

## PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT, made and entered into on this 29<sup>th</sup> day of April, 2019 by and between the City of Las Cruces, New Mexico, hereinafter called "CITY" and Miller Engineers, Inc. DBA Souder, Miller & Associates, of 3500 Sedona Hills Pkwy., Las Cruces, NM 88011, hereinafter called "ENGINEER".

### 1. PROJECT DESCRIPTION

Traffic Engineering Services ordered on an as-needed basis via Project Assignment Agreements (Attachment A) during the term of this AGREEMENT.

### 2. SCOPE OF SERVICES

In a satisfactory and proper manner, the ENGINEER shall perform SERVICES, as proposed in response to the CITY'S RFP No. 18-19-054, as set forth in Exhibit A, attached hereto and made a part of this Agreement.

### 3. APPROPRIATIONS

The terms of this Agreement are contingent on sufficient appropriations and authorization being made by the City Council for the performance of this Agreement. If sufficient appropriations and authorizations are not made by the City Council, this Agreement shall terminate upon written notice given by the CITY to ENGINEER. The CITY'S decision as to whether sufficient appropriations and authorizations exist shall be accepted by ENGINEER and shall be final.

### 4. COMPENSATION

The CITY shall compensate ENGINEER for the performance of SERVICES under this Agreement an amount agreed to for each assigned project, plus applicable taxes. ENGINEER shall perform the SERVICES upon receipt of a purchase order or written Notice to Proceed for each Project Assignment Agreement issued the CITY. The CITY cannot authorize costs to be incurred prior to such written Notice to Proceed.

ENGINEER is responsible for payment of State of New Mexico Gross Receipts Tax levied on the amounts payable under this Agreement. ENGINEER agrees to comply with all federal and state tax payments and report all items of gross receipts as income from the operations of its business.

### 5. DEVOTION OF ADEQUATE TIME

ENGINEER will devote the necessary hours each week to the performance of projects that are required by the CITY and it will serve the CITY diligently and faithfully, and according to its best ability in all respects and will promote the best interests of the CITY.

## 6. TERM AND SCHEDULE

This Agreement shall become effective on April 1, 2019 for a term of one year through March 30, 2020 and, pending mutual written agreement, may be extended annually thereafter for up to three (3) additional one (1)-year terms.

ENGINEER shall perform the SERVICES in accordance with the time set forth and agreed upon by the CITY and ENGINEER for each project assigned under the terms of this Agreement.

## 7. EXTENSIONS, CHANGES, AND AMENDMENTS

This Agreement shall not be extended, changed, or amended except by instrument in writing executed by the parties. The CITY shall not be liable for payment of any extra services nor shall ENGINEER be obligated to perform any extra services except upon such written agreement. Such written approval shall indicate the date said extension, change, or amendment is effective and shall be signed by the parties to this Agreement. In the event that the parties cannot reach agreement as to a particular change, the issue shall be resolved pursuant to Article 21.

## 8. CHANGES AND EXTRA SERVICES BY THE CITY

The CITY may make changes within the general scope of the SERVICES plus may also request ENGINEER to perform other extra services not incorporated within the Services set forth in this Agreement. If the ENGINEER is of the opinion that such change causes an increase or decrease in the cost and/or the time required for performing the changes or other services required by the City, ENGINEER shall so notify the CITY of that fact within five (5) business work days from the date of receipt of change by the CITY. The CITY shall provide written response to the ENGINEER within five (5) business work days from the date of receipt of ENGINEER'S written notification.

## 9. CHANGES AND EXTRA SERVICES BY THE ENGINEER

In the event a condition is identified by the ENGINEER which, in the opinion of the ENGINEER, changes the services, costs, and/or time required for performance under this Agreement, the ENGINEER shall provide written notification to the CITY within five (5) business work days of such identification. The CITY shall respond in writing to such notification within five (5) business work days from the date of receipt of ENGINEER'S notification.

## 10. DELAYS

In the event that performance of SERVICES is delayed by causes beyond reasonable control of ENGINEER, and without the fault or negligence of ENGINEER, the time and total compensation for the performance of the SERVICES may be equitably adjusted by written agreement to reflect the extent of such delay. ENGINEER shall provide the CITY with written notice of delay pursuant to Article 9 including therein a description of the delay and the steps contemplated or actually taken by ENGINEER to mitigate the effect of such delay. The CITY will make the final determination as to reasonableness of delays.

