



Colorado Springs Utilities

It's how we're all connected

PROFESSIONAL SERVICES AGREEMENT

PROJECT TITLE: SAMPLE

CONTRACT NUMBER: 2xxxxxxx

Between

Colorado Springs Utilities

and

(insert firm's name here)

Effective Date:

CSU Project Manager

(insert name here)

P.O. Box 1103, MC

Colorado Springs, CO 80947-(mail code)

Phone Number: 719-668-

Fax Number: 719-668-

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement (“Agreement”) is made and entered into as of the SAMPLE day of _____, 20____, (“Effective Date”) by and between Colorado Springs Utilities (“UTILITIES”) an enterprise of the City of Colorado Springs, a Colorado home rule city and municipal corporation, with its principal place of business at 121 S. Tejon Street, Colorado Springs, Colorado 80903, and _____ (“CONTRACTOR”), a (enter State of incorporation) corporation, with its principal place of business at _____.

Table of Contents

1. Scope of Work	14. Appropriation of Funds
2. Term	15. Termination
3. Independent Contractor	16. Copyrights/Intellectual Property
4. Payment	17. Non-Discrimination
5. Confidentiality	18. Audits
6. Subcontractors	19. Severability
7. Warranties	20. Assignment
8. Indemnification / Liabilities	21. Compliance with Laws and Regulations
9. Insurance	22. Governing Law
10. Representatives and Notice	23. Survival
11. Changes in Work	24. Counterparts; Facsimile Signatures
12. Force Majeure	25. Time of the Essence
13. Dispute Resolution	26. Entire Agreement

1. Scope of Work. During the term of this Agreement, CONTRACTOR shall perform the services either as defined in the specific Statement of Work attached hereto as Exhibit A (“Services”). However, in the event Exhibit A also provides for the issuance of individual Task Order(s), such Services shall be performed in accordance with Section 1.1 below.

1.1. Task Order Conditions.

- (a) Each Task Order (using form #F04-09727 as included in Exhibit A) will include a specific scope of Services and schedule, and shall be mutually agreed upon in advance by the parties in writing.
- (b) The amount of Services to be performed by CONTRACTOR under Task Orders hereunder, if any, is not guaranteed, and actual Services shall be subject to and in accordance with the applicable Task Order.
- (c) Invoicing per Section 4 below shall be separated by, and comply with, instructions in each specific Task Order.

1.2. The Services shall be performed at the rates set forth in Exhibit B (“Rates”).

2. **Term.** The term of this Agreement shall be from the Effective Date through _____ (“Term”), unless otherwise extended by mutual written agreement of the parties.

3. **Independent Contractor.** During the Term of this Agreement, CONTRACTOR shall act at all times as an independent contractor and shall have the responsibility for and control over the details and means of performing the work. CONTRACTOR acknowledges it has the duty to provide continuous, adequate supervision of its personnel, consultants and subcontractors, if any. Nowhere in this Agreement shall it be construed or implied that CONTRACTOR or any of its consultants, subcontractors, affiliates, employees, agents, or representatives are employees, representatives, or agents of UTILITIES. CONTRACTOR shall be subject to the direction of UTILITIES only with respect to the scope of the work and the general results required. CONTRACTOR shall not make any commitment nor incur any charge or expense in UTILITIES’ name without the prior written approval of UTILITIES.

4. **Payment.**

4.1. UTILITIES shall pay CONTRACTOR for Services performed or furnished in accordance with CONTRACTOR's Rates attached as Exhibit B. UTILITIES shall pay CONTRACTOR for Reimbursable Expenses incurred by CONTRACTOR or CONTRACTOR's subcontractors as set forth in Exhibit B. “Reimbursable Expenses” shall mean those reasonable and necessary expenses pre-approved by UTILITIES in writing and submitted in accordance with UTILITIES’ then-current travel and expense policy, available at www.csu.org.

4.2. Invoices will be prepared in accordance with CONTRACTOR's standard invoicing practices and will be submitted to UTILITIES by CONTRACTOR, unless otherwise agreed in writing.

4.3. Each invoice shall be accompanied by supporting documentation as required by UTILITIES. UTILITIES, a governmental entity, is exempt from taxes. Unless otherwise specified in this Agreement, payments shall be made on partial deliveries accepted by UTILITIES if the amount due on the deliveries is at least \$1000 or 50% of the total contract price. Original invoices for payments shall be submitted and addressed to:

**Accounts Payable – MC 929
Colorado Springs Utilities
PO Box 1103
Colorado Springs, Colorado 80947-0929**

Unless otherwise stated in this Agreement, a copy of each invoice, duly marked “COPY”, shall be sent directly to the project manager or contract administrator as identified in this Agreement or as otherwise advised in writing.

