prime contract with Owner (collectively, the "Contract Documents"). The parties agree that the Contract Documents are incorporated herein by reference.
2. With regard to the material/services that are to be provided herein, Seller agrees to comply with and be bound to Buyer by the terms and procedures of the Contract Documents and to assume toward the Buyer all the duties, requirements, and obligations that Buyer assumes in the Contract Documents toward Owner as it relates to the specific materials or services provide herein.
3. For all purposed, Seller shall be classed as a merchant dealing in the materials described above and Buyer shall be classed as a non-merchant.
4. Seller understands and agrees that Buyer shall be under no obligation to purchase or accept any materials not actually required by the Contract Documents, as the same may be modified throughout the course of the Project, that there are no minimum or maximum quantities of materials to be provided, except as otherwise specified in the Contract Documents, and Seller's prices shall be good for the entire term of the prime contract with Owner, unless some adjustment is otherwise authorized by Owner under the Contract Documents.
5. Unit Prices shall govern and payment for the materials/services shall be made in accordance with Owner's measurement of work.
6. After full delivery of all materials, or such installments as Buyer shall direct, Buyer will pay Seller within seven work days after Buyer received payment for the materials/services from the Owner. The parties agree that Buyer's actual receipt of payment from Owner shall be a condition precedent to Buyer's obligation to pay Seller. Seller agrees that its recovery from Buyer for payments due hereunder is limited exclusively to the specific fund created by Owner's payments to Buyer and Seller assumes the risk of the Owner's nonpayment. Buyer's obligation to pay Seller is further conditioned upon Seller's timely and prior submittal of conditional and unconditional lien and bond releases in a form acceptable to Buyer. Buyer retains the right to take whatever steps it deems necessary to ensure that all payments will be utilized to pay potential lien or bond claimants, including but no limited to, the issuance of joint checks. 5% of the estimated amount will be held until the receipt of Approved Operating and Maintenance manuals, spare parts, testing, start-up, training, and commissioning of materials/services are furnished as required by the contract documents.
7. If Buyer is notified of or discovers a deficiency in the materials/services provided by Seller or it appears that Buyer could sustain any loss or damage as a result of any act or omission by Seller on this or any other project where the parties are working together, Buyer reserves rights available under this agreement and applicable law.
8. No payment or acceptance of materials/services by Buyer shall be construed to be a waiver of any right or claim or the acceptance of improper, defective or unsuitable materials/services, not shall it be construed as evidence of the performance of any obligation of Seller. Buyer's failure to reasonably notify Seller of its intention to reject any materials shall not be deemed an acceptance thereof by Buyer.
9. All materials/services shall be first class in every respect, satisfactory to Buyer and Owner, and conform strictly with the Contract Documents. In the case materials ordered by sample, the materials furnished shall be equal in every way to the sample submitted and accepted by the Owner.
10. Seller and other supplier(s) furnishing and installing related materials/equipment for the Project, as noted or directed by Buyer, shall exchange working drawings, templates, specifications and other pertinent services or information as necessary to insure proper connection and integration of all Seller furnished and/or installed materials/equipment on the Project. The duty and obligation for such exchanges and coordination shall be the sole responsibility of Seller.
11. Time is of the essence of the agreement. Seller shall promptly deliver said materials/services at such times and to such place as Buyer shall from time to time specify. Unless a shorter period is otherwise required by the Contract Documents, Seller shall provide written notice to Buyer to an extension of time or additional compensation from Owner under the terms of the Contract Documents.

12. With each delivery, Seller shall send a shipping list, bill of landing, or such other documentation as Buyer may reasonably request. Each invoice for delivery must be supported by separate shipping or delivery receipts signed by Buyer's authorized representative. All shipping, purchase, or delivery orders shall be subject to the terms of this agreement. Any delay in receiving Seller's statements, invoices or shipping documents, or errors or omissions therein, will be considered just cause for withholding payment without loss of cash discount privileges. **Submit all invoices to ap@smithco.cc.**
13. If seller shall fail to perform and of its obligations hereunder, or fail to furnish all or any portion of the materials/services within the time specified by Buyer, or in strict accordance with the requirements of this agreement or the Contract Documents or o the reasonable satisfaction of Buyer, then Seller shall remedy such default within forty-eight (48) hours of receiving written notice from Buyer. If Seller fails to remove and/or replace the rejected materials at its own expense, then Buyer, without waiving any of its rights or remedies, including terminating this agreement for default, may purchase said materials/services elsewhere and demand Seller to pay any excess in the cost of such materials/services do over and above the prices set forth above, together with any additional expense incurred or damage sustained by Buyer. Buyer retains all rights including seeking from Seller all damages suffered by Buyer including, but not limited to, any liquidated damages assessed by Owner, plus Buyer's extended overhead, Buyer's cost to repair and/or replace any rejected services/materials, incidental and consequential damages resulting from the delay or nonperformance, and all other direct and indirect costs incurred by Buyer, including its reasonable costs and attorney's fees. In no event shall Buyer's receipt and acceptance of any materials/services constitute a waiver of any claims for delay, damages, or otherwise.
14. Buyer may terminate this contract in whole or in part upon notice in writing to Seller for convenience. Seller shall thereupon cease work and transfer to Buyer title to all completed and partially completed products and to any raw materials or supplied acquired by Seller especially for the purpose of performing this contract, and Buyer shall pay Seller the sum of the following: (1) the contract price for all products which have been completed prior to termination; (2) the cost to Seller of the material or work in process as show on the books of Seller in accordance with the accounting practice consistently maintained by Seller plus a reasonable profit thereon not to exceed 10%, but in no event more than the contract price; (3) the cost f.o.b. Seller's plant of materials and supplies acquired especially for the purpose of performing this contract; and (4) reasonable cancellation charges, if any, paid by Seller on account of any commitment(s) made hereunder.
15. Seller warrant and guarantees that the materials/services covered by this agreement are (1) free from all encumbrances, (2) of good quality and free from defects, whether patent or latent, in material or workmanship, and (3) in complete compliance with the standards and requirements of the Contract Documents. Seller acknowledges that Buyer is purchasing materials in reliance on the skill and judgment of Seller in selecting or furnishing goods suitable for Buyer's use on the Project. Seller agrees to provide whatever guarantees or assurances that are required by the Contract Documents at no additional cost to Buyer. Seller agrees to make good at its own expense any defect in such materials/services which may occur or develop prior to Buyer's release from responsibility therefore under the terms of the Contract Documents. Buyer reserves all rights to recover all expenses incurred by Buyer resulting from any such defect should repair, replacements and/or return of the materials/services to Seller be required for any reason.
16. Seller agrees to defend and indemnify Buyer, its agents and employees, and any other party Buyer is required to defend or indemnify under the Contract Documents, (a) from any and all claims, suits and liability for infringement or violation of any patent arising in connection with this agreement or from the use by Buyer of any of the materials/services furnished to it by Seller, (b) from any and all claims, suits and liability for economic or financial damages or costs, injuries to property or person, including death, on account of any act or omission of Seller or its officers, agents, employees, and servants; (c) all damages, losses or costs sustained by Buyer related to materials furnished under this Agreement; (d) from any and all claims, suits and liens for the materials/services furnished hereunder by persons other than Seller.
17. The extent Seller's materials are involved or implicated, all claims or disputes asserted by Seller concerning (1) the acts or omissions of Owner or its representatives, (2) changes initiated by Owner, (3) the quality or acceptability of Seller's services/materials, if rejected by Owner, (4) the sufficiency or adequacy of or representations contained in the Contract Documents, or (5) any other basis or event that could entitle Buyer to additional time and/or compensation under the Contract Documents, shall be subject to the claim procedures set forth in the Contract Documents. No invocation of these procedures nor any action or position take in such proceedings by Buyer shall be deemed to constitute an admission of any obligation or liability to Seller. Seller agrees that it will not take any other

action against Buyer with respect to any such claims and will not pursue independent litigation with respect thereto pending a final determination under the procedures set forth in the Contract Documents. Seller agrees to be bound by all decisions entered and determinations made through said procedures. In no event will Seller be entitled to receive any greater amount from Buyer to Buyer or costs or professional fees incurred by Buyer in obtaining such recovery. Seller agrees that it will accept such amount, if any, received by Buyer from Owner as full satisfaction of all claims.