## 11. TERMINATION

This Agreement may be terminated by either party hereto upon fifteen (15) calendar days written notice in the event of substantial failure by the other party to perform in accordance with the terms of this Agreement through no fault of the terminating party. This Agreement may also be terminated by the CITY for its convenience or because the PROJECT has been permanently abandoned, but only upon fifteen (15) calendar days written notice to ENGINEER.

In the event of termination, ENGINEER shall be compensated for all services performed and costs incurred up to the effective date of termination for which ENGINEER has not been previously compensated.

Upon receipt of notice of termination from the CITY, ENGINEER shall discontinue the SERVICES unless otherwise directed and upon final payment from the CITY deliver to the CITY the required number of copies of all data, drawings, reports, estimates, summaries, and such other information and materials as may have been accumulated by ENGINEER in the performance of this Agreement, whether completed or in process.

## 12. RECORDS AND AUDITS

ENGINEER will maintain records indicating dates, length of time, and services rendered. The CITY has the right to audit billings both before and after payment, and contest any billing or portion thereof. Payment under this Agreement does not foreclose the CITY'S right to recover excessive or illegal payments.

## 13. DISCLOSURE AND OWNERSHIP OF DOCUMENTS, PRODUCTS, DESIGN, ELECTRONIC FILES

All technical data, electronic files, and other written and oral information not in the public domain or not previously known, and all information, electronic files, and data obtained, developed, or supplied by the CITY will be kept confidential and ENGINEER will not disclose to any other party, directly or indirectly, without the CITY'S prior written consent unless required by lawful order.

All technical data, electronic files, products developed, operational parameters, blueprints, and other information and work of the ENGINEER shall be the sole property of the CITY and shall be delivered to the CITY when requested and at the end of the Agreement.

## 14. INDEPENDENT CONTRACTOR

ENGINEER represents that it has, or will secure, at its own expense, all personnel required in performing the SERVICES under this Agreement. Such personnel shall not be employees of, nor have any contractual relationship with the CITY. ENGINEER, consistent with its status as an independent contractor, further agrees that its personnel will not hold themselves out as, nor claim to be officers or employees of the CITY by reason of this Agreement.

To the extent that ENGINEER employs any employees, ENGINEER shall be solely responsible for providing its own form of insurance for its employees and in no event shall ENGINEER'S employees be covered under any policy of the CITY.

ENGINEER'S retention hereunder is not exclusive. Subject to the terms and provisions of this Agreement: (i) ENGINEER is able, during the Term hereof, to perform services for other parties; and (ii) ENGINEER may perform for its own account other professional services outside the scope of this Agreement.

ENGINEER is and shall be an Independent Contractor and shall be responsible for the management of its business affairs. In the performance of the work under this Agreement, ENGINEER will at all times be acting and performing as an Independent Contractor, as that term is understood for federal and state law purposes, and not as an employee of the CITY. Without limitation upon the foregoing, ENGINEER shall not accrue sick leave, jury duty pay, retirement, insurance, bonding, welfare benefits, or any other benefits, which may or may not be afforded employees of the CITY. ENGINEER will not be treated as an employee for purposes of: Workers' Compensation benefits; the Federal Unemployment Tax Act; Social Security; other payroll taxes, federal or any state income tax withholding; or the employee benefit provisions described in the Internal Revenue Code of 1986, as amended. Neither the CITY, nor its agents or representatives, shall have the right to control or direct the manner, details or means by which ENGINEER accomplishes and performs its services. Nevertheless, ENGINEER shall be bound to fulfill the duties and responsibilities contained in the Agreement.

#### 15. NO JOINT VENTURE OR PARTNERSHIP

Nothing contained in this Agreement shall create any partnership, association, joint venture, fiduciary or agency relationship between ENGINEER and CITY. Except as otherwise specifically set forth herein, neither ENGINEER nor CITY shall be authorized or empowered to make any representation or commitment or to perform any act which shall be binding on the other unless expressly authorized or empowered in writing.

#### 16. ASSIGNMENT

ENGINEER shall perform all the services under this Agreement and shall not assign any interest in this Agreement or transfer any interest in same or assign any claims for money due or to become due under this Agreement without the prior written consent of the CITY.