4.4. Net Payment of undisputed invoices is due and payable Net Thirty (30) days of UTILITIES’ receipt of a complete and accurate invoice, notwithstanding anything that may be printed on such invoice. These payment terms shall also be subject to discounts for prompt payment, if any, as set forth in Exhibit B, or any other applicable discounts offered by CONTRACTOR for any reason, including the terms of any applicable price warranty. In the event UTILITIES disputes or contests all or any part of any invoice, UTILITIES reserves the right to request a replacement invoice stating only the undisputed amount, and to promptly pay any undisputed amount and to withhold payment of any disputed amount,

without waiving any of its claims or defenses to payment of the disputed amount. In the event that CONTRACTOR issues a replacement invoice for any undisputed amount, it is agreed that such issuance of a replacement invoice does not constitute a waiver of CONTRACTOR's rights with regard to the disputed amount.

- 4.5. UTILITIES is committed to paying invoices within the terms of the Agreement. UTILITIES will not pay any late charges or service charges that may be incurred due to late payment.
- 4.6. In the event of any termination CONTRACTOR will be entitled to invoice UTILITIES and will be paid in full for all services accepted and all reasonable reimbursable expenses incurred through the effective date of termination. In the event of termination by UTILITIES for convenience or by CONTRACTOR for cause, CONTRACTOR shall be entitled to invoice UTILITIES and shall be paid a reasonable amount for services and expenses directly attributable to termination, such as reassignment of personnel, costs of terminating contracts with CONTRACTOR's subcontractors, and other related close-out costs, using methods and rates for additional Services as set forth in this Agreement.

5. Confidentiality.

- 5.1. CONTRACTOR acknowledges that UTILITIES is a public entity subject to the provisions of the Colorado Public Records Act, C.R.S. § 24-72-201 *et seq.* Any confidential and/or proprietary information that either party discloses to the other with respect to this Agreement shall be designated as confidential and proprietary by the disclosing party at the time of disclosure. In addition to the above Contractor acknowledges that UTILITIES is subject to the provisions of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) 15 U.S.C. § 1681 *et seq.* CONTRACTOR acknowledges that it has been or may be exposed to UTILITIES’ customer information. Despite any provision to the contrary, any customer information, including but not limited to, names addresses, telephone numbers, or personal financial information of past or present users of Utilities is deemed Confidential Information, whether or not it is marked as confidential information. Contractor agrees that it shall not use, commercialize or disclose such Confidential Information to any person or entity, except to its own employees having a “need to know”. Furthermore, CONTRACTOR shall burn, pulverize, or shred papers and destroy or erase all electronic media that contain UTILITIES’ customer information on an annual basis (each year beginning as of the Effective Date) or more frequently as is reasonable so that such Confidential Information cannot practically be read or reconstructed. UTILITIES has the right, but not the obligation, to audit CONTRACTOR compliance with this Paragraph by providing CONTRACTOR written notice 24 hours in advance of such audit.
- 5.2. The recipient shall hold such information confidential to the extent provided by law and shall not engage in any use or disclosure of such information not expressly provided for in this Agreement. In the event either party receives a request for such confidential and/or proprietary information from a third party, notice thereof shall promptly be given to the other party. The recipient shall take all reasonable steps to prevent any unauthorized possession, use, transfer or disclosure of such confidential information. Should the recipient learn of any such unauthorized possession, use, transfer or disclosure, it shall promptly notify the other party. If requested, the recipient shall deliver to the other party all confidential information (including all copies) disclosed to it with respect to this

Agreement.

- 5.3. The disclosure provisions of this section shall not apply to information that a) the parties had in their possession prior to disclosure by the other party; b) becomes public knowledge through no fault of CONTRACTOR; c) the recipient lawfully acquires from a third party not under an obligation of confidentiality to the disclosing party; or d) is required to be disclosed by law or court order.
- 5.4. CONTRACTOR shall not disclose any such confidential information or documents to any third party without the prior written authorization of UTILITIES.

6. Subcontractors. CONTRACTOR may retain subcontractors to carry out the Services outlined in this Agreement. UTILITIES reserves the right to approve all subcontractors prior to their use by CONTRACTOR. There shall be no relationship, fiduciary or otherwise, between UTILITIES and the subcontractors hired by CONTRACTOR. CONTRACTOR shall ensure that all subcontractors retained by CONTRACTOR acknowledge this Agreement, including the confidentiality provisions, in writing.

