

CITY OF SANTA FE

PROFESSIONAL SERVICES CONTRACT

THIS AGREEMENT is made and entered into by and between the City of Santa Fe, New Mexico, hereinafter referred to as the "City," and **YEAROUT ENERGY SERVICES COMPANY, LLC. (YEAROUT ENERGY)**, hereinafter referred to as the "Contractor," and is effective as of the date set forth below upon which it is executed by the Parties.

**RECITALS**

WHEREAS, this Agreement was created for use by New Mexico government entities to obtain an Investment-Grade Energy Audit of a facility from a private energy service company (YEAROUT ENERGY);

WHEREAS, authority exists in the law for City to enter into this contract, and funds have been budgeted, appropriated and otherwise made available; a sufficient unencumbered balance thereof remains available for payment; and the required approval, clearance and coordination have been accomplished from and with appropriate agencies;

WHEREAS, Contractor is a company with experience and technical and management capabilities to provide for the discovery, engineering, procurement, installation, financing, savings guarantee, maintenance and monitoring of energy and water conserving measures at facilities similar in size, function and system type to City's facilities;

WHEREAS, Contractor has been selected in accordance with Statewide Price Agreement 90-000-18-00017AH, pertaining to the discovery, engineering, procurement, installation, financing, savings guarantee, maintenance and monitoring of energy and water conserving measures at City's facilities;

WHEREAS, City has selected Contractor to provide the services described herein;

WHEREAS, City desires to enter into a contract to have Contractor perform an Investment-Grade Energy Audit and Project Proposal to determine the feasibility of entering into an Guaranteed Utility Savings Contract to provide for installation and implementation of energy and water conserving measures at City's facilities; and

WHEREAS, if energy and water conserving measures are determined to be feasible, and if the amount of savings can be reasonably sufficient to cover all costs, as defined by City, associated with an Energy Savings Performance Contracting project, the parties intend to negotiate an Guaranteed Utility Savings Contract under which the Contractor will design, procure, install, implement, maintain and monitor such energy and water conserving measures. However, this intent does not commit City to entering into such a Guaranteed Utility Savings Contract.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, City and Contractor hereto covenant and agree that the

following Exhibits are attached hereto (or will be, as provided in this Agreement) and are made a part of this Agreement by reference.

IT IS AGREED BETWEEN THE PARTIES:

1. **Scope of Work.**

Contractor shall:

A. Perform an Investment-Grade Energy Audit (Audit) in accordance with this Agreement. Contractor shall work diligently to assess validity of information provided and to confirm or correct the information as needed to provide a complete and accurate Audit. City will assist Contractor in performing the Audit as described in this Agreement. City will work diligently to provide full and accurate information needed by Contractor for the Audit. The parties contemplate that development of the Audit will be an iterative process and that City will have a reasonable amount of time, not less than 30 calendar days but not exceeding 90 calendar days from City receipt of Audit report, to review and determine acceptance of Audit report before considering issuance of the Notice of Acceptance (Exhibit A).

B. Submit a Project Proposal (Proposal) to City within 30 calendar days of Audit report submittal that provides a package of energy and water conserving measures, including details as specified in this Agreement.

C. In order to successfully implement this project, Contractor shall:

I. **Conduct assessment.**

(a) Meet with City to establish interests, plans, problems, and any other issues related to facilities and operation of facilities.

(b) Collect data and background information on buildings, equipment and facilities operation and energy use for the most recent three years (as available) from the effective date of this Contract as follows:

(1) Building square footage;

(2) Construction data of buildings and major additions including building envelope;

(3) Utility company invoices;

(4) Occupancy and usage information;

(5) Description of all energy-consuming or energy-saving equipment used on the premises, as available;

(6) Description of energy management procedures utilized on the premises;

(7) Description of any energy-related improvements made or currently being implemented;

(8) Description of any changes in the structure of the facility or energy-using or water-using equipment;

