

ON-CALL UTILITY REPAIR SERVICES AGREEMENT-RFP-25-001

This Engineering and Architectural Services Agreement ("Agreement") is hereby entered into on this 13th day of September, 2024, by and between the City of Roswell, New Mexico ("City"), a political subdivision of the State of New Mexico, and J & H SERVICES, INC. ("Contractor"), collectively referred to herein as the Parties.

RECITALS

WHEREAS, on July 14, 2024, City Issued RFP-25-001, ("RFP-25-001"), which RFP is attached hereto as Exhibit 1 and incorporated by reference;

WHEREAS, RFP-25-001 ON-CALL UTILITY REPAIR SERVICES sought multiple contractors to provide ON-CALL UTILITY services and improvements, as described in more detail in the Summary Statement of Work Exhibit 2 of RFP- 25-001 ON-ON-CALL UTILITY REPAIR SERVICES, for City's properties;

WHEREAS, RFP-25-001 ON-CALL UTILITY REPAIR SERVICES contemplates that, over the course of the Term, as defined in RFP-25-001 ON-CALL UTILITY REPAIR SERVICES, contractors whose proposals are accepted by City shall have the opportunity to be awarded projects from time to time by City for general construction services of City's properties;

WHEREAS, RFP-25-001 ON-CALL UTILITY REPAIR SERVICES further contemplates that City may award any project under RFP-25-001 to the superior proposal for that project, as determined by City in its own discretion to be in its best interests;

WHEREAS, Contractor submitted a Proposal in response to RFP-25-001 ON-CALL UTILITY REPAIR SERVICES that accepted by City on August 15, 2024, which Proposal is attached hereto as Exhibit 3 and incorporated by reference; and

WHEREAS, the Parties wish hereby to set forth and agree to the terms and procedures under which City may award, and Contractors may accept and perform, projects pursuant to RFP-25-001 ON-CALL UTILITY REPAIR SERVICES.

NOW THEREFORE, for and in consideration of the premises and mutual covenants herein contained, the Parties hereby agree as follows:

1. **Term:** As set forth in RFP-25-001 ON-CALL UTILITY REPAIR SERVICES, the Term of this Agreement shall be for one (1) year from the date signed and may be extended annually for up to three (3) additional one (1) year terms by mutual written agreement, provided that the funds for subject contract are available and approved annually by the City Council and that the Offeror has established a satisfactory record of performance.

Projects under this RFP shall be non-exclusive. Any extensions hereof shall be subject to the same terms and conditions set forth in RFP-25-001 ON-CALL UTILITY REPAIR SERVICES and this Agreement.

2. **Project Award:** City may, but is not required, to award one or more projects for general construction and improvements for city properties, as contemplated in RFP-25-001, to Contractor from time to time during the course of the Term. City's decision whether or not to award a project hereunder to contractor shall be discretionary, based upon City's determination of its best interest, which determination is absolute and not subject to challenge by Contractor.
3. **Contractor's Acceptance:** Contractor may, but is not required, to accept such project or projects awarded to Contractor under Paragraph 1. Contractor shall notify City in writing within 48 hours of receipt of the Award Notice of its acceptance or rejection of an awarded project. Failure to notify City within the time period specified shall be deemed a rejection.
4. **Project Commencement:** In the event that Contractor accepts an award of a project hereunder, Contractor shall commence work on the project upon acceptable time by both parties, provided that Contractor shall commence filing necessary permit applications within 24 hours of Contractor's acceptance. Once Contractor has commenced work on an awarded project, Contractor shall not have the right to withdraw and shall substantially complete the project within the project timeline specified in the Award Notice, unless Contractor's obligation to complete such pending project has been specifically released or extended by City in writing by a duly authorized representative of City. The work shall be considered substantially completed when the total amount of unfinished work is estimated at less than 5% and City shall determine substantial completion hereunder, by written certification of such by the Facilities Manager or the City Engineer for the City of Roswell, ("City Engineer"), as provided for hereunder.
5. **Project Performance:** Contractor shall perform all work on every project hereunder in a good and workman-like fashion, in substantial compliance in all respects with the plans and specifications, timeline, pricing, and all other project terms set forth in the Award Notice, and all instructions and directions provided by City. No act of the City, or its agents or employees or representatives, either in supervising or directing project work, or any extension of time for the completion of project

work, shall be regarded as an acceptance of such work or any part thereof, or of materials used therein, either wholly or in part. City shall determine substantial compliance hereunder solely by written certification of such by the City Engineer, as provided for hereunder.

