



Colorado Springs Utilities

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PROFESSIONAL SERVICES AGREEMENT

PROJECT TITLE: FOUNTAIN CREEK CORRIDOR MASTER PLAN

CONTRACT NUMBER:

Between

**Colorado Springs Utilities, the Lower Arkansas Valley Water
Conservancy District, the Fountain Creek Watershed, Flood Control
and Greenway District
and
THK, Inc.**

Effective Date: December 4, 2009

Utilities Project Manager
Carol Baker
P.O. Box 1103, MC 1821
Colorado Springs, CO 80947-1821
Phone Number: 719-668-8699
Fax Number: 719-668-8666

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement (“Agreement”) is made and entered into as of the 4th day of December, 2009, (“Effective Date”) by and between Colorado Springs Utilities ("UTILITIES") an enterprise of the City of Colorado Springs, a Colorado home rule city and municipal corporation, with its principal place of business at 121 S. Tejon Street, Colorado Springs, Colorado 80903, and the Lower Arkansas Valley Water Conservancy District (LOWER), the Fountain Creek Watershed, Flood Control and Greenway District (DISTRICT), and THK, Inc. (“CONTRACTOR”), a Colorado corporation, with its principal place of business at 2953 South Peoria Street, Suite 101, Aurora, CO 80014 collectively referenced as Parties. The purpose of the Agreement and the relationship and roles of the governmental Parties are set forth in the Statement of Work.

Services shall mean work performed to meet a demand, especially work not connected with a manufacturing process. The furnishing of labor, time, or effort by the CONTRACTOR, not involving the delivery of any specific end product, other than reports that are incidental to the required performance.

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1. **Scope of Work.** During the term of this Agreement, CONTRACTOR shall perform the Services as defined in the specific Statement of Work attached hereto as Exhibit A (“Services”).

This is a Task Order Agreement and paragraph 1.1 applies:

1.1. Task Order Conditions.

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

1.2. Except to the extent otherwise stated in any part of this Agreement or any Task Order, Services shall be performed at the rates set forth in Exhibit B (“Rates”).

2. **Term.** The term of this Agreement shall be from the Effective Date through September 30, 2011 (“Term”), unless otherwise extended by mutual written agreement of the Parties.

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

4. Payment.

- 4.1. DISTRICT shall pay CONTRACTOR for Services performed or furnished in accordance with CONTRACTOR's Rates attached as Exhibit B. DISTRICT shall pay CONTRACTOR for Reimbursable Expenses incurred by CONTRACTOR or CONTRACTOR's subcontractors as set forth in Exhibit B. Transportation shall be pre-approved by DISTRICT in writing; lodging, meals and incidental expenses in accordance with UTILITIES' then current Contractor Travel Reimbursement Policy available at www.csu.org or attached as Exhibit T.
- 4.2. Invoices will be prepared in a manner acceptable to UTILITIES, LOWER, and DISTRICT by CONTRACTOR and submitted to each UTILITIES, LOWER, and DISTRICT by CONTRACTOR unless otherwise agreed in writing; however, pursuant to Section 4.1, payment of said invoices shall be by the DISTRICT.
- 4.3. Each invoice shall be accompanied by supporting documentation as required by UTILITIES, LOWER, and DISTRICT. UTILITIES, LOWER, and DISTRICT, governmental entities, are exempt from taxes. UTILITIES, a governmental entity, is exempt from taxes per Federal Tax ID # 84-600574. Original invoices to UTILITIES for payments shall be submitted and addressed to:

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

Original invoices to DISTRICT for payments shall be submitted and addressed to:

Executive Director
Fountain Creek Watershed, Flood Control
and Greenway District

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

- 4.4. Net Payment of undisputed invoices is due and payable net thirty (30) days after DISTRICT's receipt of a complete and accurate invoice, notwithstanding anything that may be printed on such invoice. These payment terms shall also be subject to discounts for prompt payment, if

any, as set forth in Exhibit B, or any other applicable discounts offered by CONTRACTOR for any reason, including the terms of any applicable price warranty. In the event DISTRICT disputes or contests all or any part of any invoice, DISTRICT reserves the right to request a replacement invoice stating only the undisputed amount, and to promptly pay any undisputed amount and to withhold payment of any disputed amount, without waiving any of its claims or defenses to payment of the disputed amount. In the event that CONTRACTOR issues a replacement invoice for any undisputed amount, it is agreed that such issuance of a replacement invoice does not constitute a waiver of CONTRACTOR's rights with regard to the disputed amount.