18. Should a dispute or claim arise between Buyer and Seller that does not involve Owner or relief under the Contract Documents, Seller shall give Buyer written notice within three days after the occurrence of any event giving rise to such dispute or claim. Any such dispute or claim shall be resolved through arbitration in accordance with the Construction Industry Rules of the American Arbitration Association, unless the parties agree otherwise. Either party shall have the option of joining any other party with whom it has contracted who in their judgment may be liable for any damages claimed. In any arbitration, action, or proceeding regarding this agreement, the prevailing party shall be entitled to cover its attorney's, arbitration, and expert fees and costs and to have final judgment entered in any court having jurisdiction over the parties based upon the final award. Arbitration shall not be required to the extent that a third party asserts a claim against Buyer that related to the Seller's materials or conduct and such third party is not bound to arbitrate with Buyer. In that case, Buyer can assert and prosecute its claims against Seller in that litigation and shall be entitled to all attorney's and expert fees and costs incurred therein.
19. Insurance: Seller agrees to maintain, at its sole costs and expense, the following insurance coverages:
 1. Worker's Compensation: Coverage A Statutory policy form; Coverage B Employer's liability, Bodily injury by accident - \$1,000,000 each accident, Bodily injury by disease - \$1,000,000 policy limit, Bodily injury by disease 0 \$1,000,000 each employee.
 2. Commercial Auto Coverage: Auto liability limits of not less than \$1,000,000 each accident combined bodily injury and property damage liability insurance including, but not limited to, owned autos, hired or non-owned autos.
 3. Comprehensive General Liability or Commercial General Liability: The limits of liability shall not be less than:
 1. Comprehensive General Liability: \$2,000,000 combined single limit bodily/property damage occurrence or,
 2. Commercial General Liability: The limits of liability shall not be less than: Each occurrence limit - \$2,000,000; Personal advertising injury limit - \$2,000,000; Products Completed Operations Aggregate Limit - \$2,000,000 =; General Aggregate Limit - \$2,000,000 (other than products completed operations).Both policy forms must include: (a) Premises and operation with no X, C or U exclusions; (b) Products and completed operations coverage (Seller agrees to maintain this coverage for the time period specified in the Contract Documents); (c) Full blanket contractual coverage; (d) Broad form property damage including completed operations hereunder, Buyer, the Owner, (to extent required by the Contract Documents), and any other required person or entity that Buyer is required to defend or indemnify under the Contract Documents. Additional insured should be provided by the use of the ISO Form CG 20 10 11 85 Version or comparable.
 4. Errors & Omissions Coverage: Must be adequate or cover Seller's scope of work and be acceptable to Buyer.
 5. Other requirements: (a) All policies must contain an endorsement affording an unqualified thirty (30) days notice of cancellation to the additional insured(s) in the event of cancellation or reduction in coverage; (b) All policies must be written by insurance companies reasonable and acceptable to Buyer; (c) Certificates of insurance with the required endorsement evidencing the coverage must be delivered to Buyer prior to commencement of any work under this contract; (d) In addition to Buyer's right to terminate the agreement for default, if Seller fails to secure and maintain the required insurance, Buyer shall have the right (without obligation to do so, however) to secure same in the name and for the account of the Seller in which event the Seller shall pay the costs thereof and furnish upon demand all information that may required in connection therewith.
20. Seller shall not assign or sublet this agreement or any part thereof, including any payments due or to become due hereunder without the written consent of Buyer, which shall not be unreasonable withheld. As a condition to any consent, such assignments shall be subject to the terms and conditions herein and no greater rights or remedies shall be available to the assignee.
21. Seller shall be responsible for the preparation, submittal and accuracy of all show drawings, technical information, or approvals that relate to the services/materials described herein that must be prepared and submitted to owner pursuant to the Contract Documents. One (1) electronic copy in pdf format or printed copies if required by the Contract Documents of submittals shall be received by Buyer within 10 days of the date of execution of this

agreement, unless otherwise agreed to in writing by Buyer. This agreement is contingent upon approval of such submittals by Owner.

22. Seller agrees to pay all applicable taxes, license fees, contributions, interest and/or penalties due under any statute or regulation as a result of the materials/services provided under this agreement. Seller warrants that the prices set forth herein include an allowance to cover all such obligations. Seller shall, upon request, provide proof that all taxes and other charges are being properly paid upon receiving a written request from Buyer.
23. Buyer's acceptance of the materials/services described herein, or waiver of any of the provisions of this agreement, or Buyer's failure to exercise any options or legal remedies provided herein or at law, shall not be construed as a general waiver of its right thereafter to require such compliance or to exercise such option or remedy.
24. This agreement constitutes the entire agreement between the parties and supersedes all prior proposals, negotiations, and agreements. If any provision of this agreement is found to be invalid or otherwise unenforceable, the remaining provisions shall remain in full force and effect.
25. To be effective, all modification or amendments to this agreement must be in writing.
26. This agreement is not effective until signed by both parties.
27. This agreement shall be construed and interpreted according to the laws of the state where the Project is located.

CMAR

CMAR Subconsultants



Attachment C – Redacted Prime Agreement (For Reference Only)

PRECONSTRUCTION SERVICES AGREEMENT

THIS PRECONSTRUCTION SERVICES AGREEMENT (this “Agreement”) is made this ___ day of _____, 2023 (“Effective Date”), by and between El Paso Water Utilities – Public Service Board, a component of the City of El Paso, Texas (“Owner”), and Smithco Construction, Inc., a corporation organized under the laws of the state of New Mexico (“Contractor”), for certain services related to a construction project known as the “Construction Manager At-Risk for Back-up Power Generators and Diesel Fuel Storage and Dispensing Systems” project (“Project”).

WITNESSETH:

WHEREAS, Owner has determined that its best interests are served in delivering the Project through a “construction manager at-risk” process, as provided for by Chapter 2269, Subchapter F of the Texas Government Code (“Enabling Law”); and

WHEREAS, under this Enabling Law, a governmental entity is to contract with: (a) an engineer for design and construction phase services to the governmental entity on the project, including preparing the project’s construction documents; and (b) a construction manager-at-risk (“CMAR”) to serve as the general contractor and to provide consultation during the design and construction of the Project; and

WHEREAS, Owner entered into a contract with Arcadis US, Inc., Bath Engineering Corporation, Freese and Nichols, Inc. and Black & Veatch Corporation (collectively referenced as “Engineer”), whereby Engineer was engaged to provide design and construction phase services to Owner on the Project, including the preparation of the Project’s construction documents; and

WHEREAS, on or about October 3, 2022, Owner issued a Request for Proposals (“RFP”) soliciting interested proposers to respond to the RFP to serve as the CMAR for the Project; and

WHEREAS, on or about November 15, 2022, Contractor submitted its proposal (“Proposal”) in response to the RFP; and

WHEREAS, on or about January 18, 2023, Owner notified Contractor that it was the successful proposer; and

WHEREAS, on or about February 8, 2023, the Public Service Board of the City of El Paso, Texas approved the award of this Agreement to Contractor.

NOW, THEREFORE, in consideration of the mutual covenants and obligations contained herein, Owner and Contractor hereby agree as follows:

ARTICLE 1 **DEFINITIONS AND GENERAL PRINCIPLES**

1.1 **Definitions.** For the purposes of this Agreement, the following words and terms shall have the meanings specified below.

Affiliate means, with respect to any particular company or entity, a company or entity that: (a) owns and controls, directly or indirectly, such company or entity; (b) is owned and controlled, directly or indirectly, by such company or entity; or (c) is owned and controlled, directly or indirectly, by the same company or entity that owns and controls such company or entity. The term “control” for purposes of this

definition means: (i) ownership, directly or indirectly, of fifty percent (50%) or more of the issued voting shares of a company or entity or ownership of equivalent rights to determine the decisions of such company or entity; or (ii) having the right to appoint at least fifty percent (50%) of the members of the board of directors or equivalent governing body of such company or entity.

Agreement means this written document executed by Owner and Contractor, and including all Exhibits.

Allowance Payment Item means an item or portion of the Work which has not been defined sufficiently, or for which the Owner has yet to make certain decisions necessary, to permit pricing by Contractor.

Allowance Payment Value means the estimated dollar amount included in the GMP Proposal or other budget document as a placeholder value for an Allowance Payment Item.

Baseline Schedule means the schedule developed by Contractor in accordance with Section 5.2.4 below and approved by Owner, demonstrating, among other things, how Contractor shall complete all Work timely and achieve Substantial Completion on or before the Scheduled Substantial Completion Date.

Books and Records means all documents (whether paper, electronic, or other media) and electronically stored information, including, but not limited to, any and all books, correspondence, receipts, vouchers, estimates, records, contracts, cost data, schedules, subcontracts, schedules, job cost reports, and other data, including computations and projections, of Contractor related to bidding, negotiating, pricing, or performing the Preconstruction Services and/or Work.

Books and Records Period means that period starting on the Effective Date and ending at the later of four (4) years after: (a) Final Payment under this Agreement; or (b) Final Payment under the Construction Contract, provided, however, that if litigation, a claim, or an audit is in process, or if audit findings are not resolved, such Books and Records Period shall be extended until the later of the final conclusion of the litigation, claim, audit, or audit finding resolution.

Confidential Information has the meaning set forth in Section 14.6 below.

Contingency has the meaning set forth in Section 5.8.1 below.

Construction Contract means that contract awarded by Owner for the construction of the Project in accordance with the Construction Contract Documents.

Construction Contract Documents means those documents that are referenced as such in the Construction Contract.

Construction Documents means those final, complete design documents that have been signed and sealed by Engineer and are to be used for performing the Work under the Construction Contract.

Contractor means Smithco Construction, Inc.

Contractor-Related Entity means Contractor, Subcontractors, Sub-Subcontractors, Suppliers and anyone for whose acts any of them may be legally or contractually responsible.

Contractor's Fee is ██████% and represents the compensation to Contractor for profit and Non-Reimbursable Costs.

Contractor's General Conditions means those costs set forth in Exhibit 5.2.1.

Cost of the Work means those costs set forth in Exhibit 5.2.1.

Early Work Packages has the meaning set forth in Section 5.9 below.

Engineer means Arcadis US, Inc., Bath Engineering Corporation, Freese and Nichols, Inc. and Black & Veatch Corporation (collectively referenced as "Engineer"), and Engineer's subconsultants.

Equipment and/or Material mean all of the equipment, materials, machinery, apparatus, structures, supplies and other goods required by the Construction Contract Documents to complete the Work and to be incorporated into the Project or provided to Owner. The term "Equipment and Materials" shall not be construed to include any construction equipment, supplies, materials, apparatus or tools owned by any Contractor-Related Entity that are used to complete the Work and are not contemplated under the Construction Contract Documents to become incorporated into the Project or to be provided to Owner.

Guaranteed Maximum Price (GMP) means the sum of the Cost of the Work, Contractor's General Conditions, and Contractor's Fee, as such sum may be adjusted in accordance with the Construction Contract Documents.

GMP Proposal(s) means that proposal submitted by Contractor to Owner under Article 5 hereof.