(9) Description of future plans regarding building modifications or equipment modifications and replacements;

(10) Drawings, as available (may include mechanical, plumbing,

- electrical, building automation and temperature controls, structural, architectural, modifications and remodels);
- (11) Original construction submittals and factory data (specifications, pump curves, and any similar documentation), as available;
  - (12) Operating engineer logs, maintenance work orders, and any similar documentation, as available;
  - (13) Records of maintenance expenditures on energy-using equipment, including service contracts;
  - (14) Prior energy audits or studies, if any.
- (c) Perform a preliminary walk-through of facilities and interview staff and occupants to identify potential measures.
- (d) Meet with City to present preliminary findings and establish agreement on measures to analyze.

## **II. Identify potential measures.**

- (a) Interview the facility manager, maintenance staff, subcontractors and occupants of each building regarding:
- (1) Facility operation, including energy management procedures;
  - (2) Equipment maintenance problems;
  - (3) Comfort problems and requirements;
  - (4) Equipment reliability;
  - (5) Projected equipment needs;
  - (6) Occupancy and use schedules for the facility and specific equipment;
  - (7) Past, planned, and desired facility improvements.
- (b) Survey major energy-using equipment, including indoor and outdoor lighting, heating and heat distribution systems, cooling systems and related equipment, automatic temperature control systems and equipment, air distribution systems and equipment, outdoor ventilation systems and equipment, exhaust systems and equipment, hot water systems, electric motors, transmission and drive systems, special systems (including kitchen/dining equipment), renewable energy systems, other energy using systems, and water consuming systems (restroom fixtures, water fountains, irrigation systems, and other water systems).
- (1) Verify settings of control systems that include computer controls systems and building thermostats
  - (2) Measure lighting levels at various locations in a building to determine if recommended lighting levels exist
  - (3) Inspect filters for heating and cooling systems to determine the status of maintenance activities
  - (4) Consider maintenance staff and occupant concerns related to heating, cooling, and lighting
- (c) Perform "late-night" surveys outside of normal business hours or on weekends to confirm building system and occupancy schedules, if deemed necessary.
- (d) Develop a preliminary list of potential energy and water conserving measures. Consider the following for each system:

- (1) Comfort and maintenance problems;
- (2) Energy use, loads, proper sizing, efficiencies and hours of operation;
- (3) Current operating condition;
- (4) Remaining useful life;
- (5) Feasibility of system replacement;
- (6) Hazardous materials and other environmental concerns;
- (7) City's future plans for equipment replacement or building renovations;
- (8) Facility operation and maintenance procedures that could be affected;
- (9) Capability to monitor energy performance and verify savings.

### **III. Analyze measures.**

- (a) Establish base year consumption by examining utility bills for the past three years for electricity, gas, steam, water, and any other energy or fuel types. Present base year consumption in terms of energy units as used in utility bills, in terms of dollars, and in terms of dollars per square foot. Describe the process used to determine the base year (such as averaging, selecting most representative contiguous 12 months, or other methods). Consult with facility personnel to account for any anomalous schedule or operating conditions on billings that could skew the base year representation. Contractor shall account for periods of time when equipment was broken or malfunctioning in calculating the base year.
- (b) Estimate loading, usage and/or hours of operation for all major end uses of total facility consumption including, but not limited to: lighting, heating, cooling, motors (fans and pumps), plug loads, and other major energy and water using equipment. Where loading or usage are highly uncertain (including variable loads such as cooling), Contractor will use its best judgment, spot measurements or short-term monitoring. Contractor should not assume that equipment run hours equal the operating hours of the building(s) or facility staff estimates.
- (c) Reconcile annual end-use estimated consumption with the annual base year consumption. This reconciliation will place reasonable "real-world" limits on potential savings.
- (d) Propose adjustments to the baseline for energy and water conserving measures that will be implemented in the future. Adjustments made to the energy baseline shall only be made for any of the following changes in conditions affecting the facility:
  - (1) utility rates;
  - (2) number of days in the utility billing cycle;
  - (3) floor area of the facility;
  - (4) operational schedule of the facility;
  - (5) facility temperature;
  - (6) weather, if change is significant;
  - (7) amount of equipment or lighting used in the facility, if change is significant;
  - (8) space type(s) in the facility, if change is significant; and