6. **Subcontractors:** Contractor, as soon as practicable after the acceptance of a project, shall furnish to City in writing a list of the names of any subcontractors proposed for the project. Contractor shall not employ any subcontractor to whom City may have a reasonable objection. Contractor shall not be required to employ any subcontractor to whom he has a reasonable objection. Contracts between the Contractor and the subcontractor shall be in accordance with the terms of this Agreement and the Award Notice insofar as applicable.
7. **City Engineer's Certifications:** Upon receipt of written notice from the Contractor that the work is substantially complete and ready for inspection and acceptance, the City Engineer shall make an inspection of the project. If the City Engineer accepts Contractor's project work, he shall promptly issue a written certification over his own signature, stating that the project work provided for in this Award Notice has been substantially completed in substantial compliance with the plans and specifications ("Certification of Substantial Completion").

If required in the Award Notice, the City Engineer shall make a final inspection of the project no later than 11 months after substantial completion of the work. If the City Engineer determines that the project has been fully completed in compliance with the terms of the Award Notice, he shall promptly issue a written certification over his own signature, stating that the project work provided for in this Award Notice has been finally completed ("Certification of Final Completion").

8. **Project Payment:** City shall pay Contractor pursuant to the price and payment schedule provided in the Award Notice. Final payment shall be made within thirty (30) days after date of issuance of the Certification of Substantial or Final Completion, as provided for in the Award Notice. Payments may be withheld on account of
 - a. defective work not remedied;
 - b. failure of the Contractor to make payments properly for labor, materials, or equipment, and Sub-Contractors
 - c. damage to City or a third party;
 - d. any other claims asserted or evidence which indicates probable assertion of claims against Contractor in relation to the project; or

- e. unsatisfactory prosecution of the work by the Contractor.

In the event that City fails to make any payment due under the payment schedule without cause, City shall have the opportunity to cure any such omission within 14 days of notice by Contractor of such. Contractor shall submit to City a Final invoice for final payment. Contractor's Invoice/billing shall provide the following information:

- a. Contractor's Name;
- b. Contractor's Address and a phone number;
- c. Purchase Order Number issued by City at time of project Award Notice;
- d. Date of Invoice/ billing;
- e. Location of project jobsite (address/ department name);
- f. Project jobsite start date;
- g. Final amount quoted and accepted by City;
- h. The billed amount for New Mexico Gross Receipts Tax shall be stated on a separate line and at current rate at time of job completion,

9. Contractor's Costs: Contractor shall provide and pay for all labor, expertise, materials, freight/delivery equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of project work. Contractor shall bear the cost of all permits and licenses required to perform any project work.

10. City's Right to Inspect and Supervise Work: City, by and through the City Engineer or his designee, may make periodic visits to every project site to determine in general if project work is proceeding in accordance with the Award Notice's plans and specifications on the basis of on-site observations, the City Engineer or designee will keep City informed of the progress of the project work, and will endeavor to guard the City against defects and deficiencies in project work of Contractor. The City Engineer will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of project work, nor will City Engineer be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with project work.

City, by and through the City Engineer and/or other designee, may supervise and direct Contractor's project work and Contractor shall follow all instructions, directions and specifications of City in

the performance of project work, provided that supervision and direction by City shall conform to the project terms provided in the Award Notice. City will not be responsible, however, for the Contractor's failure to carry out project work in accordance with its obligations hereunder or pursuant to the plans and specifications of the Award Notice.