GMP Proposal Design Documents mean those design documents referenced in Section 5.2 below and upon which the GMP Proposal is based.

Governmental Approval means any authorization, consent, approval, license, lease, ruling, permit, certification, exemption, or registration by or with any Governmental Unit.

Governmental Unit means any national, state or local government, any political subdivision thereof, or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or other person and/or entity having jurisdiction over the Site, performance of the Preconstruction Services, the Work, the Project or the Parties.

Initial GMP Proposal means that proposal submitted by Contractor to Owner under Article 5 hereof when the Work of the Project is divided into separate Work packages.

Laws and/or Regulations means all applicable federal, state and local laws, codes, ordinances, rules, statutes, regulations, orders and decrees, and other requirements of any Governmental Unit, including, without limitation, any interpretation of such items by the applicable Governmental Unit.

Liquidated Damages has the meaning set forth in Section 3.3.4 below.

Minor Work means Work that has a value of \$100,000 or less.

Non-Reimbursable Costs mean those costs set forth in Exhibit 5.2.1.

Notice of Intent to Award means the written notice provided from Owner to Contractor that Owner intends to award Contractor the Construction Contract.

Notice of Non-Award means the written notice provided from Owner to Contractor that Owner does not intend to award Contractor the Construction Contract.

Open Book Basis means allowing Owner to review all underlying assumptions, records, stand-alone Subcontractor and Supplier quotes, and other data associated with each element of pricing, or any adjustment thereto, including assumptions as to Costs of the Work, schedule, composition of equipment, equipment rates, labor rates and burdens, production rates, estimating factors, contingency and indirect costs, risk pricing, inflation and deflation rates, profit, home office overhead rates, fees, charges, levies, incentives, and other items reasonably required by Owner to satisfy itself as to the reasonableness and accuracy of the amounts proposed by Contractor.

Owner means El Paso Water Utilities – Public Service Board, a component unit of the City of El Paso, Texas.

Owner Indemnitee means and includes each of Owner and Engineer and, with respect to each of the foregoing, each of its respective representatives, officers, employees, members or other constituent entities, authorized agents, and other duly authorized representatives.

Party or Parties means, as applicable: (a) in the singular, Owner or Contractor; or (b) in the plural, Owner and Contractor.

Plant means the Fred Hervey Water Reclamation Plant (WRP), the Haskell R. Street Wastewater Treatment Plant (WWTP), the John T. Hickerson Water Reclamation Facility (WRF), and the Jonathan Rogers Water Treatment Plant (WTP).

Preconstruction Services mean the work performed by Contractor under this Agreement, including but not limited to those Preconstruction Services set forth in Exhibit 2.1.

Pre-Existing Intellectual Property has the meaning set forth in Section 13.4 hereof.

Project means the Construction Manager At-Risk for Back-up Power Generators and Diesel Fuel Storage Project.

Project Team means Owner, Engineer, Contractor and other stakeholders who are responsible for making decisions regarding the Project.

Proposal Acceptance Period means no less than one hundred twenty (120) days from the date Owner receives the GMP Proposal from Contractor.

Scheduled Substantial Completion Date means the date that is set forth in the Construction Contract Documents, which is the date by which Contractor is obligated to achieve Substantial Completion of the entire Work, subject to adjustment as set forth in the Construction Contract Documents.

Security Bond means the bond provided by Contractor pursuant to Exhibit 7.1.1.

Self-Perform means Work performed by employees of the Contractor or any of its Affiliates.

Site means the area of the Plants or each of the identified localtions upon which the Project is located, as set forth in Exhibit 1.1(b).

Subcontract means any contract entered into by Contractor and any other Contractor-Related Entity in connection with the carrying out a portion of this Agreement or the Work.

Subcontractor is any person or entity having a direct contract with Contractor as an independent contractor to perform a portion of the Work and shall include materialmen and Suppliers.

Sub-Subcontractor is any person or entity having a direct contract with a Subcontractor.

Substantial Completion means that: (a) the Work (or a specified part thereof) is sufficiently complete in accordance with the Construction Contract Documents so that Owner can beneficially use and occupy the Project (or a specified part thereof) for its intended purposes and with functionality intended; and (b) Contractor has satisfied or fulfilled all other requirements set forth in the Construction Contract Documents for Substantial Completion.

Supplier is any person or entity retained by a Contractor-Related Entity to provide Equipment and Materials, or construction equipment, supplies or other goods to be used in the performance of the Work but not incorporated into the Work.

Work means the entire construction or the various separately identifiable parts thereof required to be provided under the Construction Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction; furnishing, installing, and incorporating all Equipment and Materials into such construction; and may include related services such as testing, start-up, and commissioning, all as required by the Construction Contract Documents.

Work Product means all cost estimates, schedules, bid packages, studies, data, models, documents, photographs, videos, and work developed or produced by or on behalf of Contractor, whether in hard-copy, digital or electronic data, or any other medium, and whether completed or not completed.

1.2 Contracting Approach. Owner has entered into this Agreement with Contractor for the limited purpose of having Contractor provide preconstruction services in support of the Project. As part of its scope of work, Contractor will provide Owner with a GMP Proposal(s) that will establish the commercial terms for it performing the Work in accordance with the Construction Contract Documents, including but not limited to performing the Work within the GMP and achieving Substantial Completion no later than Scheduled Substantial Completion Date. The Parties agree that if the Work of the Project is divided into separate work packages, Contractor will provide an Initial GMP Proposal. If the Parties are in agreement with the terms of the GMP Proposal or Initial GMP Proposal, it is anticipated that Owner will issue Contractor a Notice of Intent to Award, with the understanding that Construction Contract will incorporate the agreed-upon GMP Proposal or Initial GMP Proposal. If an Initial GMP Proposal is accepted by Owner, all subsequent GMP Proposals for the remainder of the Work provided by Contractor in accordance with this Agreement that are accepted by the Owner after the Parties enter the Construction Contract will be incorporated into the Construction Contract. If the Parties are unable to agree upon the terms of the GMP Proposal or Initial GMP Proposal, or if Owner determines for any other reason not to award Contractor the Construction Contract, Owner will issue Contractor a Notice of Non-Award, which will end Contractor's involvement on the Project.

1.3 Owner's Rights to Deliver the Project. For the avoidance of doubt, and notwithstanding anything else to the contrary in this Agreement, Contractor acknowledges that Owner is under no obligation to enter into any further agreement with Contractor, including the Construction Contract. Owner has the unconditional right to deliver the Project without Contractor's involvement and using, in Owner's sole and absolute discretion, whatever means of delivering the Project Owner determines to be in its best interests.

1.4 Relationship between Owner and Contractor. Owner and Contractor agree to proceed with the Project on the basis of trust, good faith and fair dealing, and shall take all actions reasonably necessary to perform this Agreement in an economical and timely manner.

ARTICLE 2 **SCOPE OF WORK**

2.1 Preconstruction Services. Contractor's Preconstruction Services are set forth in Exhibit 2.1 and consist of Basic Preconstruction Services and Additional Preconstruction Services.

2.2 Standard of Care. Contractor's standard of care in performing the Preconstruction Services will be the care and skill ordinarily used by construction contractors providing similar services on projects similar to this Project.

2.3 No Responsibility for Design. Notwithstanding anything to the contrary in this Agreement, Contractor is not responsible for providing, nor does Contractor control, the Project design and contents of the design documents. By performing constructability, value engineering and other reviews of the design as part of the Preconstruction Services, Contractor shall not be deemed to assume responsibility or liability, in whole or in part, for the Project design and contents of the design documents, or for any of the contractual or customary responsibilities or duties of the Engineer. However, Contractor retains the responsibility of providing written disclosure of known defects within a reasonable time after such defects are discovered or reasonably should have been discovered using ordinary diligence before or after construction.

2.4 Changes to Preconstruction Services. Owner, without invalidating this Agreement, may make changes to the Preconstruction Services, including the authorization of Additional Preconstruction Services, by written notice to Contractor. If Contractor believes that any such change will affect the cost or time to perform its responsibilities under this Agreement, Contractor shall, before proceeding with the change, notify Owner in writing and await further instruction from Owner. Contractor shall not perform any Additional Preconstruction Services, or any other work that is not specified as basic Preconstruction Services, unless approved in writing by Owner.

2.5 Construction Activities at the Site. As of the Effective Date, the Preconstruction Services do not include the performance by Contractor of any construction activities (e.g., Site clearing, demolition, or construction of permanent Work) at the Site. If Owner and Contractor determine that the best interests of the Project would be served by having Contractor perform one or more Early Work Packages involving construction activities at the Site, they will proceed in accordance with Section 5.9 below. For the avoidance of doubt, Contractor's Site visits and investigations shall not be construed as being construction activities. Additionally, the Parties agree that if the Work of the Project is divided into separate Work packages and the Parties enter into a Construction Contract after the Owner's acceptance of the Initial GMP Proposal, Contractor will perform construction activities pursuant to the Construction Contract while Contractor continues performance of Preconstruction Services for the remainder of the Work packages.

2.6 Key Personnel. Contractor's Key Personnel are set forth in Exhibit 2.6. Contractor acknowledges that the qualifications of its Key Personnel were an essential element to Contractor being awarded this Agreement, and further acknowledges the importance of its Key Personnel in successfully performing the Preconstruction Services and, if a Construction Contract is awarded to Contractor, the Work. Absent separation of employment, none of the Key Personnel may be withdrawn from the Project without prior written approval of Owner, with it being understood and agreed that Contractor will provide Owner with at least thirty (30) days written notice of any request to withdraw any Key Personnel. Any replacement

personnel shall have equivalent skill, experience and reputation. Contractor shall remove or replace, or have removed or replaced, any personnel performing the work if Owner has a reasonable objection to such individual.