- (9) material change(s) in or to the facility.
- (e) Develop a preliminary analysis of potential energy and water conserving measures. This resulting list of measures shall be compiled and submitted to City within 90 calendar days of the execution of this Contract. Furthermore:
- (1) List all potential measures, whether cost-effective or not. Consider technologies in a comprehensive approach including, but not limited to: lighting systems, heating/ventilating/air conditioning equipment and distribution systems, controls systems, building envelope, motors, kitchen equipment, pools, renewable energy systems, other special equipment, irrigation systems, and water conserving devices.
  - (2) Identify measures which appear likely to be cost effective and therefore warrant detailed analysis.
  - (3) For each measure, prepare a preliminary estimate of energy or water cost savings, including description of analysis methodology, supporting calculations and assumptions used to estimate savings.
- (f) Meet with City to present preliminary findings prior to thorough analysis. Describe how the projected project economics meet the City's terms for completing the Investment-Grade Energy Audit and Proposal Contract. Discuss assessment of energy use, savings potential, project opportunities, and potential for developing an energy performance contract. Develop a list of recommended measures for further analysis. The City shall have the option to reject calculations of savings, potential savings allowed, or project recommendations.
- (g) Perform final analysis of savings and costs for each energy and water conserving measure, including the following:
- (1) Follow the methodology of American Society of Heating, Refrigerating, and Air-Conditioning Engineers or other nationally-recognized authority following the engineering principle(s) identified for each retrofit option.
  - (2) Utilize assumptions, projections and baselines which best represent the true value of future energy or operational savings. Include accurate marginal costs for each unit of savings at the time the audit is performed, documentation of material and labor cost savings, adjustments to the baseline to reflect current conditions at the facility, calculations which account for the interactive effects of the recommended measures.
  - (3) Use best judgment regarding the employment of instrumentation and recording durations so as to achieve an accurate and faithful characterization of energy use.
  - (4) Use markups and fees stated above in all cost estimates.
  - (5) Develop a preliminary measurement and verification plan for each measure.
  - (6) Follow additional guidelines for analysis and report preparation given below.
  - (7) Include cost to provide services and complete application for Energy

Star Label, LEED-EB certification for Existing Buildings, or other certification. Also include cost for EPA's Tools for Schools or other such program related to improved air quality.

#### **IV. Provide Investment-Grade Energy Audit Report**

The report provides an engineering and economic basis for negotiating a potential Guaranteed Utility Savings Contract between the City and the Contractor.

(a) Contractor shall prepare and submit to City a draft Investment-Grade Energy Audit Report within 180 calendar days of the date of execution of this Contract. The report shall provide the following information:

(1) Overview, which shall include:

- i) Contact information;
- ii) Summary table of recommended energy and water conserving measures, with itemization for each measure of total design and construction cost, annual maintenance costs, the first-year cost avoidance (in dollars and energy units), simple payback and equipment service life;
- iii) Summary of annual energy and water use by fuel type and costs of existing or base year condition;
- iv) Calculation of cost savings expected if all recommended measures are implemented and total percentage savings of total facility energy cost;
- v) Description of the existing facility, mechanical and electrical systems;
- vi) Summary description of measures, including estimated costs and savings for each as detailed above;
- vii) Discussion of measures considered but not investigated in detail;
- viii) Conclusions and recommendations.

(2) Base year energy use, which shall include:

- i) Description and itemization of current billing rates, including schedules and riders;
- ii) Summary of all utility bills for all fuel types and water;
- iii) Identification and definition of base year consumption and description of how established;
- iv) Reconciliation of estimated end use consumption (i.e. lighting, cooling, heating, fans, plug loads, etc) with base year (include discussion of any unusual findings).