- 11. City's Right to Direct Contractor Employees:** City's right to supervise and direct Contractor's project work shall include the right to direct Contractor's managerial and supervisory employees, and subcontractors, who shall faithfully and timely comply with all instructions of City concerning project work. In the event that City determines that any employee or subcontractor of Contractor has refused or neglected to obey City's instructions relating to project work; or are determined by City, in its discretion, to be otherwise incompetent, disorderly or unfaithful, Contractor shall, upon notice from City, at once discharge and not again employ such employee or subcontractor on any part of the project work, unless reinstated by the written consent of City.
- 12. Implied Work:** Any work that is fairly implied by the plans and specifications of the Award Notice or this Agreement, as determined by the City Engineer, shall be completed by Contractor at no additional cost and within the project timeline set forth in the Award Notice, notwithstanding the failure of the Award Notice or this Agreement to explicitly state such work.
- 13. Change Orders:** City may, whenever the City Engineer deems it necessary during the progress of a project, notify Contractor of any changes in project work ("Change Orders"), which shall automatically amend and become incorporated into the Award Notice, so long as such Change Order is within the scope of the plans and specifications of the Award Notice. Change Orders shall, if necessary, include any associated alteration of project pricing and/or timeline.
- 14. Additional Work:** In the event, however, that City desires additional work beyond that contemplated by the Award Notice, City shall notify Contractor of such additional work in a supplemental notice of award ("Supplemental Award Notice"), which shall set forth the plans and specifications, timeline, pricing and payment schedule of the additional work. Contractor may accept or reject the additional work as otherwise provided for herein.
- 15. Liquidated Damages for Delays:** The Parties acknowledge and agree that the failure of Contractor to adhere to project timelines, resulting in delay to substantial completion of a project, will cause damages to City, including, without limitation, additional engineering and inspection expenses,

which are significant but difficult to quantify. In the event that substantial completion of an awarded contract is delayed beyond project timelines established by City, as a result of any failure of Contractor, Contractor shall pay to City \$5,000.00 per each day substantial completion is delayed beyond established project timelines. The Parties agree that sums payable in this Paragraph constitute liquidated damages and not penalties and are in addition to all other rights of City, under this Agreement or as otherwise provided by law.

16. Compliance with Law: The Contractor will be required to observe and comply with all applicable laws, ordinances, rules, regulations and orders of any public authority applicable to Contractor's performance of project work, including, without limitation, those relating to worker health and safety, obstruction of the streets, runways, taxiways, maintaining signals, keeping open passageways and protecting the same where exposed. Contractor shall obtain all necessary permits and licenses relative to any project.

17. Safety: Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with project work. It shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

- a. all employees and subcontractors on every project and other persons who may be affected thereby;
- b. all materials and equipment to be used and/or incorporated in the project; and
- c. any other property at the project site or elsewhere.

Contractor shall bear all risk of loss to project work, materials or equipment due to fire, theft, vandalism, or other casualty or cause, until project work is substantially completed and accepted by City. All damage or loss to any property caused in whole or in part by the Contractor, or its employees, agents, representatives, or subcontractors shall be remedied by the Contractor.

18. Insurance: Without waiving or limiting Contractor's duty herein to indemnify City, Contractor shall purchase and maintain in full force and effect a \$1,000,000.00 policy or policies of general public liability insurance in which City is named as an additional insured, covering against claims for injury, death or damage to person(s) or property arising from or relating to any and every project undertaken by Contractor.

19. Bid Bond: For any project, the price of which is \$25,000.00 or greater, Contractor shall furnish to City, with its acceptance of the project, a Bid Bond in the amount of 5% of the total amount of the price of such project, which Bond shall be executed by Contractor as principal, with at least one Corporate Surety Company authorized to do business in the State of New Mexico, as Surety conditioned for the faithful commencement of the work in strict conformity with the plans and specifications, pricing and timeline set forth in the Award Notice. In addition, in the event that Contractor performs multiple projects pursuant to this Agreement and the combined prices of such projects paid by City to Contractor equals or exceeds \$25,000.00, City may require Contractor secure a Bid Bond, as provided above, for any such additional projects cumulatively equaling or exceeding \$25,000.00.

20. Performance Bond: For each and every project accepted and undertaken by Contractor, Contractor shall furnish to City a Performance Bond in the amount of 100% of the total amount of the project price, which Bond shall be executed by Contractor as principal, with at least one Corporate Surety Company authorized to do business in the State of New Mexico, as Surety conditioned for the faithful completion of the work in strict conformity with the plans and specifications, pricing and timeline set forth in the Award Notice.