2.7 Project Kick-Off Meeting. The parties will meet within seven (7) days after the Effective Date to discuss issues affecting the administration of this Agreement, including potential Subcontractor involvement, processes relating to submittals and payment, and other matters that will facilitate the ability of the parties to perform their obligations under this Agreement.

ARTICLE 3

TIME FOR RENDERING PERFORMANCE

3.1 Commencement. Contractor shall begin rendering the Preconstruction Services as of the Effective Date of the Agreement.

3.2 Performance Time. Specific periods of time and/or dates for Contractor rendering the Preconstruction Services are, as applicable, provided in Exhibit 2.1. If such periods of time or dates are changed through no fault of Contractor, the rates and amounts of compensation provided for in this Agreement shall be subject to equitable adjustment.

3.3 Project Schedule.

3.3.1 Development and Maintenance of Project Schedule. Contractor will develop and maintain the Project Schedule on behalf of the entire Project Team. The fundamental purpose of the Project Schedule is to identify, coordinate, manage and monitor the tasks and activities to be performed by all Project Team members for all phases of the Project. Among other things, the Project Schedule will depict: (a) the production of various design phase documents; (b) long-lead procurements; (c) permitting requirements; (d) any real estate and right-of-way acquisition; (e) bid packaging strategy and awards to Subcontractors and Suppliers; (f) major stages of construction; (g) coordination with third-party utilities and Governmental Units; (h) start-up and commissioning; and (h) substantial completion. Each Project Team member is responsible for complying with the Project Schedule.

3.3.2 Further Development of Project Schedule. The Project Schedule is intended to become more detailed as the design progresses, evolving from conceptual to detailed. Early Project Schedules will concentrate on milestones for each design phase deliverable (e.g., 30%, 60%, 90%, 100%) design, Equipment lead times and general construction durations. Contractor will expand and update the Project Schedule throughout the term of this Agreement such that it will not require significant changes at the start of the construction phase to incorporate Contractor's plan for the performance of the construction phase work under the Construction Contract. It is intended that the Baseline Schedule submitted by Contractor pursuant to Section 5.2.4 below will be derived from the most current Project Schedule.

3.3.3 Updates. Contractor will provide updates and/or revisions to the Project Schedule for use by the Project Team, whenever required, but no less often than monthly.

3.3.4 Liquidated Damages. If Contractor does not achieve completion of the Work required under the Construction Agreement in accordance with the Contract Times specified in the Construction Agreement, Owner will suffer damages which are difficult to determine and accurately specify. To compensate Owner for those damages, the Parties will agree upon liquidated damages ("Liquidated Damages"), which will be set forth in the Construction Agreement.

ARTICLE 4
COMPENSATION AND PAYMENT

4.1 Compensation. Owner shall pay Contractor for services properly performed or furnished under this Agreement on the basis set forth in Exhibit 4.1.

4.2 Payment Process. Contractor shall submit an Application for Payment to Owner by the tenth (10th) day of each month following the performance of services for which Contractor is entitled to payment hereunder. Each Application for Payment shall: (a) be in the form approved by Owner; (b) identify the services performed during the preceding month; (c) indicate the total amount requested for payment; (d) indicate the total amount paid Contractor through the date of the Application for Payment; and (e) include such other information or documentation as Owner may reasonably require.

4.3 Payment by Owner. Owner shall make payment to Contractor of all properly supported invoiced amounts in accordance with Chapter 2251 of the Texas Government Code following receipt of an acceptable Application for Payment. In the event of a disputed or contested invoice, Owner will provide notice to Contractor in accordance with Chapter 2251 of the Texas Government Code and Owner may withhold from payment only that portion so contested and shall pay the undisputed portion.

4.4 Final Payment. Owner shall make final payment to Contractor of all monies due under this Agreement in accordance with Chapter 2251 of the Texas Government Code, after its receipt from Contractor of a Final Application for Payment. The Final Application for Payment shall be accompanied by such documentation as Owner may require, including appropriate releases. Contractor shall submit its Final Application for Payment after Owner's award to Contractor of the Construction Contract or the Notice of Non-Award.

4.5 Interest. Payments due and unpaid by Owner to Contractor shall bear interest commencing thirty (30) days after payment is due as established in Chapter 2251 of Texas Government Code.

4.6 Contractor's Right to Suspend for Late Payment. If Owner fails to make any undisputed payment due Contractor for services and expenses in accordance with Chapter 2251 Texas Government Code, after receipt of Contractor's invoice, then Contractor may, after giving seven (7) days written notice to Owner, suspend performing of services under this Agreement until Owner has paid Contractor in full all undisputed amounts due.

ARTICLE 5
GMP PROPOSAL

5.1 GMP Proposal(s). When directed by Owner, Contractor shall submit to Owner a GMP Proposal in accordance with this Article 5. The Parties agree that if the Work of the Project is divided into separate Work packages, the Contractor will be directed to submit an Initial GMP Proposal for the first Work package. If the Owner and Contractor enter into a Construction Contract after the Owner's acceptance of the Initial Proposal, the Contract will provide the Owner subsequent GMP Proposals for the remainder of the Work packages in accordance with the requirements of this Agreement. The format of the GMP Proposal(s) or Initial GMP Proposal shall be initially developed by Contractor and provided to Owner for its review and approval. At a minimum, the supporting documentation will include a complete line item cost estimate indicating the itemized costs that comprise the GMP(s).

5.2 Contents of GMP Proposal(s) or Initial GMP Proposal. The GMP Proposal(s) or Initial GMP Proposal shall include the following, unless the Parties mutually agree otherwise:

- .1 A proposed GMP, which shall be the sum of:
 - (a) The estimated Cost of the Work, inclusive of the Contingency;
 - (b) Contractor's General Conditions, including the methodology proposed for calculating the amount of Contractor's General Conditions and the process by which Contractor's General Conditions will be paid; and
 - (c) Contractor's Fee. The proposed GMP shall be supported by a detailed cost estimate organized in a manner agreed upon by Owner and Contractor to facilitate cost estimate reviews including any Allowance Payment Items and Contingency.
- .2 The GMP Proposal Design Documents upon which the GMP Proposal is based, with such documents to be listed and attached to the GMP Proposal.
- .3 A list of the assumptions and clarifications made by Contractor in the preparation of the GMP Proposal, which list is intended to supplement the information contained in the GMP Proposal Design Documents.
- .4 A proposed Baseline Schedule and the Scheduled Substantial and Final Completion Dates upon which the proposed GMP is based.
- .5 A Schedule of Values for all of the Work, which will include quantities and prices of items which when added together equal the proposed GMP and subdivides the Work into component parts in sufficient detail to serve as the basis for progress payments during performance of the Work, and otherwise in form and detail as requested by Owner.
- .6 A cash flow projection estimating that portion of the proposed GMP to be due during each month of performance.
- .7 If applicable, a list of Allowance Payment Items, Allowance Payment Values, and a statement of their basis.
- .8 If applicable, a schedule of alternate prices.
- .9 If applicable, a schedule of unit prices.
- .10 If applicable, a statement of additional services which may be performed, but which are not included in the proposed GMP and which, if performed, shall be the basis for an increase in the GMP and/or Scheduled Substantial Completion Date.
- .11 A list of Subcontractors whose bids/proposals have been accepted by Owner, including the Subcontractor's classification (i.e., Small Locally-Owned Business Enterprise, Minority Business Enterprise, Woman-Owned Business Enterprise), which bids/proposals are deemed to be part of the GMP and GMP Proposal.
- .12 An updated notarized letter from Contractor's surety or sureties verifying that Contractor has bonding capacity in the amount of the proposed GMP.
- .13 A commitment letter from Contractor's insurance broker that it will provide: (a) a Builder's Risk insurance policy compliant with the terms of the Construction Contract prior to the execution

of the Construction Contract; and (b) a specimen Builder's Risk insurance policy with all appropriate attachments, sub-limits, etc.

.14 An updated list of Key Personnel and an updated organizational chart.

.15 A completed Minority Certification and Participation Summary form demonstrating that Contractor has met the participation goals set forth in Exhibit 14.1.4.

.16 A completed Texas Ethics Commission Form 1295 ("Certificate of Interested Parties").

.17 Such other information and materials as Owner may reasonably request.

.18 Confirmation that the proposed GMP Proposal(s) or Initial GMP Proposal will remain valid during the Proposal Acceptance Period.

5.3 Review and Adjustment to GMP Proposal(s) or Initial GMP. After submission of the GMP Proposal(s) or Initial GMP Proposal, Contractor and Owner shall meet to discuss and review such proposal, with the understanding that: (a) all information shall be provided by Contractor on an Open Book Basis; (b) Contractor shall provide such information as Owner may reasonably request relative to the GMP Proposal(s) or Initial GMP Proposal; and (c) Contractor shall identify and justify any costs that are significantly different than Contractor's latest cost model. If Owner has any comments regarding the GMP Proposal(s) or Initial GMP Proposal, or finds any inconsistencies or inaccuracies in the information presented, it shall promptly notify Contractor of such comments or findings. If appropriate, Contractor shall, upon receipt of Owner's notice, make appropriate adjustments to the GMP Proposal(s) or Initial GMP Proposal. Contractor is also on notice that Owner shall, at any time, submit the GMP Proposal(s) or Initial GMP Proposal to either Engineer or an independent third party for review and verification.

5.4 Negotiation of and Owner's Actions on GMP Proposal.

5.4.1 Negotiation. If Owner determines that there is merit in considering the GMP Proposal(s) or Initial GMP Proposal as the basis for entering into a Construction Contract, it shall so notify Contractor and, as applicable, the Parties shall negotiate in good faith, and attempt to reach agreement on the terms of the GMP Proposal(s) or Initial GMP Proposal.