(3) Full written description of each energy and water conserving measure, which shall include:

- i) Existing conditions;
- ii) Description of equipment to be installed and how it will function;
- iii) Discussion of facility operations and maintenance procedures that will be affected by installation/implementation;
- iv) Plan for installing or implementing the recommended measure.

(4) Allowable cost and savings factors approved for consideration. City will provide Contractor with sufficient guidance to develop savings estimates, which shall include:

- i) Payment sources that can be incorporated:
  - a) Energy and water cost savings;
  - b) Material/commodity savings, including scheduled replacement of parts (only for years that these cost savings are applicable);
  - c) Outside labor cost savings, including maintenance contracts;
  - d) In-house labor costs;
  - e) Deferred maintenance cost;
  - f) Offset of future capital cost;
  - g) Outside incentive funds (utility incentives, grants, etc.);
  - h) Any savings related to maintenance and operation of the facilities will be limited to those that can be thoroughly documented;
- ii) Payment sources that may also be considered and negotiated;
- iii) Additional factors related to establishing savings that cover all costs:
  - a) Escalation rates that apply to each payment source. These are rates to be used in cash flow projections for project development purposes; *NOTE: Use federal government guidelines on utility escalation rates to ensure reasonableness.*
  - b) Interest rates (municipal tax-exempt rates for public agencies);
  - c) City cash outlay (City's sole discretion);
- iv) The markup costs are presented in Exhibit B: Cost and Pricing. These rates will be used in the Investment-Grade Energy Audit and subsequent Guaranteed Utility Savings Contract.

(b) Savings calculations

- (1) Base year energy use and cost.
- (2) Post-retrofit energy use and cost.
- (3) Savings estimates including analysis methodology, supporting calculations and assumptions used.
- (4) Annual savings estimates. The cost savings for all energy conserving measures must be estimated for each year during the contract period. Savings must be able to be achieved each year (cannot report average annual savings over the term of the contract).
- (5) Savings estimates must be limited to savings allowed by the City as described above.
- (6) Percent cost-avoidance projected.
- (7) Description and calculations for any proposed rate changes.
- (8) Explanation of how savings interactions between retrofit options are accounted for in calculations.

- (9) Operation and maintenance savings, including detailed calculations and description. Ensure that maintenance savings are only applied in the applicable years and only during the lifetime of the particular equipment.
  - (10) If computer simulation is used, include a short description and state key input data. If requested by City, access will be provided to the program and all assumptions and inputs used, and/or printouts shall be provided of all input files and important output files and included in the Investment-Grade Energy Audit with documentation that explains how the final savings figures are derived from the simulation program output printouts.
  - (11) If manual calculations are employed, formulas, assumptions and key data shall be stated.
  - (12) Conclusions, observations, and caveats.
- (c) Cost estimate -- detailed scope of the construction work needed, suitable for cost estimating. Include all anticipated costs associated with installation and implementation. Provide specifications for major mechanical components as well as detailed lighting and water fixture counts.
- (1) Engineering/design costs.
  - (2) Contractor/vendor estimates for labor, materials, and equipment; include special provisions, overtime, etc., as needed to accomplish the work with minimum disruption to the operations of the facilities.
  - (3) Permit costs.
  - (4) Construction management fees.
  - (5) Environmental costs or benefits (disposal, avoided emissions, handling of hazardous materials, etc.).
  - (6) Note that all markups and fees stated in this Contract shall be used in the cost estimates, unless otherwise documented and justified due to change in scope or size of project or other unforeseen circumstances.
  - (7) Conclusions, observations, and caveats.
  - (8) Other cost categories as defined above under "markups" in Section 3b above.
- (d) Other
- (1) Estimate of average useful service life of equipment.
  - (2) Preliminary commissioning plan.
  - (3) Preliminary measurement and verification plan, following the International Performance Measurement and Verification Protocol (IPMVP), explaining how savings from each measure is to be measured and verified (stipulated by Contract, utility bill analysis, end-use measurement and calculation, etc.).
  - (4) Discussion of impacts that facility would incur after contract ends. Consider operation and maintenance impacts, staffing impacts, budget impacts, etc., and identify who is responsible for maintenance.
  - (5) Compatibility with existing systems. NOTE: Include the name of the existing controls system, if new controls systems will have to be

compatible with an existing brand of controls. Also note if a sole-source vendor is established for controls systems.