- 4.5. DISTRICT is committed to paying invoices within the terms of the Agreement subject to funding limitations set forth in Section 14. DISTRICT will not pay any late charges or service charges that may be incurred due to late payment.
- 4.6. In the event of any termination CONTRACTOR will be entitled to invoice DISTRICT and will be paid in full for all Services accepted and all reasonable reimbursable expenses incurred through the effective date of termination. In the event of termination by UTILITIES, LOWER, and DISTRICT for convenience, CONTRACTOR shall be entitled to invoice DISTRICT and shall be paid a reasonable amount for Services and expenses directly attributable to termination, such as reassignment of personnel, costs of terminating contracts with CONTRACTOR's subcontractors, and other related close-out costs, using methods and rates for additional Services as set forth in this Agreement.

5. Confidentiality.

- 5.1. CONTRACTOR acknowledges that UTILITIES, LOWER, and DISTRICT are public entities subject to the provisions of the Colorado Public Records Act, C.R.S. § 24-72-201 et seq. Any confidential and/or proprietary information that either party discloses to the other with respect to this Agreement shall be designated as confidential and proprietary by the disclosing party at the time of disclosure.
- 5.2. In the course and scope of the Services being performed under this Agreement, CONTRACTOR may be provided, or by way of presence on UTILITIES' premises or by use of or access to UTILITIES' computer system, have access to information that is UTILITIES' customer's confidential information. In addition to the above CONTRACTOR acknowledges that UTILITIES, LOWER, and DISTRICT are subject to the provisions of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") 15 U.S.C. § 1681 et seq. Despite any provision to the contrary, any customer information, including but not limited to, names, addresses, telephone numbers, or personal financial information of past or

present users of Utilities is deemed Confidential Information, whether or not it is marked as confidential information. CONTRACTOR agrees that it shall not use, commercialize or disclose such Confidential Information to any person or entity, except to its own employees having a "need to know." Furthermore, CONTRACTOR shall burn, pulverize, or shred papers and destroy or erase all electronic media that contain UTILITIES', LOWER's, and/or DISTRICT's customer information on an annual basis (each year beginning as of the Effective Date) or more frequently as is reasonable so that such Confidential Information cannot practically be read or reconstructed. UTILITIES, LOWER, and DISTRICT has the right, but not the obligation, to audit CONTRACTOR compliance with this Paragraph by providing CONTRACTOR written notice 24 hours in advance of such audit.

- 5.3. The recipient shall hold and not engage in any use or disclosure of confidential information not expressly provided for in this Agreement. In the event any Party to this Agreement receives a request for such confidential and/or proprietary information from a third party, notice thereof shall promptly be given to the other Parties to this Agreement. The recipient shall take all reasonable steps to prevent any unauthorized possession, use, transfer or disclosure of such confidential information. Should the recipient learn of any such unauthorized possession, use, transfer or disclosure, it shall promptly notify the other Parties to this Agreement. If requested, the recipient shall deliver to the other Parties to this Agreement all confidential information (including all copies) disclosed to it with respect to this Agreement.
 - 5.4. The disclosure provisions of this section shall not apply to information that a) the Parties had in their possession prior to disclosure by any other Party to this Agreement; b) becomes public knowledge through no fault of CONTRACTOR; c) the recipient lawfully acquires from a third party not under an obligation of confidentiality to the disclosing Party; or d) is required to be disclosed by law or court order.
 - 5.5. CONTRACTOR shall not disclose any such confidential information or documents to any third party without the prior written authorization of UTILITIES, LOWER, and DISTRICT.
- 6. Subcontractors.** CONTRACTOR may retain subcontractors to carry out the Services outlined in this Agreement. UTILITIES, LOWER, and DISTRICT reserves the right to approve all subcontractors prior to their use by CONTRACTOR. There shall be no relationship, fiduciary or otherwise, between UTILITIES, LOWER, and DISTRICT and the subcontractors hired by CONTRACTOR. CONTRACTOR shall ensure that all subcontractors retained by CONTRACTOR acknowledge this Agreement, including the confidentiality provisions, in writing.