5.4.2 Agreement on GMP Proposal or Initial GMP Proposal. If the Parties reach agreement on the GMP Proposal or Initial GMP Proposal, as may be amended by Contractor to reflect discussions between the Parties, and Owner intends to award the Construction Contract, then Owner shall issue Contractor a Notice of Intent to Award. The Construction Contract shall incorporate the agreed-upon GMP Proposal or Initial GMP Proposal. As a condition to award, Contractor shall provide the Performance and Payment Bonds as required by Section 7.2 below.

5.4.3 Failure to Agree upon GMP Proposal or Initial GMP Proposal. If the Parties are unable to reach an agreement on the GMP Proposal or Initial GMP Proposal, Owner may:

.1 Continue to evaluate and suggest modifications to the GMP Proposal or Initial GMP Proposal, whereupon, if Owner accepts such GMP Proposal or Initial GMP Proposal or such modifications are accepted in writing by Contractor, then the Parties shall be deemed to have agreed upon the GMP Proposal or Initial GMP Proposal and accepted modifications, in which case Owner may issue Contractor a Notice of Intent to Award in accordance with Section 5.4.2 above;

.2 Authorize Contractor to continue to provide services under this Agreement, and provide another GMP Proposal or Initial GMP Proposal at the appropriate time in accordance with this Article 5; or

.3 Exercise its rights under Section 5.5 below.

5.5. Notice of Non-Award. At any time before entering into a Construction Contract, Owner may issue Contractor a Notice of Non-Award. In such case or upon termination of this Agreement after entering into a Construction Contract, Owner will have, in addition to any other right available under Laws and Regulations, the right to complete the Project by whatever means it so chooses, without the involvement of Contractor. If Owner issues a Notice of Non-Award, Contractor's sole and exclusive right and remedy shall be to be paid for all Preconstruction Services properly performed through the date of the Notice of Non-Award. Contractor shall not be entitled to any Contractor's Fee, or any other overhead or profit, on unperformed Preconstruction Services or services of any other kind. In no case shall Contractor or any other Contractor-Related Entity be entitled to anticipatory or unearned profits, unabsorbed overhead, opportunity costs, or consequential or other damages as a result of Owner's issuance of a Notice of Non-Award.

5.6 Contractor's Rights if Owner Fails to Act within the Proposal Acceptance Period. If Owner fails to issue Contractor a Notice of Intent to Award or a Notice of Non-Award within the Proposal Acceptance Period (as such period may be extended by mutual agreement of the Parties), then Contractor may, after giving Owner seven (7) days written notice of its intention to do so, declare: (a) the GMP Proposal null and void; and/or (b) that Owner has constructively issued a Notice of Non-Award, in which case Contractor's rights shall be as stated in Section 5.5 above.

5.7. Subsequent GMP Proposals after award of Construction Contract.

The Parties agree that if the Work of the Project is divided into separate Work packages and the Parties enter into a Construction Contract after the Owner's acceptance of the Contractor's Initial GMP, the Contractor will submit subsequent GMP Proposals to the Owner for the remainder of the Work packages in accordance with the requirements of this Agreement. All GMP Proposals accepted by Owner subsequent to entering the Construction Contract, will be incorporated into the Construction Contract.

5.8 Contingency.

5.8.1 Purpose. The GMP Proposal(s) or Initial GMP Proposal and any subsequent GMP Proposal(s) will include a contingency line item ("Contingency") as part of the estimated Cost of the Work. The Contingency will be made up of two parts, the Owner's Contingency and the Project Contingency.

The Owner's Contingency is available for Costs of Work not included in any GMP that would be the basis for a Change Order. The Owner's Contingency is available for the Owner's exclusive use.

The Project Contingency is available for Contractor's exclusive use for unanticipated Costs of the Work that it has incurred that are not the basis for a Change Order under the Contract Documents, plus the applicable Contractor's Fee. By way of example, and not as a limitation, such costs may include: (a) trade buy-out differentials; (b) overtime or acceleration; (c) escalation of labor and material costs; (d) correction of defective, damaged or nonconforming Work; (e) Subcontractor defaults; and (f) deductibles incurred by Contractor under the insurance required under the Contract Documents (but not to exceed \$25,000 per occurrence). The Project Contingency is not available to Owner for any reason, including, but not limited to, changes in scope or any other item which would enable Contractor to increase the GMP under the Contract Documents.

All potential work elements comprising the Owner Contingency will be detailed in a Risk Register prepared and maintained by the Contractor.

The Risk Register will assign an estimated cost for each Owner Contingent work element and the percentage or probability of occurrence and percentage or probability of impact. The weighted cost (estimated cost x percentage occurrence x percentage impact) of each Owner Contingent work element will then be summed up and inserted in the GMP as the Owner's Contingency.

The Risk Register will also assign an estimated cost for each Project Contingent work element and the percentage or probability of occurrence and percentage and probability of impact. The weighted cost (estimated cost x percentage occurrence x percentage impact) of each Project Contingent work element will then be summed up and inserted in the GMP as the Project's Contingency.

5.8.2 Criteria. The criteria for development of the Contingency will be discussed by the Parties and must ultimately be acceptable to Owner. It is understood that the Contingency amount will be negotiated between Owner and Contractor, with input from Engineer.

5.8.3 Draws upon Contingency. The Construction Contract will establish the terms and conditions associated with Contractor's use of the Contingency.

5.9 Early Work Packages. The Parties anticipate that some elements of the Work may be ready to start before the Parties arrive at a GMP or Initial GMP for the entire Work ("Early Work Packages"), prior to the Parties entering into a Construction Contract. Owner shall have the sole discretion as to whether or not to consider and authorize that Contractor perform an Early Work Package. If Owner chooses to authorize Contractor to prepare a commercial proposal for an Early Work Package, the Parties will agree upon the specific process for doing so, with the understanding that the process is intended to generally follow the submittal and negotiation process set forth above for a GMP Proposal.

5.10 Relationship between GMP Proposal Design Documents and Construction Documents.

5.10.1 Agreed-Upon Assumptions and Clarifications. Owner shall authorize and cause the Engineer to incorporate into the Construction Documents the agreed-upon assumptions and clarifications contained in an accepted GMP Proposal(s) or Initial GMP Proposal. Contractor shall promptly notify Owner and Engineer if such revised documents are inconsistent with the agreed-upon assumptions and clarifications, with the goal that such revised documents will be provided to Contractor before the execution of the Construction Contract.

5.10.2 GMP Proposal Design Documents Not Fully Completed Design Documents. The Parties acknowledge that the GMP Proposal Design Documents are not fully completed design documents, and that such documents will continue to be developed into what will eventually become the Construction Documents. In formulating the GMP Proposal(s) or Initial GMP Proposal, Contractor represents that it has accounted for this continued development, and that the GMP and GMP Proposal(s) or Initial GMP Proposal assumes that the Construction Documents will represent a reasonably inferable and logical development of the design intent of the GMP Proposal Design Documents. The GMP Proposal(s) or Initial GMP Proposal (including the GMP itself) represents Contractor's offer to construct the Project or portions of the Project in accordance with the Construction Documents, at no increase in the GMP, with the understanding that the Contingency amount accounts for clarifications, assumptions, and further development of the GMP Proposal Design Documents into the Construction Documents.

5.11 Effect and Administration of the GMP. By executing the Construction Contract with the GMP or subsequent GMPs, including the Initial GMP, if the Work is divided into separate Work packages,

Contractor will be guaranteeing that Owner's payment obligations shall not exceed the amount of the GMP accepted by the Owner, and that Contractor shall be responsible for paying all costs of completing the Work which exceed the GMP for the Work or portion of the Work, as the GMP may be adjusted in accordance with the Contract Documents. The Construction Contract will address the treatment of overall savings under the GMP (i.e., the difference between: (a) the GMP, as adjusted in accordance with the terms of the Construction Contract; and (b) the sum of: (1) the actual Cost of the Work incurred by Contractor; (2) Contractor's General Conditions; and (3) Contractor's Fee.)

ARTICLE 6

SUBCONTRACTS

6.1 Subcontractor and Supplier Participation in Performance of the Preliminary Services. If Contractor wishes to retain any Subcontractor or Supplier to provide assistance to Contractor in the performance of the Preliminary Services, Contractor shall so notify Owner. The Parties shall meet and confer about the most appropriate way of having such Subcontractors/Suppliers participate, and Owner will have ultimate authority to determine whether any Subcontractor or Supplier will be awarded a Subcontract to provide Preliminary Services under this Agreement and, if so, the commercial arrangement for such award.

6.2 Major Elements of the Work to be Performed through Subcontractors and Suppliers. It is contemplated that all major elements of the Work other than the Minor Work that may be included in the General Conditions will be carried out by Subcontractors and Suppliers. Work will be considered to be Minor Work if it is Work that has a value of \$100,000 or less. Contractor shall be responsible for dividing the Work into suitable bid packages. If Contractor desires to Self-Perform certain portions of the Work, it will seek permission from Owner to be one of the approved bidders/proposers for those specific bid packages. Contractor's bid/proposal will be evaluated in accordance with Section 6.6 below.

6.3 Procurement of Subcontractors and Suppliers for Work. All first-tier Subcontractors and Suppliers are to be awarded fixed-price subcontracts for the Work through the competitive procurement process set forth below, unless otherwise authorized by Owner in writing. Contractor shall publicly advertise for bids or proposals and receive bids or proposals from Subcontractors and Suppliers in accordance with all applicable Laws. In connection with all such procurements, Contractor shall:

- .1 Develop procurement procedures in consultation with Owner and prepare all necessary procurement documents;
- .2 Publicly advertise for bids or proposals and receive bids or proposals;
- .3 Open and review all bids or proposals in a manner that does not disclose the contents of the bids or proposals to persons not employed by Contractor, Owner or Engineer;
- .4 Evaluate the bids or proposals in accordance with the selection criteria established in the procurement documents; and
- .5 Recommend a bid or proposal for approval by Owner in accordance with such evaluation.