- (6) Complete appendices that document the data used to prepare the analyses. Describe how data were collected.
- (e) Contractor shall meet with City to: review the recommendations, savings calculations and impact of the measures on the operations of the facility; describe how the projected project economics meet the City's terms for completing the Investment-Grade Energy Audit and Project Proposal; and discuss the willingness and capability of City to make capital contributions to the project to improve the economics of the overall project.
- (f) Contractor shall revise Audit Report as directed by City and shall submit **final Investment Grade Audit Report** within 30 days of the above meeting.

**V. Provide Project Proposal (term sheet).**

- (a) In anticipation of Contractor and City entering into an Guaranteed Utility Savings Contract to design, install, and monitor the energy and water conserving measures proposed in the Investment-Grade Energy Audit Report, Contractor shall prepare a proposal for terms to be incorporated in the Guaranteed Utility Savings Contract, which shall include:
  - (1) Project Cost is the total amount City will pay for the project and Contractor's services. Costs must be consistent with maximum markups and fees established above. Costs may include but are not limited to: engineering, designing, packaging, procuring, installing (from Investment-Grade Energy Audit Report results); performance/payment bond costs; construction management fees; commissioning costs; maintenance fees; monitoring fees; training fees; legal services; overhead and profit; other markups.
  - (2) Include a List of Services that will be provided as related to each cost.
  - (3) Expected term of the Energy Performance Contract.
  - (4) Description of how the project will be financed including available interest rates and financing terms, based on interest rates likely available to City at this time, and based on a 60-day and 90-day lock option.
  - (5) Explanation of how the savings will be calculated and adjusted due to weather (such as heating and cooling degree days), occupancy or other factors. Monitoring and verification methods must be consistent with the International Performance Monitoring and Verification Protocol 2000.
  - (6) Analysis of annual cash flow for City during the contract term.
  - (7) Contractor agrees to meet with City to present results and negotiate final terms.
- (b) Services will be performed on the facilities outlined in Exhibit B.

2. **Compensation.**

A. Except as provided for in subparagraphs 2D and 2E below, the City shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work in the sum of one-hundred-four-thousand six-hundred-fifty dollars (\$104,650) in 2019/2020. The New Mexico gross receipts tax levied on the amounts payable under this Agreement in 2019/2020 totaling eight-thousand eight-hundred-thirty dollars (\$8,830) shall be paid by the City to the Contractor. **The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed one-hundred-thirteen-thousand four-hundred-eighty dollars (\$113,480) in 2019/2020.**

B. The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed **one-hundred-thirteen-thousand four-hundred-eighty dollars (\$113,480)**. This amount is a maximum and not a guarantee that the work assigned to the Contractor under this Agreement to be performed shall equal the amount stated herein. This amount is based on a maximum of 598,000 gross square feet at seventeen-and-one-half-cents US dollars (\$0.175) per square foot of audited facility floor area, as per Exhibit B, Cost and Pricing. City shall only pay for facility floor area actually audited. Areas not audited Contractor will not be charged to City.

C. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the City finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the City that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the City shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

D. City shall have no payment obligations under this contract, provided that Contractor and City execute a Guaranteed Utility Savings Contract within 120 days [allows sufficient time for contract negotiation, attorney review, and City processing days], after issuance of the Notice of Acceptance (Exhibit A) of the final Investment-Grade Energy Audit and Project Proposal, but the fee indicated above shall be incorporated into Contractor's project costs in the Guaranteed Utility Savings Contract and paid through the Guaranteed Utility Savings Contract funding mechanisms.