21. State Wage Rates: If applicable, pursuant to NMSA 1978 §13-4-11 (A), state wage rates shall apply to any bid or proposal on construction or public works projects in excess of \$60,000.00. In addition, all bidders shall comply with federal wage rates on applicable projects.

22. Prohibition on Liens: Contractor agrees that it shall not assert rights to or claim a lien, or encumbrance of any type or kind, including any mechanic's or materialman's lien on any portion of the land, buildings, equipment, fixtures, or materials that constitute or form a part of the project, nor shall it permit or suffer any liens for labor, equipment or materials furnished to

Contractor in relation to its performance of project work to encumber City's land, buildings, equipment, fixtures, or materials, and shall indemnify and hold harmless City against any such liens asserted by third parties. In addition, the Performance Bond provided for above shall be held and construed to cover all such third-party lien claims.

23. Disputes: The City Engineer shall be the initial interpreter of the requirements of this Agreement and the Award Notice and judge the acceptability of all project work thereunder.

Claims, disputes and other matters relating to the acceptability of project work or the interpretation of the requirements of this Agreement or the Award Notice pertaining to the performance and furnishing of project work, Change Orders, and project timelines will be referred initially to the City Engineer in writing with a request for a decision. Written notice of each such claim, dispute or other matter will be delivered by Contractor to the City Engineer promptly after the occurrence or event giving rise thereto. The City Engineer will render a decision in writing promptly after receipt of the submittal, allowing sufficient time for review of the matter. The City Engineer's decision on such claim, dispute or other matter will be final and binding upon Contractor.

24. Deficiency Notices: If at any time during the progress of an ongoing project, the City Engineer determines that:

- a. Contractor is failing to supply sufficient time, supplies, or manpower reasonably required by the project, or is otherwise failing to vigorously perform project work, such that there is a substantial possibility that the Contractor will not complete the project according to the applicable timeline;
- b. Contractor is neglecting to perform the work a good and workman-like fashion according to the plans and specifications of the Award Notice, instructions of City, and requirements of this Agreement; and/or
- c. Contractor is otherwise failing to perform any obligation or adhere to any covenant required hereunder or in the Award Notice;

the City Engineer shall notify Contractor of such determination ("Deficiency Notice") and require Contractor to provide such additional resources or to make good such deficiencies, as the City Engineer may deem necessary. Contractor shall supply the additional resources or make good the deficiencies at no additional cost to City and shall provide the City Engineer with evidence of satisfactory compliance within 10 business days of the Deficiency Notice. Satisfactory compliance shall be determined in good faith by the City Engineer.

25. Force Majeure: Notwithstanding the foregoing, in no event shall the Contractor be responsible or liable for any failure or delay in the performance of its obligations pursuant to City's specifications or timeline caused by any negligence or omission of City. Contractor shall further bear no responsibility or liability for delays arising out of or caused by forces beyond its control and not caused by the negligence or intentional conduct or misconduct of Contractor, including, without limitation, war, strike, fire, Act of God, earthquake, flood, lockout, embargo, governmental acts or

orders or restrictions, failure of suppliers, provided Contractor has exerted all reasonable efforts to avoid or remedy such force majeure.

In the event of a force majeure, Contractor shall notify City thereof within 10 days of its occurrence and request an extension of the applicable project timeline. Failure of Contractor to notify City of the occurrence of a force majeure shall subject Contractor to the liquidated damages specified above, notwithstanding this Paragraph.

- 26. Default:** Failure of Contractor to complete any project accepted pursuant to the terms of this Agreement according to the plans and specifications, instructions, and timeline of City, to comply with any Deficiency Notice of the City Engineer, or to otherwise adhere to any obligation or covenant set forth in this Agreement, shall constitute a Default of this Agreement. In the event of Default by Contractor, City may, without prejudice to any other remedy City may have, make good deficiencies and may deduct the cost thereof from payments then or thereafter due the Contractor or, at City's option, may terminate this Agreement and suspend Contractor's work on the project, take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the work by whatever method City may deem expedient.