7. Warranties.

- 7.1. CONTRACTOR agrees to perform Services with the same degree of care, skill and diligence as is ordinarily possessed and exercised in the same profession under similar circumstances and shall ensure that its subcontractors, if any, have the level of skill in the area commensurate with the requirements of the Services to be performed. CONTRACTOR shall at all times attempt to serve the best interests of UTILITIES in connection with such Services and shall advise UTILITIES when services it requests are not in UTILITIES' best interests.
- 7.2. If it is shown within twenty-four (24) months of completion of the Services that CONTRACTOR or its subcontractors committed an error in the performance of the Services or that normal standards of care and diligence have not been met, and UTILITIES promptly notifies CONTRACTOR of such an error or deficiency, CONTRACTOR shall perform corrective Services at no cost to UTILITIES as may be necessary to remedy the error or deficiency. If CONTRACTOR does not promptly comply with the terms of such instructions, or in an emergency where delay would cause serious risk of loss or damage, UTILITIES may have the corrective Services performed by a third party, and all costs, losses, and damages arising out of or relating to such correction will be paid by CONTRACTOR.
- 7.3. CONTRACTOR warrants that it is the lawful owner or licensee of any software programs or other materials used by CONTRACTOR in the performance of the services called for in this Agreement and has all rights necessary to grant to UTILITIES any licenses necessary to use any equipment or intellectual property installed or specified by CONTRACTOR.
- 7.4. CONTRACTOR warrants that all services will meet applicable UTILITIES specifications and agrees to correct deficiencies in any services performed, in whole or in part, by the CONTRACTOR, which UTILITIES can demonstrate does not meet the applicable UTILITIES specifications, provided written notice is given to CONTRACTOR within one (1) year from date of final acceptance.
- 7.5. CONTRACTOR warrants that any software programs developed, in whole or part, by the

CONTRACTOR (this excludes commercial, off-the-shelf unaltered software developed exclusively and completely by third parties) for use by UTILITIES will be free from clerical errors, viruses, time bombs, hidden files, malicious code, or any other contaminants, including, but not limited to, codes, commands or instructions that may be used to alter, delete, damage or disable the Licensed Program, other software, UTILITIES information or other UTILITIES property and will perform the functions defined in the applicable UTILITIES specifications. CONTRACTOR agrees to correct any such error or failure to perform which affects the functional performance of the system in which the program is used, provided written notice is given to CONTRACTOR within one (1) years from date of final acceptance. CONTRACTOR would not be responsible to the extent any program or equipment with which it is used is modified by UTILITIES or if programs are improperly loaded by UTILITIES. UTILITIES shall be responsible for any additional CONTRACTOR expenses which result from such UTILITIES modifications or improper loading.

- 7.6. CONTRACTOR shall obtain from all suppliers and manufacturers any and all warranties and guarantees of such suppliers and manufacturers received for any products obtained on behalf of UTILITIES as part of CONTRACTOR's performance of this Agreement, whether or not specifically required by the Scope of Work, and shall assign such warranties and guarantees to UTILITIES.
- 7.7. CONTRACTOR shall guarantee that all products obtained on behalf of UTILITIES for the purpose of performing this Agreement shall have warranties that are transferable to UTILITIES.

8. Indemnification/Liability.

- 8.1. To the fullest extent permitted by law, CONTRACTOR hereby releases UTILITIES and shall fully protect, defend, indemnify and hold harmless UTILITIES, the City of Colorado Springs, their officers, City Council, UTILITIES Board, directors, employees, agents and representatives from and against any and all claims, costs (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or other dispute resolution costs), losses, damages, causes of action, or liability of any nature to the extent caused by the willful misconduct or negligent, reckless or tortious acts or omissions of CONTRACTOR or anyone for whose acts CONTRACTOR may be liable in the performance of its obligations under this Agreement.
- 8.2. Infringement/Indemnity. CONTRACTOR will indemnify UTILITIES against a claim that any product, including but not limited to software, as provided by CONTRACTOR to UTILITIES and used within the scope of this Agreement, infringes any copyright or any United States patent or trademark, or incorporates any misappropriated trade secret (a "Claim"). CONTRACTOR will pay any liabilities, costs, damages, or expenses, including reasonable attorneys' fees, attributable to such a Claim that are incurred by UTILITIES and/or awarded against UTILITIES in a final judgment or settlement approved in advance and in writing by CONTRACTOR, provided that UTILITIES notifies CONTRACTOR in writing within thirty days of the Claim.
 - (a) In the event that any product, including but not limited to software, or any part thereof becomes, or in CONTRACTOR's opinion is likely to become, the subject of a valid claim of infringement, CONTRACTOR may, at its option, (i) obtain the right

for UTILITIES to continue using the product or software; or (ii) replace or modify the product or software so that it is no longer infringing; or (iii) if neither (i) nor (ii) are reasonably practicable, terminate the applicable license(s) and remove the product or software. If CONTRACTOR so terminates the applicable license(s) and removes the product or software, CONTRACTOR shall refund to UTILITIES the license fees paid. Such refund will not limit any other remedies available to UTILITIES pursuant to this Agreement.

- (b) The foregoing indemnity shall not apply to any infringement claim to the extent it arises from (i) products or software that have been modified by anyone other than CONTRACTOR or its subcontractors; and/or (ii) UTILITIES use of the products or software with other software or hardware, where such other software or hardware gave rise to the infringement claim.