E. City shall have no payment obligations under this Contract in the event that Contractor's final Investment-Grade Energy Audit and Project Proposal does not contain a package of energy and water conservation measures which, if implemented and as meeting terms of Scope of Work, will provide the City with utility cost savings sufficient to fund City's payments of all costs and fees associated with the Guaranteed Utility Savings Contract, including: 1) the fee associated with the Investment-Grade Energy Audit; 2) all monthly payments on a lease purchase agreement to finance the measures; and 3) any annual fees for monitoring and maintenance incurred by the Contractor. Should the

Contractor determine at any time during the Investment-Grade Energy Audit that savings cannot be attained to meet these terms, the Investment-Grade Energy Audit will be terminated by written notice by Contractor to City. In this event, this Agreement shall be terminated and City shall have no obligation to pay, in whole or in part, the amounts specified in subparagraphs 2A or 2B.

3. **Term.**

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE CITY. This Agreement shall terminate on **July 1, 2020** unless terminated pursuant to paragraph 4 (Termination), or paragraph 5 (Appropriations). In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978.

4. **Termination.**

A. **Termination.** This Agreement may be terminated by either of the parties hereto upon written notice delivered to the other party at least thirty (30) days prior to the intended date of termination. Except as otherwise allowed or provided under this Agreement, the City's sole liability upon such termination shall be to pay for acceptable work performed prior to the Contractor's receipt of the notice of termination, if the City is the terminating party, or the Contractor's sending of the notice of termination, if the Contractor is the terminating party; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor if the Contractor becomes unable to perform the services contracted for, as determined by the City or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of City funds or due to the Appropriations paragraph herein. **THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE CITY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.**

B **Termination Management.** Immediately upon receipt by either the City or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the City; 2) comply with all directives issued by the City in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the City shall direct for the protection, preservation, retention or transfer of all property titled to the City and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the City upon termination and shall be submitted to the City as soon as practicable.

5. **Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the City Council for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City Council, this Agreement shall terminate immediately upon written notice being given by the City to the Contractor. The City's decision as

to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the City proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

**6. Status of Contractor.**

The Contractor and its agents and employees are independent contractors performing professional services for the City and are not employees of the City. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of City vehicles, or any other benefits afforded to employees of the City as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the City unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

**7. Assignment.**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the City.

**8. Subcontracting.**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the City. No such subcontract shall relieve the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from the City.

**9. Release.**

Final payment of the amounts due under this Agreement shall operate as a release of the City, its officers and employees from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

**10. Confidentiality.**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the City.

**11. Product of Service -- Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the City and shall be delivered to the City no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

**12. Conflict of Interest; Governmental Conduct Act.**

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.

B. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978.

C. Contractor's representations and warranties in Paragraphs A and B of this Article 12 are material representations of fact upon which the City relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the City if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the City and notwithstanding anything in the Agreement to the contrary, the City may immediately terminate the Agreement.

D. All terms defined in the Governmental Conduct Act have the same meaning in this section.

**13. Amendment.**

A. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.

B. If the City proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed Amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth in Article 4 herein, or to agree to the reduced funding.

**14. Merger.**

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

**15. Penalties for violation of law.**

The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

**16. Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and Santa Fe City Code, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

**17. Applicable Law.**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

**18. Workers Compensation.**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the City.

**19. Professional Liability Insurance.**

Contractor shall maintain professional liability insurance throughout the term of this Agreement providing a minimum coverage in the amount required under the New Mexico Tort Claims Act. The Contractor shall furnish the City with proof of insurance of Contractor's compliance with the provisions of this section as a condition prior to performing services under this Agreement.

**20. Other Insurance**

If the services contemplated under this Agreement will be performed on or in City facilities or property, Contractor shall maintain in force during the entire term of this Agreement, the following insurance coverage(s), naming the City as additional insured.