If, in the event City opts to suspend Contractor's work and complete the project, the unpaid balance of payments owed Contractor for the project exceeds the expense of finishing the work, such excess shall be paid to the Contractor, but if such expense exceeds such unpaid balance, the Contractor shall pay the difference to the City. These rights and remedies are in addition to any right to damages or other rights and remedies allowed by law.

- 27. Waiver:** Neither a failure nor a delay on the part of either City in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise of any right, power or privilege. The rights, remedies and benefits of the City herein expressly specified are cumulative and not exclusive of any other rights, remedies or benefits which either may have under this Agreement at law, in equity, by statute or otherwise.

- 28. Termination:** This Agreement may be terminated at any time and without penalty, by either party by giving 60 days written notice, subject to any pending project on which work has commenced,

which project shall be completed according to the applicable project timeline and specifications, notwithstanding the right of termination hereunder, unless Contractor's obligation to complete such pending project has been specifically released by City in writing by a duly authorized representative of City.

City may suspend or annul any project commenced hereunder at any time, including by awarding the project to another contractor, with or without terminating this Agreement, when City determines such an action is in its best interest, which determination is absolute and not subject to contest by Contractor. In the event a project is annulled, Contractor shall be paid for all services satisfactorily completed, as determined by the City Engineer, within 30 days of annulment. In the event a project is temporarily suspended hereunder and later recommenced by Contractor, the project timeline shall be adjusted to account for such suspension.

- 29. Indemnification:** Contractor hereby expressly agrees to identify and save harmless the City in all suits and actions of every nature and description brought against by or on account of any injuries or damages received or sustained by any parties through the negligence or carelessness of Contractor, of its employees or subcontractors, or by from acts of Contractor of its servants or agents or subcontractors in the performance of their duties in doing the work herein contracted or in consequence of any negligence in making said improvements or in any improper materials used in its construction or by or on account of any acts or omissions of Contractor, its servants or agents or subcontractors.

Notice: All notices, requests or other communications to the parties shall be given by

Registered mail addressed as follows:

City of Roswell
Attn: Chad Cole
City Manager
P. O. Box 1838
Roswell, NM 88201

J & H SERVICES, INC.
Attn: Holly Mitchell
Vice President
6616 Gulton Ct NE, Ste 90
Albuquerque, NM, 87109

- 30. Prohibition on Assignment:** Contractor shall not assign any of its rights or interest or delegate any of its any of its obligations under this Agreement without the prior written consent of City, which consent may be withheld in its sole and absolute discretion.
- 31. Entire Agreement:** This Agreement embodies the entire agreement of the Parties with respect to the subject matters contained herein. This Agreement may be modified or amended or the provisions hereof waived only by a written instrument signed by the duly authorized representatives of the Parties.

32. Severance Clause: In case any provision in this Agreement shall be held invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

33. Choice of Law and Forum Selection: This Agreement shall be governed by the laws of the State of New Mexico, exclusive of choice of law provisions, and venue for any judicial proceeding resulting here from shall lie in the Fifth Judicial District, Chaves County, New Mexico.

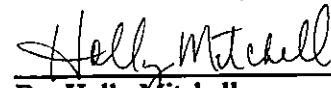
[SIGNATURES FOLLOW ON NEXT PAGE]

IN WITNESS WHEREOF, J & H SERVICES, INC. and the City of Roswell have caused this Agreement to be executed by their duly authorized officers on this 27 day of September 2024, the Effective Date hereof.

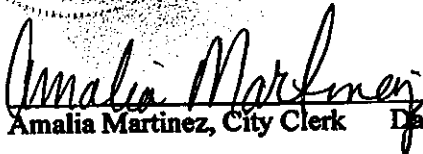
"City"
City of Roswell

 9/17/24
By: Chad Cole Date
City Manager

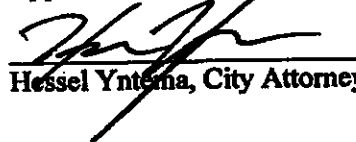
"J & H"
J & H SERVICES, INC

 9/27/24
By: Holly Mitchell Date
Vice President



 9-27-24
Amalia Martinez, City Clerk Date

Approved as to Form:

 9-16-24
Hessel Yntema, City Attorney Date