8.3. Nothing in this Agreement shall be interpreted to limit or prevent the protections afforded to UTILITIES or the City of Colorado Springs under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*

9. Insurance.

9.1. For the duration of this Agreement, CONTRACTOR shall, at his own expense, procure and maintain insurance and shall require all subcontractors of all tiers to provide and maintain insurance of the type and with limits as set forth below, on all of its operations, and with companies authorized to do business in the State of Colorado and rated by A.M. Best's Rating as A:VIII or better, or with companies acceptable to UTILITIES, as follows:

- (a) **Workers' Compensation and Employer's Liability Insurance.** Workers' Compensation insurance shall be provided as required by an applicable law or regulation. Employer's liability insurance shall be provided in amounts not less than \$500,000 each accident for bodily injury by accident, with a \$500,000 policy limit for bodily injury by disease, and \$500,000 each employee for bodily injury by disease.
- (b) **General Liability Insurance.** Commercial General Liability insurance covering all operations by or on behalf of CONTRACTOR providing insurance for bodily injury liability and property damage liability for the limits of liability indicated below and including coverage for:
 - (1) premises and operations liability;
 - (2) products and completed operations liability;
 - (3) contractual liability insuring the obligations assumed by CONTRACTOR in this Agreement.
 - (4) broad form property damage (including completed operations);
 - (5) X.C.U. Coverage – If the Agreement requires any work procedures involving blasting, excavating, tunneling, or other underground work, the liability coverage shall include coverage commonly referred to as X.C.U. for explosion, collapse and underground hazards.
 - (6) personal injury liability; and

- (7) railroad liability within 50' of railroad, if working within the vicinity of any railroad, bridge, trestle, track, roadbed, tunnel, underpass or crossing.

Except with respect to bodily injury and property damage included within the products and completed operations, the aggregate limits, where applicable, shall apply separately to Services under this Agreement.

The limits of liability shall not be less than:

\$1,000,000 each occurrence (combined single limit for bodily injury and property damage)

\$1,000,000 for Personal Injury Liability

\$2,000,000 Aggregate for Products-Completed Operation

\$2,000,000 General Aggregate

UTILITIES and the City of Colorado Springs, their officers, City Council, Utilities Board and employees shall be named Additional Insureds.

- (c) **Automobile Liability Insurance** (Bodily Injury and Property Damage Liability) including coverage for all owned, hired and non-owned automobiles. The limits of liability shall not be less than \$1,000,000 Combined Single Limit for each accident. CONTRACTOR's Automobile Liability insurance policy shall include coverage for Automobile Contractual Liability.
- (d) **Professional Liability.** Professional Liability insurance including errors and omissions coverage in an amount of not less than \$1,000,000 per occurrence (or claims made) and aggregate for licensed professional consultants.
- (e) **Pollution Liability.** In the event the Services involve any excavation, subsurface, underground, or dewatering work, CONTRACTOR must carry at all times during the term of this Agreement, and for twenty-four (24) months following termination of this Agreement, a Pollution Liability policy with limits not less than \$1,000,000 per occurrence (or claims made) and not less than \$1,000,000 aggregate for Bodily Injury, Personal Injury and Property Damage, naming UTILITIES and the City of Colorado Springs, their officers, City Council, Utilities Board and employees as Additional Insureds. This coverage must include any losses arising from transit exposures and also include all costs associated with clean-up, containment, and disposal of any hazardous liquids or materials. This insurance must include coverage for any costs arising out of mold or fungus claims or issues.
- (f) **Umbrella/Excess Liability.**
- (1) In the event the value of this Agreement is \$50,000 or less, CONTRACTOR shall maintain umbrella/excess liability insurance in an amount of not less than \$1,000,000 with respect to coverage required under the Commercial General Liability, Automobile Liability and Employer's Liability. UTILITIES and the City of Colorado Springs, their officers, City Council, Utilities Board and employees shall be named Additional Insureds. This coverage must be Umbrella coverage, offering coverage "at least as broad as all underlying coverages."

- (2) In the event the value of this Agreement exceeds \$50,000, CONTRACTOR shall maintain umbrella/excess liability insurance in an amount of not less than \$5,000,000 with respect to coverage required under the Commercial General Liability, Automobile Liability and Employer's Liability. UTILITIES and the City of Colorado Springs, their officers, City Council, Utilities Board and employees shall be named Additional Insureds. This coverage must be Umbrella coverage, offering coverage "at least as broad as all underlying coverages." Subcontractors shall be required to maintain umbrella/excess liability insurance limits of at least \$1,000,000.

CONTRACTOR shall verify its subcontractors' compliance with the requirements of sections (a) through (f), and cause their certificates of insurance to be provided to CONTRACTOR, and upon request, to be made available to UTILITIES.