All bids or proposals shall be made available to Owner on request and to the public after the later of the award of the contract or the seventh (7th) day after the date of final selection of bids or proposals.

6.4 Award to Subcontractors and Suppliers for Work. Owner shall have the ultimate authority to determine which Subcontractor and/or Supplier will be awarded a Subcontract. If Contractor reviews, evaluates, and recommends to Owner a bid or proposal from a Subcontractor or Supplier, but Owner requires another bid or proposal to be accepted, Owner shall compensate Contractor by a change in price, time, or GMP for any additional cost and risk that Contractor incurs because of Owner's requirement that another bid or proposal be accepted.

6.5 Owner and Engineer's Rights to Participate in Procurement Process for Subcontractors and/or Suppliers for Work. Without limiting any of the foregoing, Contractor acknowledges and agrees that Owner and Engineer shall have the right to: (a) review and comment on all procurement documents; (b) attend any bid or proposal openings; (c) attend any meetings with prospective Subcontractors or Suppliers, including scope review meetings; (d) review all bids, proposals, and other information developed or otherwise resulting from any competitive procurement, including Contractor's tabulation, scoring or evaluation materials; and (e) otherwise participate in the negotiation and contract award process. Upon subcontract award, Contractor shall provide Owner with a description of the competitive process undertaken in connection with such subcontract award, together with copies of all material documents used in connection therewith and agreements resulting therefrom.

6.6 Ability to Self-Perform Work. Contractor shall be allowed to Self-Perform Work if: (a) Contractor submits its bid or proposal for those portions of the work in the same manner as all other Subcontractors or Suppliers; and (b) Owner determines that Contractor's bid or proposal provides the best value for Owner. If Contractor does wish to Self-Perform, Owner shall have the right to require the submittal of all bids or proposals for such work directly to Owner and/or Engineer (and not to Contractor) for review and evaluation.

6.7 Subcontractor Default. If a selected Subcontractor defaults in the performance of its work or fails to execute a subcontract after being selected in accordance with the process set forth above, Contractor may itself fulfill, without advertising, the contract requirements or select a replacement Subcontractor to fulfill the contract requirements.

ARTICLE 7

BONDS AND INSURANCE

7.1 Bonds.

7.1.1 Security Bond. Contractor shall provide the Security Bond within ten (10) days of the Effective Date. The form of the Security Bond is set forth in Exhibit 7.1.1.

7.1.2 Performance, Payment and Supply Bonds. Contractor shall, within ten (10) days of Owner's issuance of the Notice of Intent to Award, and as a condition to Owner executing the Construction Contract, provide Owner with: (a) a performance bond in the penal amount equal to one hundred percent (100%) of the GMP, which bond shall cover the faithful performance of all Contractor's obligations under the Construction Contract Documents ("Performance Bond"); (b) a payment bond in the penal amount equal to one hundred percent (100%) of the GMP ("Payment Bond"); and (c) Contractor shall provide a supply bond in the penal amount equal to one hundred percent (100%) of the value of the certain equipment and materials identified by the Owner ("Supply Bond"). The forms of the Performance, Payment and Supply Bonds are set forth in Exhibits 7.1.2(a), 7.1.2(b), 7.1.2(c) respectively. If Contractor fails to provide such bonds, Contractor may be found in material default of this Agreement, permitting Owner to terminate this Agreement for cause and draw upon the Security Bond.

7.1.3 Requirements for Surety. The Security, Performance and Payment Bonds shall be provided by a surety authorized by applicable Laws and Regulations to do business in the State of Texas, with an A.M. Best Company Rating of not less than A VIII. The surety must also be listed in the U.S. Department of Treasury's Circular 570.

7.2 Insurance. Contractor shall procure and maintain the following insurance as required by Exhibit 7.2.

ARTICLE 8 INDEMNIFICATION

8.1 **CONTRACTOR'S INDEMNITY.** TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAWS AND REGULATIONS, CONTRACTOR SHALL INDEMNIFY AND HOLD HARMLESS THE OWNER INDEMNITEES FOR, FROM AND AGAINST ANY AND ALL LOSSES, CLAIMS, SUITS, DAMAGES, LIABILITIES, DEBTS, LIENS, OBLIGATIONS, CAUSES OF ACTION, COSTS AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES, COURT COSTS, INTEREST, LITIGATION EXPENSES, AND THE COSTS OF APPELLATE PROCEEDINGS) TO WHICH ANY SUCH OWNER INDEMNITEES MAY BECOME SUBJECT, UNDER ANY THEORY OF LIABILITY WHATSOEVER ("CLAIMS") ONLY TO THE EXTENT THAT SUCH CLAIMS (OR ACTIONS IN RESPECT THEREOF) ARE CAUSED BY THE NEGLIGENT ACTS OR OMISSIONS, RECKLESSNESS OR INTENTIONAL MISCONDUCT OF ANY CONTRACTOR-RELATED ENTITY IN CONNECTION WITH THE PERFORMANCE OF THIS AGREEMENT.

8.2 **NO LIMITATION.** IF AN EMPLOYEE OF ANY CONTRACTOR-RELATED ENTITY HAS A CLAIM AGAINST ANY OWNER INDEMNITEE, CONTRACTOR'S INDEMNITY OBLIGATION SET FORTH IN SECTION 8.1 ABOVE SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR ANY CONTRACTOR-RELATED ENTITY UNDER ANY EMPLOYEE BENEFIT ACTS, INCLUDING WORKERS' COMPENSATION OR DISABILITY ACTS. THE PURPOSE OF THIS PROVISION IS NOT TO CHANGE ANY LIABILITY/BENEFIT BETWEEN ANY CONTRACTOR-RELATED ENTITY AND ITS EMPLOYEE, BUT TO PROTECT OWNER INDEMNITEES TO THE FULL EXTENT TO WHICH AN EMPLOYEE MAY ASSERT A CLAIM AGAINST AN OWNER INDEMNITEE ARISING UNDER SECTION 8.1 ABOVE.

ARTICLE 9 TERMINATION AND SUSPENSION

9.1 Termination for Cause.

9.1.1 Process. If either Party fails to perform material obligations under this Agreement, then the other Party may provide written notice to the breaching Party that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be promptly cured, within seven (7) days of the breaching Party's receipt of such notice. If the breaching Party fails to cure, or reasonably commence and diligently continue to cure, such problem, then the non-breaching Party may give a second written notice to the breaching Party of its intent to terminate within an additional seven (7) day period. If the breaching Party, within such second seven (7) day period, fails to cure, or reasonably commence and diligently continue to cure, such problem, then the non-breaching Party may declare the Agreement terminated for default by providing written notice to the breaching Party of such declaration.

9.1.2 Remedies. If Owner is terminated for cause pursuant to Section 9.1.1 above, Contractor's sole and exclusive right and remedy shall be that set forth in Section 9.2 below. If Contractor is terminated for cause, Owner shall have the remedies available to it under applicable Laws and Regulations, subject to the terms of this Agreement.

9.2 Termination for Convenience. Owner may, upon ten (10) days written notice to Contractor, terminate this Agreement, in whole or in part, for the convenience of Owner, without prejudice to any right or remedy otherwise available to Owner. Upon receipt of such notice, Contractor shall immediately discontinue all Preconstruction Services affected unless such notice directs otherwise. In the event of a termination for convenience, Contractor's sole and exclusive right and remedy shall be to be paid for all Preconstruction Services properly performed through the date of the notice of termination. Contractor shall not be entitled to any overhead or profit on unperformed Preconstruction Services or services of any other kind. In no case shall Contractor or any other Contractor-Related Entity be entitled to anticipatory or unearned profits, unabsorbed overhead, opportunity costs, or consequential or other damages as a result of Owner's termination for convenience.

9.3 Owner's Right to Suspend. Owner may order Contractor in writing to suspend, delay or interrupt all or any part of the Preconstruction Services without cause for such period of time as Owner may determine to be appropriate for its convenience. Contractor shall be entitled to seek an adjustment to its compensation and time of performance from such suspension.

9.4 Termination for Failure to Comply with Subchapter J, Chapter 552, Government Code. This clause is applicable to contracts that have a stated expenditure or result in the expenditure of at least \$1 million.

The requirements of Subchapter J, Chapter 552, Government Code, may apply to this Agreement and the Contractor agrees that this Agreement can be terminated if the Contractor knowingly or intentionally fails to comply with a requirement of that subchapter.

ARTICLE 10

BOOKS AND RECORDS

10.1 Retention and Audit of Books and Records. Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles, consistently applied, and as may be provided in the Contract Documents. During the Book and Records Period, Owner and its accountants shall be afforded access to, and the right to audit from time-to-time, upon reasonable notice, all Books and Records relating to the Work, all of which Contractor shall preserve during the Books and Record Period. Such inspection shall take place at Contractor's offices during normal business hours unless another location and time is agreed to by the Parties. Owner may take possession of such Books and Records by reproducing such Books and Records for off-site review or audit. When requested in Owner's written notice of examination and/or audit, Contractor shall provide Owner with copies of electronic and electronically stored Books and Records in a reasonably usable format that allows Owner to access and analyze all such Books and Records. For Books and Records that require proprietary software to access and analyze, Contractor shall provide Owner with the means to do so, including a license authorizing Owner to access and analyze all such Books and Records.