7. Warranties.

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

assign such warranties and guarantees to UTILITIES, LOWER, and DISTRICT.

- 7.6. CONTRACTOR shall warrant that all products obtained on behalf of UTILITIES, LOWER, and DISTRICT for the purpose of performing this Agreement shall have warranties that are transferable to UTILITIES and shall transfer all such warranties to UTILITIES, LOWER, and DISTRICT.
- 7.7. CONTRACTOR shall be fully responsible to UTILITIES, LOWER, and DISTRICT for all acts and omissions of the Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work just as CONTRACTOR is responsible for CONTRACTOR's own acts and omissions. Nothing in the Contract Documents shall create for the benefit of any such Subcontractor, Supplier, or other individual or entity any contractual relationship between UTILITIES, LOWER, and DISTRICT and any such Subcontractor, Supplier, or other individual or entity, nor shall it create any obligation on the part of UTILITIES, LOWER, and DISTRICT to pay or to see to the payment of any moneys due any such Subcontractor, Supplier, or other individual or entity except as may otherwise be required by Laws and Regulations.

All Work performed for CONTRACTOR by a Subcontractor or Supplier will be pursuant to an appropriate agreement between CONTRACTOR and the Subcontractor or Supplier, which specifically binds the Subcontractor or Supplier to the applicable terms and conditions of the Contract Documents for the benefit of UTILITIES, LOWER, and DISTRICT. Whenever any such agreement is with a Subcontractor or Supplier who is listed as an additional insured on the property insurance provided in paragraph 5.03, the agreement between the CONTRACTOR and the Subcontractor or Supplier will contain provisions whereby the subcontractor or Supplier waives all rights against UTILITIES, LOWER, and DISTRICT, CONTRACTOR, UTILITIES' REPRESENTATIVE, UTILITIES' Consultants, and all other individuals or entities identified herein to be listed as insureds or additional insureds (and the officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of them) for all losses and damages caused by, arising out of, relating to, or resulting from any of the perils or causes of loss covered by such policies and any other property insurance applicable to the Work. If the insurers on any such policies require separate waiver forms to be signed by any Subcontractor or Supplier, CONTRACTOR will obtain the same.

8. Indemnification/Liability.

- 8.1. To the fullest extent permitted by law, CONTRACTOR hereby releases UTILITIES, LOWER, and DISTRICT and shall fully protect, defend, indemnify and hold harmless UTILITIES, LOWER, and DISTRICT, the City

of Colorado Springs, their officers, City Council, UTILITIES Board, LOWER's Board, directors, employees, agents and representatives, and DISTRICT's Board, directors, employees, agents and representatives from and against any and all claims, costs (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or other dispute resolution costs), losses, damages, causes of action, or liability of any nature to the extent caused by the willful misconduct or negligent, reckless or tortious acts or omissions of CONTRACTOR or anyone for whose acts CONTRACTOR may be liable in the performance of its obligations under this Agreement.

- 8.2. Intellectual Property/Infringement. CONTRACTOR will indemnify UTILITIES, LOWER, and DISTRICT against a claim that any service, as provided by CONTRACTOR to UTILITIES, LOWER, and DISTRICT and used within the scope of this Agreement, infringes any copyright or any United States patent or trademark, or incorporates any misappropriated trade secret (a "Claim"). CONTRACTOR will pay any liabilities, costs, damages, or expenses, including reasonable attorneys' fees, attributable to such a Claim that are incurred by UTILITIES, LOWER, and DISTRICT and/or awarded against UTILITIES, LOWER, and DISTRICT in a final judgment or settlement approved in advance and in writing by CONTRACTOR, provided that UTILITIES, LOWER, and DISTRICT notifies CONTRACTOR in writing within thirty (30) days of the Claim.
- 8.3. Nothing in this Agreement shall be interpreted to limit or prevent the protections afforded to UTILITIES, LOWER, and DISTRICT or the City of Colorado Springs under the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*

9. Insurance.

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

(a) Workers' Compensation and Employer's Liability Insurance.

Workers' Compensation insurance shall be provided as required by an applicable law or regulation. Employer's liability insurance shall be provided in amounts not less than \$500,000 each accident for bodily injury by accident, with a \$500,000 policy limit for bodily injury by disease, and \$500,000 each employee for bodily injury by disease.