- 9.2. Any deductible or self-insured retention greater than \$25,000 per claim must be declared to and approved by UTILITIES. Any and all deductibles or self-insurance retentions in the foregoing insurance policies shall be assumed by and be for the account of, and at the sole risk of CONTRACTOR and its subcontractors.
- 9.3. Certificates of insurance shall be furnished by CONTRACTOR to UTILITIES before any Services are commenced hereunder by CONTRACTOR. The certificates of insurance shall provide that there will be no cancellation, reduction or modification of coverage without thirty (30) days' prior written notice to UTILITIES. On all policies except for Workers' Compensation, the certificates shall also contain a specific endorsement adding the required entities as additional insureds, as well as specifically stating that all coverage furnished by CONTRACTOR is primary, and that any insurance held by the City of Colorado Springs or UTILITIES is excess and non-contributory. If CONTRACTOR does not comply with this section, UTILITIES may, in addition to any other remedies it may have, terminate this Agreement, subject to any provision of this Agreement. Alternatively, UTILITIES may, at its option, provide insurance coverage to protect the City of Colorado Springs and UTILITIES and charge CONTRACTOR for the cost of that insurance. The required insurance shall be subject to the approval of UTILITIES, but any acceptance of insurance certificates by UTILITIES shall not limit or relieve CONTRACTOR of the duties and responsibilities assumed by it under this Agreement.
- 9.4. The insurance coverage required within this entire insurance section shall not minimize, limit, nor eliminate CONTRACTOR's responsibility for any uninsured or uncovered claims, losses, or expenses occurring during or after completion of the Services. The foregoing requirements as to the types and limits of insurance coverage to be maintained by CONTRACTOR, and any approval of said insurance by UTILITIES, or its insurance consultant(s) are not intended to and shall not in any manner limit or qualify the liability and obligations otherwise assumed by CONTRACTOR pursuant to this Agreement, including but not limited to the provisions concerning indemnification. UTILITIES reserves the right to withhold payments to CONTRACTOR in the event of material noncompliance with the insurance requirements outlined above.

10. Representatives and Notice.

10.1. UTILITIES may appoint a representative to act as liaison with CONTRACTOR in accordance with Exhibit A. UTILITIES' representative may be changed upon prior written notice to CONTRACTOR. All notices necessary or required under this Agreement shall be in writing and shall be personally delivered, sent by overnight delivery service, or mailed by certified mail, postage prepaid and return receipt requested, as follows:

If to UTILITIES: **COLORADO SPRINGS UTILITIES**
Attn: Procurement and Contract Services Manager, MC 920
PO Box 1103
Colorado Springs, Colorado 80947-0920
Phone: (719) 668-3862

If to CONTRACTOR: **CONTRACTOR**

Phone: _____

10.2. Notice given by personal delivery, overnight delivery, or mail shall be effective upon actual receipt. The parties may change any address to which notice is to be given by giving notice as provided above of such change of address.

11. Changes in Work. Subject to Section 14.3, Appropriation of Funds, any request by either party for additional work or for changes in the manner or method of work performance, shall be made only by written amendment, which shall also reference the task order(s) affected by each change if Exhibit A requires the issuance of Task Orders. UTILITIES shall not be liable for payment of any additional work performed by CONTRACTOR not previously authorized by UTILITIES by written amendment.

12. Force Majeure. Neither party shall be liable for delays in performing its obligations to the extent the delay is caused by an unforeseeable condition beyond its reasonable control without fault or negligence including strikes, riots, wars, floods, fires, explosions, acts of nature, acts of government, or labor disturbances.

13. Dispute Resolution.

13.1. If a dispute arises between the parties relating to this Agreement, the following procedure shall be followed:

- (a) The parties shall hold a meeting promptly, but in no event later than thirty (30) calendar days from the initial written notice of the dispute, attended by persons with decision-making authority regarding the dispute, to attempt in good faith to negotiate a resolution of the dispute; provided, however, that no such meeting shall be deemed

to vitiate or reduce the obligations and liabilities of the parties thereunder or be deemed a waiver by a party hereto of any remedies to which such party would otherwise be entitled thereunder unless otherwise agreed to by the parties in writing.

- (b) If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they agree to submit the dispute to non-binding mediation and to bear equally the costs of the mediation.
- (c) The parties will jointly appoint a mutually acceptable mediator. If they fail to do so within twenty (20) calendar days from the conclusion of the negotiation period, they shall each select a mediator. The two mediators will then appoint a third mediator who shall, as the sole mediator, conduct mediation for the parties.

13.2. The parties agree to participate in good faith in the mediation and negotiations related thereto for a period of thirty (30) calendar days. The substantive and procedural law of the State of Colorado shall apply to the proceedings. If the parties are not successful in resolving the dispute through mediation, then the parties shall be free to litigate the matter, and agree that in the event of such litigation, the exclusive venue for such litigation shall be the El Paso County District Court, Colorado Springs, Colorado, and if necessary, for exclusive federal questions, the United States District Court for the District of Colorado.