#### 17. INSURANCE

ENGINEER shall obtain and maintain insurance at its own cost and expense during the life of this Agreement, and shall require Subcontractors, if any, to maintain during the life of his subcontract:

1. \$1,000,000 (One Million Dollars) General Liability Insurance with the City named as an Additional Insured with the same coverage as the ENGINEER. Coverage must include:
  - a. Premises / Operations

- b. Products / Completed Operations
- c. The City of Las Cruces must be named as an Additional Insured.
- 2. \$100,000 (One Hundred Thousand Dollars) Property Damage Insurance.
- 3. In the case of any approved subcontract, the ENGINEER shall require the subcontractor to provide statutory Workers' Compensation and Employers' Liability Insurance, with the same limits as those required by the ENGINEER.
- 4. Auto Liability - \$1,000,000 – Each Accident, and must include:
  - a. Covers all owned, leased, hired, and non-owned autos or “any auto”
  - b. The City of Las Cruces must be named as an Additional Insured.
- 5. Worker's Compensation Per New Mexico Statute (3 or more employees)
  - \$1,000,000 – Bodily Injury: By Accident – Each Accident
  - \$1,000,000 – By Disease: Policy Limit
  - \$1,000,000 – By Disease: Each Employee
  - This coverage required for non-construction contractor with three (3) or more employees, or construction contractor with one (1) or more employees
  - Exception: Not applicable to out-of-state companies unless they are hiring in New Mexico.
- 6. The ENGINEER must immediately notify the CITY if insurance is canceled or not renewed.

The City must be named as additional insured – this coverage must be as broad as the coverage provided to the insured; coverage must be primary and non-contributory before any other insurance or self-insurance. A copy of the endorsement(s) for this coverage must be provided as a condition of this Agreement.

Waiver of Subrogation will apply and shall be noted on the certificate.

ENGINEER shall furnish the CITY with a certificate(s) of insurance showing ENGINEER and Subcontractors, if any, have complied with this Article. The ENGINEER shall provide insurance certificates before work is to start on the project and shall provide the CITY thirty (30) days written notification of cancellation of such policies.

#### 18. INDEMNITY AND LIMITATION

ENGINEER shall indemnify, defend, and hold harmless the CITY from and against any and all claims, suits, actions, judgments, demands, losses, costs, expenses, damages, and liability caused solely by, resulting solely from, or arising solely out of the negligent acts, errors, or omissions of ENGINEER, its officers, employees, agents, or representatives in the performance of SERVICES under this agreement.

#### 19. APPLICABLE LAW

This Agreement and the rights and obligations of the parties shall be governed by and construed by the laws of the State of New Mexico applicable to Agreements between New Mexico parties made and performed in that state, without regard to conflicts of law principles. Venue shall be in the Third Judicial District, State of New Mexico.

ENGINEER shall abide and be governed by all applicable state law, CITY ordinances, and laws regarding the ENGINEER'S services or any work done pursuant to this Agreement.

## 20. BREACH

In the event ENGINEER breaches any obligation contained in this Agreement, prior to instituting any action or dispute resolution procedure, the CITY shall give ENGINEER written notice of such breach. In the event ENGINEER fails to remedy the breach within five (5) working days of receiving such written notice, the CITY, at its sole discretion, without any obligation to do so and in addition to other remedies available under applicable law, may remedy ENGINEER'S breach and recover any and all costs and expenses in so doing from ENGINEER.

## 21. DISPUTE RESOLUTION

In the event that a dispute arises between CITY and ENGINEER under this Agreement or as a result of breach of this Agreement, the parties agree to act in good faith to attempt to resolve the dispute.

## 22. NOTIFICATION

All notices required or permitted under this Agreement shall be in writing and shall be deemed sufficiently served if served by Registered Mail addressed as follows:

TO CITY:                      City of Las Cruces  
                                    PO Box 20000  
                                    Las Cruces, NM 88004  
                                    ATTENTION: Tony Trevino, Project Development  
                                    Administrator

With Copies to:             City Attorney  
                                    Purchasing Manager

TO ENGINEER:              Miller Engineers, Inc. DBA Souder, Miller & Associates  
                                    3500 Sedona Hills Pkwy.  
                                    Las Cruces, NM 88011  
                                    ATTENTION: Karl E. Tonander

## 23. SCOPE OF AGREEMENT

This Agreement incorporates all of the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof and that all such covenants, agreements, and understandings have been merged into this written agreement. No prior agreement or understanding verbal or otherwise of the parties or their agents shall be valid or enforceable unless embodied in this agreement.

(SIGNATURE BLOCK FOLLOWS ON NEXT PAGE)

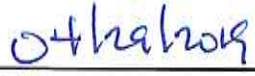
MILLER ENGINEERS, INC. dba  
SOUDER, MILLER & ASSOCIATES


BY:   
Karl E. Tonander  
Senior Vice President / C.O.O.