(b) General Liability Insurance. Commercial General Liability insurance covering all operations by or on behalf of CONTRACTOR providing insurance for bodily injury liability and property damage liability for the limits of liability indicated below and including coverage for:

- (1) premises and operations liability;
- (2) products and completed operations liability;
- (3) contractual liability insuring the obligations assumed by CONTRACTOR in this Agreement;
- (4) broad form property damage (including completed operations);
- (5) X.C.U. Coverage – If the Agreement requires any work procedures involving blasting, excavating, tunneling, or other underground work, the liability coverage shall include coverage commonly referred to as X.C.U. for explosion, collapse and underground hazards;
- (6) personal injury liability; and
- (7) railroad liability within 50' of railroad, if working within the vicinity of any railroad, bridge, trestle, track, roadbed, tunnel, underpass or crossing.

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

The limits of liability shall not be less than:

- \$1,000,000 each occurrence (combined single limit for bodily injury and property damage)
- \$1,000,000 for Personal Injury Liability
- \$2,000,000 Aggregate for Products-Completed Operation
- \$2,000,000 General Aggregate

UTILITIES, LOWER, and DISTRICT and the City of Colorado Springs, their officers, City Council, Utilities Board and employees, LOWER's Board, directors, employees, agents and representatives, and DISTRICT's Board, directors, employees, agents and representatives shall be named Additional Insureds.

(c) Automobile Liability Insurance (Bodily Injury and Property Damage Liability) including coverage for all owned, hired and non-owned automobiles. The limits of liability shall not be less than \$1,000,000 Combined Single Limit for each accident. CONTRACTOR's Automobile Liability insurance policy shall include coverage for Automobile Contractual Liability.

(d) Professional Liability. Professional Liability insurance including errors and omissions coverage in an amount of not less than

\$1,000,000 per occurrence (or claims made) and aggregate for licensed professional consultants.

(e) Pollution Liability. In the event the Services involve any excavation, subsurface, underground, or dewatering work, CONTRACTOR must carry at all times during the term of this Agreement, and for twenty-four (24) months following termination of this Agreement, a Pollution Liability policy with limits not less than \$1,000,000 per occurrence (or claims made) and not less than \$1,000,000 aggregate for Bodily Injury, Personal Injury and Property Damage, naming UTILITIES, LOWER, and DISTRICT and the City of Colorado Springs, their officers, City Council, Utilities Board and employees, LOWER's Board, directors, employees, agents and representatives, and DISTRICT's Board, directors, employees, agents and representatives as Additional Insureds. This coverage must include any losses arising from transit exposures and also include all costs associated with clean-up, containment, and disposal of any hazardous liquids or materials. This insurance must include coverage for any costs arising out of mold or fungus claims or issues.

(f) Umbrella/Excess Liability.

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

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

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

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

10. Representatives and Notice.

10.1. Pursuant to the terms of the August 28, 2009 Intergovernmental Agreement, UTILITIES, LOWER and DISTRICT shall appoint representatives to a Steering Committee, which shall act as a liaison with CONTRACTOR in accordance with Exhibit A. Representatives on the Steering Committee may be changed. Written notice will be provided to CONTRACTOR of any such change. All notices necessary or required under this Agreement shall be in writing and shall be personally delivered, sent by overnight delivery service, or mailed by certified mail, postage prepaid and return receipt requested, as follows:

If to UTILITIES: **COLORADO SPRINGS UTILITIES**
Attn: Carol Baker
PO Box 1103, MC 930
Colorado Springs, Colorado 80947-0930
Phone: 719-668-8699

If to LOWER: **LOWER ARKANSAS WATER
CONSERVANCY DISTRICT**
Jay Winner
801 Swink Avenue
Rocky Ford, CO 81067
(719) 469-8935

If to DISTRICT: **FOUNTAIN CREEK WATERSHED, FLOOD
CONTROL AND GREENWAY DISTRICT**
Attn: _____, Executive Director

If to CONTRACTOR: **THK, INC.**
Attn: Kevin Shanks
2953 South Peoria Street, Suite 101
Aurora, CO 80014
Phone: (303) 770-7201

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

11. Changes in Work. Subject to Section 14.3, Appropriation of Funds, any request by any Party to this Agreement for additional work or for changes in the manner or method of work performance, shall be made only by written amendment, which shall specify the part of the Agreement affected by the change. UTILITIES, LOWER and

DISTRICT shall not be liable for payment of any additional work performed by CONTRACTOR not previously authorized by UTILITIES, LOWER and DISTRICT by written amendment.