14. Appropriation of Funds.

- 14.1. In accord with the City Charter, performance of UTILITIES' obligations under this Agreement is expressly conditioned upon appropriation of funds by the City Council. In the event funds are not appropriated in whole or in part sufficient for performance of UTILITIES' obligations under this Agreement, or appropriated funds may not be expended due to City Charter spending limitations, then this Agreement shall thereafter become null and void by operation of law, and UTILITIES shall thereafter have no liability for compensation or damages to CONTRACTOR in excess of UTILITIES' authorized appropriation for this Agreement or the applicable spending limit, whichever is less. UTILITIES shall notify CONTRACTOR as soon as reasonably practicable in the event of non-appropriation or in the event a spending limitation becomes applicable.
- 14.2. The funds appropriated for this Agreement are equal to or exceed the contract amount for the year in which this Agreement was awarded. For work to be completed in subsequent fiscal years, if any, UTILITIES will notify CONTRACTOR of the appropriation of funds for such work after the adoption of UTILITIES' annual appropriation ordinance for those years.
- 14.3. CONTRACTOR and UTILITIES agree and acknowledge as a part of this Agreement that no amendment that requires additional compensable work to be performed under this Agreement shall be issued by UTILITIES unless funds are available to pay such additional costs, and CONTRACTOR has been given written assurance by UTILITIES that lawful appropriations to cover the cost of the additional work have been made or unless such work is covered under a remedy-granting provision in this Agreement.

15. Termination.

- 15.1. The following conduct shall be deemed to be a default of CONTRACTOR under this Agreement:
- (a) The Services under this Agreement are abandoned by CONTRACTOR; or
 - (b) The Agreement is assigned by CONTRACTOR without the written consent of UTILITIES; or
 - (c) CONTRACTOR is adjudged bankrupt; or
 - (d) A general assignment of CONTRACTOR's assets is made for the benefit of its creditors; or
 - (e) A receiver is appointed for CONTRACTOR or any of its property; or
 - (f) At any time UTILITIES certifies in writing that the performance of the Services under this Agreement is being unnecessarily delayed, that CONTRACTOR is violating any of the conditions of this Agreement or that CONTRACTOR is executing the same in bad faith or otherwise not in accordance with the terms of said Agreement; or
 - (g) The Services are not substantially completed within the time named for its completion.
- 15.2. Upon default, UTILITIES may serve written notice upon CONTRACTOR of UTILITIES' intention to terminate this Agreement. If CONTRACTOR agrees to corrective action, then CONTRACTOR will have an additional five (5) calendar days to develop a corrective action plan acceptable to UTILITIES for completion of the work. If CONTRACTOR fails to complete the previous two activities within the prescribed timeframes, or if CONTRACTOR fails to complete the work pursuant to the corrective action plan, then UTILITIES may terminate this Agreement without further notice to CONTRACTOR. In the event of such termination, UTILITIES may take over and prosecute the work to completion, by contract or otherwise. CONTRACTOR shall be liable to UTILITIES for all reasonable costs sustained by UTILITIES by reason of such prosecution and completion.
- 15.3. This Agreement may be terminated without cause by UTILITIES upon thirty (30) days advance written notice to CONTRACTOR. CONTRACTOR shall not be paid for any Services performed after the date of termination, unless otherwise mutually agreed upon by the parties in writing.

16. Copyrights/Intellectual Property.

- 16.1. CONTRACTOR agrees that UTILITIES will have extensive input in the process of producing all materials associated with this Agreement. Therefore, CONTRACTOR agrees and acknowledges that all materials produced as a result of the Services (e.g. video, artwork, brochures, covers, labels, writings, designs, models, etc) that have been or will be used by or paid for by UTILITIES, pursuant to this Agreement is a work made for hire as that term is defined by the United States copyright laws, but within full control of UTILITIES, and that UTILITIES is the sole owner of any work product which CONTRACTOR has made or will make under this Agreement, including but not limited to all intellectual property rights in said work product under copyright, patent, trademark, trade secret and other applicable law, and that compensation to CONTRACTOR for acceptance and acknowledgment of this Agreement is included in any compensation or

price whatsoever paid to CONTRACTOR. It is the intent of the parties that UTILITIES shall have full ownership of the work product produced pursuant to this Agreement upon payment in-full by UTILITIES to CONTRACTOR.