A. Workers Compensation (including accident and disease coverage) at the statutory limit. Employers liability: \$100,000.

B. Comprehensive general liability (including endorsements providing broad form property damage, personal injury coverage and contractual assumption of liability for all liability the Contractor has assumed under this contract). Limits shall not be less than the following:

- a. Bodily injury: \$1,000,000 per person /\$1,000,000 per occurrence.
- b. Property damage or combined single limit coverage: \$1,000,000.

- c. Automobile liability (including non-owned automobile coverage): \$1,000,000.
- d. Umbrella: \$1,000,000.

C. Contractor shall maintain the above insurance for the term of this Agreement and name the City as an additional insured and provide for 30 days cancellation notice on any Certificate of Insurance form furnished by Contractor. Such certificate shall also specifically state the coverage provided under the policy is primary over any other valid and collectible insurance and provide a waiver of subrogation.

**21. Records and Financial Audit.**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the City. The City shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the City to recover excessive or illegal payments

**22. Indemnification.**

The Contractor shall defend, indemnify and hold harmless the City from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the City.

**23. New Mexico Tort Claims Act**

Any liability incurred by the City of Santa Fe in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The City and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

**24. Invalid Term or Condition.**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

**25. Enforcement of Agreement.**

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless

express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

**26. Notices.**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the City:  
Erik Litzenberg – City Manager  
City of Santa Fe  
200 Lincoln Avenue  
Santa Fe, NM 87504  
[ejlitzenberg@ci.santa-fe.nm.us](mailto:ejlitzenberg@ci.santa-fe.nm.us)

To the Contractor:  
Colby Geer – President  
Yearout Energy Services Co., LLC  
8501 Washington NE  
Albuquerque, NM 87113  
[Colby.Geer@yearoutenergy.com](mailto:Colby.Geer@yearoutenergy.com)

**27. Authority.**

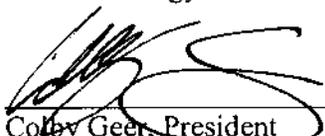
If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date of the signature by the required approval authorities below.

CITY OF SANTA FE:

CONTRACTOR:  
Yearout Energy Services Co., LLC

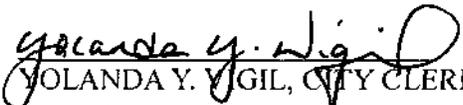
  
ALAN WEBBER, MAYOR

  
Colby Geer, President

DATE: 8/2/19

DATE: 7/18/19  
CRS# 03260362-00-2  
Registration # 19.00158314

ATTEST:

  
YOLANDA Y. VIGIL, CITY CLERK  
CC mtg. 7-31-19

APPROVED AS TO FORM:

*EMM* *6/18/19*  
ERIN K. MCSHERRY, CITY ATTORNEY

APPROVED:

*(for M. McCoy)* *08.02.19*  
*M. McCoy*  
MARY MCCOY, FINANCE DIRECTOR *RM*

32010.572960  
Business Unit Line Item

**Exhibit A**  
**Notice of Acceptance**

Issuance of a Notice of Acceptance is contingent upon the City's review and acceptance of the Audit Report, in accordance with Scope of Work, Item 1A.