10.2 Items Not Subject to Audit. For the avoidance of doubt, Owner shall not have the right to audit any items for which it has accepted a lump sum proposal or agreed upon a fixed price/lump sum, including, but not limited to any multipliers or markups agreed to by the Owner and Contractor as part of

this Agreement, which are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement. Notwithstanding any language of this Agreement, the Parties agree that Owner is subject to the Texas Public Information Act (“Act”) and Contractor will provide Owner any and all information related to this Project necessary to comply with the Act.

10.3 Flow-Down into Subcontracts. Contractor shall insert a clause containing all the provisions of this Article 10 in all Subcontracts.

10.4 Contracting Information. This clause is applicable to contracts that have a stated expenditure or result in the expenditure of at least \$1 million.

The Contractor must preserve all contracting information related to this contract as provided by the records retention schedule requirements applicable to Owner for the duration of this contract. Contractor will promptly provide Owner any contracting information related to this contract that is in the custody or possession of the Contractor on request of Owner. On completion of this Agreement, Contractor will either provide at no cost to Owner all contracting information related to this contract that is in the custody or possession of the Contractor or preserve the contracting information related to this contract as provided by the records retention requirements applicable to Owner.

ARTICLE 11

LAWS AND REGULATIONS

11.1 Laws and Regulations. This Agreement is based on the Laws and Regulations applicable as of the Effective Date. Changes to these requirements after the Effective Date may be the basis for modifications to Contractor’s compensation, scope, and schedule. Contractor shall perform the Preconstruction Services in accordance with all Laws and Regulations and shall provide all notices applicable to the Preconstruction Services as required by all Laws and Regulations.

11.2 Change in Laws and/or Regulations. Contractor shall be entitled to an adjustment in its compensation or time to perform the Preconstruction Services for changes in Laws or Regulations enacted after the Effective Date, provided, however, that no adjustments shall be allowed for changes in Laws or Regulations relating to any Contractor-Related Entity’s corporate existence or the maintenance of its business, or a change in Laws or Regulations affecting labor or employment matters.

ARTICLE 12

LIMITATIONS OF LIABILITY

12.1 Waiver of Consequential Damages. To the fullest extent permitted by law, and notwithstanding any other provision of the Agreement, in no event, whether arising out of contract, breach of warranty (express or implied), tort (including negligence), strict liability, or any other cause of or form of action whatsoever, shall either Party be liable to the other for any consequential damages (including but not limited to damages for loss of use, loss of profits or anticipated profits, loss of revenue, and loss of business opportunity) arising out of or in connection with the performance or non-performance of its obligations under this Agreement.

ARTICLE 13
WORK PRODUCT

13.1 Owner's Rights in Work Product. Contractor hereby assigns and conveys to Owner all right, title, and interest, including all copyrights, patents, or any other intellectual property rights (but excluding Pre-Existing Intellectual Property) in all Work Product and all ideas or methods specifically developed for such Work Product. All Work Product will become the property of Owner on the Owner's payment to Contractor of monies due in accordance with this Agreement and not subject to a good faith dispute. Owner's use of any Work Product for any purpose other than the Project, without the involvement of Contractor, shall be at its own risk, and Contractor shall have no liability to Owner for or relating to any such use.

13.2 Contractor-Related Entities. Except as specifically provided in Section 13.4 below, no Contractor-Related Entity will own or claim any copyright, patent, or any other intellectual property right in or with respect to any Work Product or ideas or methods specifically developed for such Work Product.

13.3 Contractor Right to Retain Copies of Work Product. Contractor may make and retain copies of the Work Product for information, reference and use by the Contractor-Related Entities solely with respect to the Work. No Contractor-Related Entity may use the Work Product for any other purpose without the specific written consent of Owner.

13.4 Pre-Existing Intellectual Property. Owner acknowledges and agrees that in the performance of services under this Agreement, Contractor may use proprietary algorithms, software, hardware, databases, other background technology, and other proprietary information that Contractor developed or licensed from third parties prior to the Effective Date ("Pre-Existing Intellectual Property"). Without limiting Owner's rights with respect to the Work Product or the Project, Contractor will retain all right, title, and interest in such Pre-Existing Intellectual Property. However, Owner shall have the irrevocable, perpetual, and unrestricted right from and after the Effective Date to use (or permit use of) all Pre-Existing Intellectual Property incorporated in the Work Product or the Project, all oral information received by Owner in connection with the Work, and all ideas or methods represented by Pre-Existing Intellectual Property incorporated in the Work Product or the Project, in each case without additional compensation. Contractor hereby licenses such irrevocable, perpetual, and unrestricted rights to Owner. Owner's use of such license rights for any purpose other than the Project shall be at its own risk, and Contractor shall have no liability to Owner for or relating to any such use.

ARTICLE 14
MISCELLANEOUS

14.1 Compliance with Owner's Policies.

14.1.1 Drug and Alcohol-Free Workplace. Owner maintains a drug and alcohol-free workplace in accordance with the Drug-Free Workplace Act of 1988. Contractor shall publicize a statement notifying its employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace, including at the Plant.

14.1.2 Smoking. Owner maintains specific rules regarding smoking on Owner's properties. Contractor shall adhere to such rules at the Plant.

14.1.3 Firearms. Owner maintains specific rules regarding firearms and Contractor shall adhere to such rules at the Plant.

14.1.4 Good Faith Efforts to Obtain Minority Participation in the Project. Owner encourages the participation of Small Locally-Owned Businesses, Minority Business Enterprises and Women-Owned Business Enterprises. The goals and requirements of this program are set forth in Exhibit 14.1.4, and Contractor shall comply with the terms of such Exhibit.

14.1.5 Owner's Safety Requirements. While at the Plant, Contractor shall comply with Owner's Safety Manual (dated June 12, 2018).

14.1.6 Israel. Contractor confirms that it does not boycott Israel and will not do so during the term of this Agreement.

14.1.7 Traffic Safety. Owner maintains specific rules regarding traffic safety on Owner's properties. Contractor shall adhere to such rules at the Plant.

14.1.8 Project Wage Rates and Apprenticeship Requirements. The wage rates and other requirements of Exhibit 14.1.8 are applicable to all work performed by Contractor under this Agreement, and all work under the Construction Contract. Contractor confirms that it will comply with the terms of such Exhibit.

14.1.9 Energy Companies. In accordance with Chapter 2274 of the Texas Government Code, Contractor affirms it does not boycott energy companies and will not boycott energy companies during the term of this Agreement.

14.1.10 Firearm Entity or Trade Association. In accordance with Section 2274.002 of the Texas Government Code, Contractor does not have a practice, policy, guidance or directive that discriminates against a firearm entity or firearm trade association and will not discriminate during the term of this Agreement against a firearm entity or firearm trade association.

14.1.11 Foreign-Owned Company. Contractor affirms it is not a foreign-owned company that is owned or controlled by citizens of or directly controlled by the government of China, Iran, North Korea, Russia or a designated country pursuant to Chapter 2274 of the Texas Government Code. Additionally, Contractor affirms it is not a company that is headquartered in China, Iran, North Korea, Russia or a designated country pursuant to Chapter 2274 of the Texas Government Code.

14.2 Contractor's Certifications Contractor certifies that it has not engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing this Agreement. For the purposes of this Section 14.2:

.1 "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value likely to influence the action of a public official in the bidding process or in the Agreement execution;

.2 "fraudulent practice" means an intentional misrepresentation of facts made; (a) to influence the bidding process or the execution of this Agreement to the detriment of Owner; (b) to establish bid or contract prices at artificial non-competitive levels; or (c) to deprive Owner of the benefits of free and open competition;

.3 "collusive practice" means a scheme or arrangement between two or more proposers/bidders to this Agreement, with or without the knowledge of Owner, a purpose of which is to establish bid or contract prices at artificial, non-competitive levels; and

.4 “coercive practice” means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the bidding process or affect the execution of the Agreement.

14.3 Dispute Resolution and Governing Law.

14.3.1 Commitment to Resolve Disputes. The Parties are fully committed to working with each other and agree to communicate regularly with each other at all times so as to avoid or minimize and resolve any disputes. If any disputes do arise, Contractor and Owner each commit to resolving such disputes in an amicable, professional and expeditious manner.

14.3.2 Mediation. If a dispute cannot be resolved on terms satisfactory to both Parties, the Parties may mutually agree to mediate the dispute through non-binding mediation. For the avoidance of doubt, mediation is a condition precedent to the initiation of litigation. Any mediation will be based upon a process mutually agreed upon by the Parties.

14.3.3 Litigation. Any and all disputes between the Parties shall be finally resolved through litigation. Legal proceedings between the Parties shall be solely and exclusively initiated and maintained in a court of competent jurisdiction sitting in El Paso County, Texas. Contractor irrevocably consents to the jurisdiction of such courts in any such proceeding and waives any objection it may have to the jurisdiction of any such proceeding.

14.3.4 Governing Law. This Agreement shall be governed by the laws of the state of Texas, without giving effect to its conflict of law principles.

14.4 No Third Party Beneficiaries. Nothing under this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than Owner and Contractor, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Contractor and not for the benefit of any other party.

14.5 Independent Contractor. Contractor is and will be an independent contractor and whatever measure of control Owner exercises over the work or deliverable pursuant to the Agreement will be as to the results of the work only. No provision in this Agreement will give or be construed to give Owner the right to direct Contractor as to the details of accomplishing the work or deliverable. These results will comply with all applicable Laws and Regulations.