- 16.2. CONTRACTOR hereby warrants to UTILITIES that it will take no action to copyright, patent, trademark, or trade secret any and all of the work product described in this Agreement.
- 16.3. In the event this Agreement is deemed by a court of competent jurisdiction not to be a work for hire under federal copyright laws, this Agreement provision shall act as an irrevocable disclaimer by CONTRACTOR in favor of UTILITIES and as an irrevocable assignment to UTILITIES by CONTRACTOR of any and all intellectual property rights in CONTRACTOR's work product, including, but not limited to, copyright, patent, trademark and trade secrets, including, but not limited to, all rights in perpetuity. Under this irrevocable assignment, CONTRACTOR hereby assigns to UTILITIES the sole and exclusive right, title, and interest in and to CONTRACTOR's work product, in any and all countries. It is CONTRACTOR's specific intent to assign all right, title, and interest whatsoever in any media and for any purpose, to UTILITIES, including all rights of renewal and extension. To that end, CONTRACTOR agrees to execute and deliver all necessary documents requested by the City of Colorado Springs and/or UTILITIES in connection therewith and appoints City of Colorado Springs and/or UTILITIES as CONTRACTOR's agent and attorney-in-fact to act for and in CONTRACTOR's behalf and stead to execute, register and file any such applications, and to do all other lawfully permitted acts to further the registration, prosecution, issuance, renewals, and extensions of copyrights or other protections with the same legal force and effect as if executed by CONTRACTOR. Further, the parties expressly agree that the provisions of this paragraph shall be binding upon the parties and their legal representatives, successors, and assigns.
- 16.4. Royalties and fees for patents covering materials, articles, apparatus, devices, or equipment (as distinguished from processes) used in the work or services, shall be included in the hourly rate amounts paid to CONTRACTOR in accordance with Exhibit B. No additional compensation shall be due to CONTRACTOR for such items. CONTRACTOR shall satisfy all demands that may be made at any time for such royalties or fees and they shall be liable for any damages or claims for patent infringements. CONTRACTOR shall, at its own cost and expense, defend all suits or proceedings that may be instituted against UTILITIES and hold UTILITIES harmless for infringement or alleged infringement of any patents involved in the work and, in case of an award, including any costs and attorney fees awarded, and any and all costs and attorney fees associated with any appeals that may be taken from any judgment rendered on any such suits or proceedings of damages, CONTRACTOR shall pay such award provided UTILITIES gives CONTRACTOR prompt notice in writing of such claim and permits CONTRACTOR to contest same through its counsel or, at its option, to settle by securing for UTILITIES the right to continue to use such products or by modifying them to avoid infringement, or by reclaiming them and reimbursing UTILITIES the sum paid therefore; and provided UTILITIES gives CONTRACTOR all necessary authority and assistance, at the expense of CONTRACTOR, to enable CONTRACTOR to do so. Final payment to CONTRACTOR by UTILITIES will not be made while any suit or claim remains unsettled.

16.5. Title to all CONTRACTOR software which was developed prior to the effective date of this Agreement and not in conjunction with Services rendered for UTILITIES, shall remain with CONTRACTOR which shall grant a perpetual, non-exclusive, non-transferable, royalty free, license to UTILITIES to use the software in connection with UTILITIES operations and systems. Source code in encrypted form (except for third party software included in CONTRACTOR's software which will be in object code/binary format only) will be installed on UTILITIES systems and the encryption key for the source code shall either be provided to UTILITIES or placed in escrow under the terms of an escrow agreement which is mutually acceptable to the parties. If CONTRACTOR is no longer in business or stops support for the software, UTILITIES has the right to the encryption key (which provides UTILITIES with access to the source code) for the purposes of continuing to support and maintain UTILITIES operations and systems.

16.6. CONTRACTOR and UTILITIES shall not at any time use the name, trademark(s) or trade name(s) of the other in any advertising or publicity without the prior written consent of the other.

17. Non-Discrimination. UTILITIES is committed to equal employment opportunity for all and maintains and implements equal opportunity and affirmative action where necessary in all of its daily operations. UTILITIES' policy is that no person shall be discriminated against because of race, color, national origin or ancestry, sex, age, religious convictions, veteran status, disability or political beliefs. CONTRACTOR shall comply with all federal and state nondiscrimination laws and have an equal employment opportunity policy. CONTRACTOR shall also comply with UTILITIES' Equal Employment Opportunity/Affirmative Action policies regarding nondiscrimination and harassment, which includes sexual harassment, in the conduct of its business while on UTILITIES' property and/or interacting with UTILITIES' employees. CONTRACTOR will cooperate with UTILITIES in using CONTRACTOR's best efforts to ensure that Disadvantaged Business Enterprises are afforded the full opportunity to compete for subcontracts or work under this Agreement.

18. Audit. CONTRACTOR shall maintain accurate records of all amounts billable to and payments made by UTILITIES hereunder in accordance with recognized accounting practices and in a format that will permit audit, for a period of three (3) years after payment of the last invoice related to this Agreement. Such records shall be open to reasonable inspection and subject to audit and/or reproduction, during normal working hours, by UTILITIES or its authorized representative. UTILITIES shall give CONTRACTOR advance notice of intended audits.

19. Severability. If any provision of this Agreement shall be found to be illegal or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect, and such term or provision shall be deemed stricken for as long as it remains illegal or unenforceable.

20. Assignment. There shall be no assignment of the rights or obligations contained in this Agreement by either party without the prior written consent by the other party, and any such assignment shall be null and void. Nothing herein shall be construed to give any rights or benefits hereunder to anyone other than UTILITIES and CONTRACTOR.