12. Force Majeure. No Party to the Agreement shall be liable for delays in performing its obligations to the extent the delay is caused by an unforeseeable condition beyond its reasonable control without fault or negligence including strikes, riots, wars, floods, fires, explosions, acts of nature, acts of government (other than the Colorado Springs City Council), or labor disturbances.

13. Dispute Resolution.

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

(a) The Parties shall hold a meeting promptly, but in no event later than thirty (30) calendar days from the initial written notice of the dispute, attended by persons with decision-making authority regarding the dispute, to attempt in good faith to negotiate a resolution of the dispute; provided, however, that no such meeting shall be deemed to vitiate or reduce the obligations and liabilities of the Parties thereunder or be deemed a waiver by a party hereto of any remedies to which such party would otherwise be entitled thereunder unless otherwise agreed to by the Parties in writing.

(b) If, within thirty (30) calendar days after such meeting, the Parties have not succeeded in negotiating a resolution of the dispute, they agree to submit the dispute to non-binding mediation and to bear equally the costs of the mediation.

(c) The Parties will jointly appoint a mutually acceptable mediator. If they fail to do so within twenty (20) calendar days from the conclusion of the negotiation period, they shall each select a mediator. The two mediators will then appoint a third mediator who shall, as the sole mediator, conduct mediation for the Parties.

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

14. Appropriation of Funds.

14.1. In accord with the City Charter, performance of UTILITIES' obligations, and to the extent applicable, LOWER's and DISTRICT's obligations, under

this Agreement is expressly conditioned upon appropriation of funds by the City Council. In the event funds are not appropriated in whole or in part sufficient for performance of UTILITIES' obligations under this Agreement, or appropriated funds may not be expended due to the City of Colorado Springs City Charter spending limitations, then this Agreement shall thereafter become null and void by operation of law, and UTILITIES shall thereafter have no liability for compensation or damages to CONTRACTOR in excess of UTILITIES' authorized appropriation for this Agreement or the applicable spending limit, whichever is less. UTILITIES shall notify CONTRACTOR as soon as reasonably practicable. In the event of a similar applicable limitation with regard to LOWER and/or DISTRICT, LOWER and/or DISTRICT shall similarly notify CONTRACTOR.

- 14.2. The funds appropriated for this Agreement are equal to or exceed the contract amount for the year in which this Agreement was awarded. For work to be completed in subsequent fiscal years, if any, UTILITIES, LOWER and DISTRICT will notify CONTRACTOR of the appropriation of funds for such work after the adoption of UTILITIES' annual appropriation ordinance and any applicable LOWER and DISTRICT appropriations for those years.
- 14.3. CONTRACTOR and UTILITIES, LOWER and DISTRICT agree and acknowledge as a part of this Agreement that no amendment that requires additional compensable work to be performed under this Agreement shall be issued by UTILITIES, LOWER and DISTRICT unless funds are available to pay such additional costs, and CONTRACTOR has been given written assurance by UTILITIES, LOWER and DISTRICT that lawful appropriations to cover the cost of the additional work have been made or unless such work is covered under a remedy-granting provision in this Agreement.
- 14.4. DISTRICT'S funding obligations are limited to funding availability pursuant to the IGA and are expressly contingent upon appropriation of funding by, and receipt by the DISTRICT of said appropriated funds from, LOWER and UTILITIES. Should either LOWER or UTILITIES fail to provide funding as set forth in the IGA, DISTRICT shall have no further obligation to complete performance under this Agreement.

15. Termination.

- 15.1. The following conduct shall be deemed to be a default of CONTRACTOR under this Agreement:
 - (a) The Services under this Agreement are abandoned by CONTRACTOR; or

- (b) The Agreement is assigned by CONTRACTOR without the written consent of UTILITIES, LOWER and DISTRICT; or
- (c) CONTRACTOR is adjudged bankrupt; or
- (d) A general assignment of CONTRACTOR's assets is made for the benefit of its creditors; or
- (e) A receiver is appointed for CONTRACTOR or any of its property; or
- (f) At any time UTILITIES, LOWER and DISTRICT sends notice that the performance of the Services under this Agreement is being unnecessarily delayed, that CONTRACTOR is violating any of the conditions of this Agreement or that CONTRACTOR is executing the same in bad faith or otherwise not in accordance with the terms of said Agreement; or
- (g) The Services are not substantially completed within the time named for its completion.