14.6 Confidential Information. Confidential Information is defined as information which is determined by the transmitting Party to be of a confidential or proprietary nature and: (a) the transmitting Party identifies as either confidential or proprietary; (b) the transmitting Party takes steps to maintain the confidential or proprietary nature of the information; and (c) the document is not otherwise available in or considered to be in the public domain. Subject to applicable Laws, such as the Texas Public Information Act, the receiving Party agrees to maintain the confidentiality of the Confidential Information and agrees to use the Confidential Information solely in connection with the Project. Notwithstanding the language of this section or any other section in this Agreement, Contractor understands that Owner is subject to the Act and that Owner will follow all the requirements of the Act. Owner will not be liable for disclosure of information pursuant to the Act or under court order.

14.7 Assignment. Neither the Agreement nor any right, privilege, delegation, or interest thereunder may be assigned or transferred in whole or in part by Owner or Contractor without the prior

written consent of the other Party, and any attempted assignment or transfer without such written consent shall be void.

14.8 Severability. If any provision or any part of a provision of this Agreement is held as a matter of law to be unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall be enforceable without such provision.

14.9 No Waiver. The failure of either Owner or Contractor to insist, in any one or more instances, on the performance of any of the obligations required by the other under the Agreement shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance.

14.10 Survival. The obligations of the Parties under Article 8 (Indemnity), Article 10 (Books and Records), Article 12 (Limitations of Liability), Article 13 (Work Product) and Section 14.6 (Confidential Information) shall survive completion or termination of this Agreement.

14.11 Notice. Whenever the Agreement requires that notice be provided to the other Party, notice will be deemed to have been validly given: (a) if delivered in person to the individual intended to receive such notice; or (b) four (4) days after being sent by registered or certified mail, postage pre-paid, with return receipt requested, to the address indicated in the Agreement, or (c) one (1) business day after being sent by overnight delivery via a nationally recognized courier service (e.g., FedEx or UPS), postage, transmittal or shipping charges prepaid, to the address set forth below:

If to Contractor:

Smithco Construction, Inc.
Brett Smith, Vice President
6 King Canyon Loop
Caballo, NM 87931

If to Owner:

El Paso Water Utilities – Public Service Board
President/CEO
1154 Hawkins Blvd.
El Paso, TX 79925

Copy to:

El Paso Water Utilities – Public Service Board
Chief Technical Officer
1154 Hawkins Blvd.
El Paso, TX 79925

14.12 Exhibits. The following exhibits (“Exhibits”) are specifically made part of, and incorporated by reference into, this Agreement:

Exhibit 1.1(a)	Site Description
Exhibit 2.1	Contractor’s Preconstruction Services
Exhibit 2.6	List of Key Personnel
Exhibit 4.1	Contractor’s Compensation
Exhibit 5.2.1	Elements of the GMP
Exhibit 7.1.1	Form of Security Bond

Exhibit 7.1.2(a)	Form of Performance Bond
Exhibit 7.1.2(b)	Form of Payment Bond
Exhibit 7.1.2(c)	Form of Supply Bond
Exhibit 7.2	Insurance Requirements
Exhibit 14.1.4	Good Faith Efforts to Obtain Minority Participation in the Project
Exhibit 14.1.8	Project Wage Rates and Apprenticeship Requirements

14.13 Force Majeure. If, by reason of Force Majeure, either party hereto will be rendered unable wholly or in part to carry out its obligations under this Agreement then such party will give notice and full particulars of such Force Majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied upon, and the obligation of the party giving such notice, so far as it is affected by such Force Majeure, will be suspended for only thirty (30) days during the continuance of the inability then claimed, except as hereinafter provided, but for no longer period, and such party will try to remove or overcome such inability with all reasonable dispatch.

The term Force Majeure as employed herein, will mean acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemies, orders of any kind of government of the United States or the State of Texas or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquake, fires, hurricanes, storms, floods, washouts, droughts, arrests, restraint of government and people, civil disturbances, explosions, breakage or accidents to machinery, pipelines, or canals. It is understood and agreed that the settlement of strikes and lockouts will be entirely within the discretion of the party having the difficulty, and that the above requirement that any Force Majeure will be remedied with all reasonable dispatch will not require the settlement of strikes and lockouts by acceding to the demands of the opposing party or Parties when such settlement is unfavorable in the judgment of the party having the difficulty. If a party is unable to comply with the provisions of this Agreement by reason of Force Majeure for a period beyond thirty days after the event or cause relied upon, then upon written notice after the thirty (30) days, the affected Party shall be excused from further performance under this contract.

14.14 Entire Agreement. This Agreement and accompanying Exhibits is intended by the Parties as a final expression of their agreement and is intended also as a complete and exclusive statement of the terms of their Agreement. No course of prior dealings between the parties and no usage of the trade will be relevant to supplement or explain any term used in this Agreement. Acceptance or acquiescence in a course of performance rendered under this Agreement will not be relevant to determine the meaning of this Agreement even though the accepting or acquiescing party has knowledge of the performance and opportunity for objection.

IN WITNESS WHEREOF, intending to be bound, the Parties have entered into this Agreement as of the Effective Date.

CONTRACTOR:

SMITHCO CONSTRUCTION, INC.

OWNER:

EL PASO WATER UTILITIES – PUBLIC SERVICE BOARD

By: _____

By: _____
JOHN E. BALLIEW
PRESIDENT / CEO

CMAR

CMAR Subconsultants



Attachment D – Financial Disclosure and Qualification Statement

QUALIFICATION AND FINANCIAL DISCLOSURE STATEMENT

BIDDER:

PROJECT NAME:

**GMP 1: EARLY EQUIPMENT
PACKAGE 1**

1. ORGANIZATION

- 1.1 How many years has your organization been in business as a Contractor?
- 1.2 How many years has your organization been in business under its present business name?
- 1.2.1 Under what other or former names has your organization operated?
- 1.3 If your organization is a corporation, answer the following:
- 1.3.1 Date of incorporation: _____
- 1.3.2 State of incorporation: _____
- 1.3.3 President's name: _____
- 1.3.4 Vice-president's name(s): _____

- 1.3.5 Secretary's name: _____
- 1.3.6 Treasurer's name: _____
- 1.4 If your organization is a partnership, answer the following:
- 1.4.1 Date of organization: _____
- 1.4.2 Type of partnership (if applicable): _____
- 1.4.3 Name(s) of general partner(s): _____
- 1.5 If your organization is an individually owned sole proprietorship, answer the following:
- 1.5.1 Date of organization: _____
- 1.5.2 Name of owner: _____
- 1.6 If the form of your organization is other than those listed above, describe it and name the principals:

2. LICENSING

- 2.1 List jurisdictions and trade categories in which your organization is legally qualified to do business, and indicate registration or license numbers, if applicable. Indicate name, license number and expiration date for Master Electrician or other trade required under the Instructions to Bidders section of this Bid.
- 2.2 List jurisdictions in which your organization's partnership or trade name is filed.

3. EXPERIENCE (Revised 3/18/96, 9/9/96, 12/10/97, 10/9/98, 7/13)

- 3.1 List the categories of work that your organization normally performs with its own forces.
- 3.2 Claims and Suits. (If the answer to any of the questions below is yes, please attach details.)
 - 3.2.1 Has your organization ever failed to complete any work awarded to it?
 - 3.2.2 Are there any judgments, claims, arbitration proceedings, or suits pending or outstanding against your organization or its officers?
 - 3.2.3 Has your organization filed any lawsuits or requested arbitration with regard to construction contracts within the last five years?
- 3.3 Within the last five years, has any officer or principal of your organization been an officer or principal of another organization when it failed to complete a construction contract? (If the answer is yes, please attach details.)
- 3.4 On a separate sheet, list major construction projects your organization has in progress, giving the name of project, owner, architect, contract amount, percent complete and scheduled completion date.
 - 3.4.1 State total worth of work in progress and under contract:
- 3.5 On a separate sheet, list the major projects your organization has completed in the past five years, giving the name of project, owner, architect, contract amount, date of completion and percentage of the cost of the work performed with your own forces.
 - 3.5.1 State annual amount of construction work performed each year during the past five years:
- 3.6 On a separate sheet, list the construction experience and present commitments of the key individuals of your organization. Submit resumes of Key Personnel (as defined in Section 00100, Instructions to Bidders). By execution of this bid, the Bidder certifies that its Resident Superintendent has the authority to act on behalf of the Contractor at all times. No substitution shall be made without the written approval of the Owner and the Engineer based upon acceptance of the qualifications of the proposed substitute.
- 3.7 On a separate sheet, provide evidence that the Bidder meets the minimum criteria called out in Section 00100, Instructions to Bidders. Provide similar evidence for Subcontractors, if required by Bid or by Engineer.
- 3.8 Provide the MWBE CERTIFICATION SUMMARY FORM found at the end of Section 00300.

4. REFERENCES

4.1 Trade References:

4.2 Bank References:

4.3 Surety:

Name and telephone number of Bonding Company: _____

Name, telephone, and address of Agent: _____

5. FINANCING

5.1 Financial Statement

5.1.1 Attach a financial statement, preferably audited, including your organization's latest balance sheet and income statement showing the following items:

- a. Cash Flow Statement
- b. Notes to Financial Statement
- c. Auditor Statement
- d. Comparison Statements, if available

5.1.2 Name and address of firm preparing attached financial statement, and date thereof.

5.1.3 Is the attached financial statement for the identical organization named on page one?

5.1.4 If not, explain the relationship and financial responsibility of the organization whose financial statement is provided (e.g., parent-subsubsidiary).

5.2 Will the organization whose financial statement is attached act as guarantor of the contract for construction?

6. SIGNATURE

6.1 To be executed by a Principal of the firm authorized to certify the foregoing information:
_____, being duly sworn, deposes and says that the information provided herein is true and sufficiently complete so as not to be misleading.

6.2 Dated at _____ this _____ day of _____, 20____.

Name of Organization: _____

By: _____

(Printed Name)

Title: _____