21. Compliance with Laws and Regulations.

21.1. This Agreement and the rights and obligations of the parties hereunder shall be subject to all applicable laws, orders, court decisions, directives, rules and regulations of any duly constituted governmental body or official having jurisdiction.

21.2. Compliance with Colorado Revised Statute 8-17.5-101 et seq.

- (a) Contractor represents, warrants, and agrees that it (i) has verified that it does not employ any illegal aliens, or (ii) has attempted to verify through participation in the Department of Homeland Security's Basic Pilot Program that the Contractor does not employ any illegal aliens and, if potential Contractor is a sole proprietor, is not himself/herself an illegal alien. Further, if the Contractor has not been accepted into the Basic Pilot Program prior to entering into this Agreement, the Contractor shall apply to participate in the Basic Pilot Program (unless it has been discontinued) every three months thereafter until the Contractor either is accepted or this Agreement has been completed, whichever is earlier.
- (b) Notwithstanding the foregoing subparagraph, the Contractor shall be prohibited from using and relying upon the Basic Pilot Program procedures for the purpose of, or to undertake, pre-employment screening of job applicants while this Agreement is being performed.
- (c) If at any time prior to or during the performance of this Agreement, the Contractor obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, the Contractor shall be required to (i) notify both the subcontractor and UTILITIES in writing within three (3) days after obtaining such knowledge that the Contractor has actual knowledge that the subcontractor is employing or contracting with an illegal alien, and (ii) terminate the subcontract with the subcontractor if, within the three (3) days following receipt of such notice, the subcontractor does not stop employing or contracting with the illegal alien, except that the Contractor shall not terminate the contract with the subcontractor if, during such three (3) days' time, the subcontractor provides information to the Contractor to establish that the subcontractor has not knowingly employed or contracted with an illegal alien. For purposes of this subparagraph only, and without waiving or changing any other Notice provisions in this Agreement, all notices to UTILITIES to comply with this subparagraph only shall be addressed to the attention of the "Procurement & Contract Services Manager," Colorado Springs Utilities, P.O. Box 1103, Mail Stop 920, Colorado Springs, Colorado 80947-0920
- (d) The Contractor shall comply with all reasonable requests made in the course of an investigation under CRS 8-17.5-102 by the Colorado Department of Labor and Employment.

21.3. If CONTRACTOR is a sole proprietor, then CONTRACTOR shall comply with Colorado Revised Statutes 24-76.5-101, et seq., 24-37.5-101 and 39-22-604.

22. Governing Law. This Agreement shall be construed in accordance with the laws of the State of Colorado without reference to conflicts of laws, the Colorado Springs City Charter, City Code, Ordinances, Rules and Regulations. In the event of litigation, this Agreement shall be enforceable by or against the City of Colorado Springs on behalf of UTILITIES as provided in

Colorado Springs City Code § 12-1-108. In the event of any dispute over the Agreement's terms and conditions, the exclusive venue and jurisdiction for any litigation arising thereunder shall be in the District Court of El Paso County, Colorado, and, if necessary for exclusive federal questions, the United States District Court for the District of Colorado.

- 23. Survival.** The provisions of this Agreement with respect to confidentiality, copyrights/ intellectual property, dispute resolution, warranties and indemnification shall survive the termination of this Agreement.
- 24. Counterparts; Facsimile Signatures.** This Agreement may be executed in one or more counterparts, each of which shall be deemed original and all of which together shall constitute one and the same instrument. Facsimile copies of signatures shall be permitted for purposes of the binding nature of this Agreement.
- 25. Time of the Essence.** The parties agree that time is of the essence and performance of the Services under this Agreement shall be developed, completed and implemented according to the Scope of Work. Any delays in performance within the control of CONTRACTOR, its consultants, subcontractors, employees or agents shall not be cause for extending the date for completion of the Services.
- 26. Entire Agreement.** This Agreement with all referenced exhibits or attachments constitutes the entire agreement between the parties and supersedes all previous written or oral communications, understandings, and agreements between the parties unless specifically stated herein. This Agreement may only be amended by a written agreement signed by both parties. Email and all other electronic (including voice) communications from UTILITIES in connection with this Agreement are for informational purposes only. No such communication is intended by UTILITIES to constitute either an electronic record or an electronic signature, or to constitute any agreement by UTILITIES to conduct a transaction by electronic means. Any such intention or agreement is hereby expressly disclaimed.

In witness whereof, the representatives of each party hereto certifies via execution below that they are duly authorized to commit their organization to this Agreement in its entirety:

COLORADO SPRINGS UTILITIES

CONTRACTOR

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

City Attorney's Office - Utilities Division

Approved As To Form:

By: _____

Name: _____

Title: _____

Date: _____

EXHIBIT A

STATEMENT OF WORK

(Includes Task Order Template F04-09727 if Applicable)

EXHIBIT B
RATES