**Exhibit B  
Cost and Pricing**

Facility	Street Address	City	State	Zip	Gross Area (ft <sup>2</sup> )
Public Library - Southside	6599 Jaguar Dr	Santa Fe	NM	87507	26,000
Santa Fe Regional Airport	3003 Aviation Dr	Santa Fe	NM	87507	14,000
Municipal Recreation Complex	205 Caja Del Rio	Santa Fe	NM	87507	12,000
Fire Station #8	6796 Jaguar Dr	Santa Fe	NM	87507	10,000
La Familia Medical Center	1035 Alto St	Santa Fe	NM	87501	25,000
Siringo Complex (Police Records, IT, Facilities)	2651 Siringo Rd	Santa Fe	NM	87505	34,000
Police Dept - Admin	2515 Camino Entrada	Santa Fe	NM	87507	26,000
Public Library - Main	145 Washington Ave	Santa Fe	NM	87501	40,000
Public Library - LaFarge	1730 Llano St	Santa Fe	NM	87505	23,000
Siler Complex (Parks & Rec, Environmental Services, Fleet Maintenance)	1142 Siler Rd	Santa Fe	NM	87507	40,000
Santa Fe Convention Center	201 W Marcy St	Santa Fe	NM	87501	72,000
Genoveva Chavez Community Center	3221 Rodeo Rd	Santa Fe	NM	87507	138,000
Kitchen Angels	1222 Siler Rd #A	Santa Fe	NM	87507	15,000
Sandoval Parking Garage Lot B	200 Sandoval	Santa Fe	NM	87501	-----
Fort Marcy Recreation Complex	490 Bishops Lodge Rd	Santa Fe	NM	87501	26,000
Salvador Perez Swimming Pool	601 Alta Vista St	Santa Fe	NM	87505	18,000
Canyon Road Water Treatment Plant	1780 Upper Canyon Rd	Santa Fe	NM	87505	11,000
Santa Fe Water Dept Office	801 W San Mateo Rd	Santa Fe	NM	87505	23,000
Transit Administration	2931 Rufina St	Santa Fe	NM	87507	26,000
Bicentennial / Alto Park Complex (Sr Center, Pool, Head Start, Park)	1121 Alto St	Santa Fe	NM	87501	19,000
Southside Transit Center (Remodel, Solar Only)	TBD	Santa Fe	NM	TBD	-----
Fire Station #2 (New Facility, Solar Only)	TBD	Santa Fe	NM	TBD	-----
<b>Totals</b>					<b>\$98,000</b>
IGA Fee (\$0.175/ft <sup>2</sup> )					<b>\$104,650</b>
NMGRT (8.4375%)					<b>\$8,830</b>
<b>Total IGA Fee + NMGRT</b>					<b>\$113,480</b>

Yearout Energy shall include the following pump locations as part of the IGA at no additional cost.

Pump Description	Street Address	City	State
52300 Wtr 10MG 1048 Las Montoyas	0 Ten Million Gallon Tank	Santa Fe	NM
52300 Wtr Agua Fria Well La Canada	1819 Camino La Canada	Santa Fe	NM
52300 Wtr Cristo Rey Church	1209 UpperCanyon Rd	Santa Fe	NM
52300 Wtr Dempsey Booster Station	0 Cerro Gordo Rd	Santa Fe	NM
52300 Wtr NW QDRT Booster 1 10MGal	1048 Camino de los Montoyas	Santa Fe	NM
52300 Wtr NW Well Los Montoyas	0 PL TR042 B28 A03 NE Well	Santa Fe	NM
52300 Wtr St Michaels & Railroad	0 St Michaels & SF Railroad	Santa Fe	NM
52300 Wtr Summit Booster 1212	1212 Calle De Agua Tank	Santa Fe	NM
BDD/Water Division	02 Booster Station 2A Rd	Santa Fe	NM
BDD/Water Division	0 Buckman Rd (Lift Station)	Santa Fe	NM
BDD/Water Division	01 Booster Station 1A	Santa Fe	NM
BDD/Water Division	341 Caja Del Rio (Treatment Plant) #a	Santa Fe	NM
52300 STR Cukmn Bster D & Well 10	0 Buckman Well #10	Santa Fe	NM
52300 Wtr Buckman Booster Sta 1	Booster #1	Santa Fe	NM
52300 Wtr Buckman Booster Sta 4	Buckman Booster #4	Santa Fe	NM
52300 Wtr Buckman Well 1	0 Buckman	Santa Fe	NM
52300 Wtr Bukmn Bster 3 & Well 13	0 Buckman Well 13	Santa Fe	NM