25Apr19  
Date

CITY OF LAS CRUCES

BY:   
*FOR* Donny Prosis  
Interim Purchasing Manager

  
Date

APPROVED AS TO FORM  
  
City Attorney

**EXHIBIT A**

**SERVICES**



**ATTACHMENT C – COST PROPOSAL FORM RFP 18-19-054 - Traffic Engineering Services**  
**(NOTE: This form shall not be modified in any way)**

Consulting Firm Souder, Miller & Associates

ITEM	DIRECT LABOR / CLASSIFICATION	HOURLY RATE*
1	Principal Engineer	\$ 220.00
2	Project Engineer/Project Manager	\$ 165.00
3	Senior Engineer	\$ 145.00
4	Design Engineer	\$ 125.00
5	Engineer Intern	\$ 100.00
6	Engineering Technician	\$ 90.00
7	Drafting Technician	\$ 75.00
8	Survey Crew**	\$ 190.00
9	Construction Inspector/Observer	\$ 90.00
10	Administrative/Clerical	\$ 70.00
11	Data Collection (per location)	
	8-Hour Turning Movement Count/Pedestrian Count	\$ 1,875.00
	7-Day Traffic Count	\$ 3,075.00
	Stopping Sight Distance Study	\$ 7,500.00
	8- Hour Pedestrian Volume Count	\$ 1,475.00
ITEM	MATERIALS / REIMBURSABLE EXPENSES	RATE
	<b>Travel</b>	
12	Per Diem (per day) – Pre-Approval Required	City of Las Cruces Rate
13	Vehicle Mileage Rate (per mile)	Current IRS Rate
	<b>Reproduction Services</b>	
14	Black and White Copies (per copy)	\$ .03
15	Color Copies (per copy)	\$ .07
16	Prints 24x36 (per sheet)	\$ 3.50
17	Mylars 24x36 (per sheet)	\$ 6.00
18	Photo Quality Plots (per plot)	\$ 9.00

19	<b>Miscellaneous</b> Any other costs incurred	Case by Case Basis
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*\*Rates are to include all overhead costs and any and all assessment expenses*

*\*\*Survey Crew Rates are to include GPS and Total Station Equipment*

Notes:

1. Detailed man hour Estimates are required for T&M contracts and are to utilize corresponding rates
2. Rates in place at the time a project is contracted with the City will remain for the duration of the contract.



## PROJECT ASSIGNMENT AGREEMENT

### 18-19-054 TRAFFIC ENGINEERING SERVICES

#### PROJECT NAME

Pursuant to terms and conditions of City of Las Cruces (CITY) Contract No. 18-19-054 dated March \_\_\_\_, 2019 between the CITY and Miller Engineers, Inc. DBA Souder, Miller & Associates, (ENGINEER), as amended and incorporated herein by reference, the City and Contractor hereby agree on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, as follows:

1. In a satisfactory and proper manner, the ENGINEER shall perform SERVICES as proposed in response to the CITY's RFP No. 18-19-054 and ENGINEER's proposal as set forth in ATTACHMENT A attached hereto.
2. Insurance (select the appropriate clause below, delete the other):  
(for non-construction projects)  
ENGINEER agrees to maintain a Commercial General Liability policy with limits not less than \$1 million per occurrence and \$2 million aggregate limits. The City of Las Cruces is to be named as an additional Insured. Evidence of coverage must be on an Acord 25 Certificate of Insurance with attached Additional Insured Endorsement.  
  
(for construction, maintenance, installation projects)  
ENGINEER agrees to maintain a Commercial General Liability policy with limits not less than \$1 million per occurrence and \$2 million aggregate limits. Coverage must include Premise and Operations, Products and Completed Operation and Personal and Advertising Injury coverage. Aggregate limits must be "per project" or "per location". Coverage must be primary and non-contributory before any other insurance or self-insurance. The City of Las Cruces is to be named as an additional Insured. Evidence of coverage must be on an Acord 25 Certificate of Insurance with attached Additional Insured Endorsement.
3. The estimated completion date is **number** days after a Notice to Proceed is issued by the CITY to the ENGINEER.
4. In consideration for the satisfactory completion of the work agreed to herein, compensation shall be made in the amount of \$ **dollars.cents**, plus NMGRT. Invoices issued by the ENGINEER shall be made **monthly / upon completion of project** with payment by the CITY being made within 30 days upon receipt of undisputed invoice.

MILLER ENGINEERS, INC. dba SOUDER,  
MILLER & ASSOCIATES

CITY OF LAS CRUCES

By: \_\_\_\_\_  
Signature Date

By: \_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Print Name and Title

Donny Prosis, Interim Purchasing Manager

Requisition No. **XXXXXXXX**