15.2. Upon default, UTILITIES, LOWER and DISTRICT may send written notice upon CONTRACTOR of UTILITIES', LOWER's and DISTRICT's intention to terminate this Agreement. If CONTRACTOR agrees to corrective action, then CONTRACTOR will have an additional five (5) calendar days to develop a corrective action plan acceptable to UTILITIES, LOWER and DISTRICT for completion of the work. If CONTRACTOR fails to complete the previous two activities within the prescribed times, or if CONTRACTOR fails to complete the work pursuant to the corrective action plan, then UTILITIES, LOWER and DISTRICT may terminate this Agreement without further notice to CONTRACTOR. In the event of such termination, UTILITIES, LOWER and DISTRICT may take over and prosecute the work to completion, by contract or otherwise. CONTRACTOR shall be liable to UTILITIES, LOWER and DISTRICT for all reasonable costs sustained by UTILITIES, LOWER and DISTRICT by reason of such prosecution and completion.

15.3. This Agreement may be terminated for convenience regardless of default by UTILITIES, LOWER and DISTRICT upon thirty (30) days advance written notice to CONTRACTOR. CONTRACTOR shall not be paid for any Services performed after the date of termination, unless otherwise mutually agreed upon by the Parties in writing.

16. Copyrights/Intellectual Property.

16.1. CONTRACTOR agrees that UTILITIES, LOWER and DISTRICT will have extensive input in the process of rendering Services associated with this Agreement. Therefore, CONTRACTOR agrees and acknowledges that all work produced as a result of the Services (e.g. video, artwork, brochures, covers, labels, writings, designs, models, etc.) that have been or will be used by or paid for by UTILITIES, LOWER and DISTRICT pursuant to this Agreement is a work made for hire as that term is defined by the United States copyright laws, but within full control of UTILITIES, LOWER and

DISTRICT and that UTILITIES, LOWER and DISTRICT are the joint owner of any work product which CONTRACTOR has made or will make under this Agreement, including but not limited to all intellectual property rights in said work product under copyright, patent, trademark, trade secret and other applicable law, and that compensation to CONTRACTOR for acceptance and acknowledgment of this Agreement is included in any compensation or price whatsoever paid to CONTRACTOR. It is the intent of the Parties that UTILITIES, LOWER and DISTRICT shall have full ownership of the work product produced pursuant to this Agreement upon payment in full by UTILITIES, LOWER and/or DISTRICT to CONTRACTOR.

- 16.2. CONTRACTOR hereby warrants to UTILITIES, LOWER and DISTRICT that it will take no action to copyright, patent, trademark, or trade secret any and all of the work product described in this Agreement.
- 16.3. In the event this Agreement is deemed by a court of competent jurisdiction not to be a work for hire under federal copyright laws, this Agreement provision shall act as an irrevocable disclaimer by CONTRACTOR in favor of UTILITIES, LOWER and DISTRICT and as an irrevocable assignment to UTILITIES, LOWER and DISTRICT by CONTRACTOR of any and all intellectual property rights in CONTRACTOR's work product, including, but not limited to, copyright, patent, trademark and trade secrets, including, but not limited to, all rights in perpetuity. Under this irrevocable assignment, CONTRACTOR hereby assigns to UTILITIES, LOWER and DISTRICT the sole and exclusive right, title, and interest in and to CONTRACTOR's work product, in any and all countries. It is CONTRACTOR's specific intent to assign all right, title, and interest whatsoever in any media and for any purpose, to UTILITIES, LOWER and DISTRICT including all rights of renewal and extension. To that end, CONTRACTOR agrees to execute and deliver all necessary documents requested by the City of Colorado Springs and/or UTILITIES, LOWER and DISTRICT in connection therewith and appoints City of Colorado Springs and/or UTILITIES, LOWER and DISTRICT as CONTRACTOR's agent and attorney-in-fact to act for and in CONTRACTOR's behalf and stead to execute, register and file any such applications, and to do all other lawfully permitted acts to further the registration, prosecution, issuance, renewals, and extensions of copyrights or other protections with the same legal force and effect as if executed by CONTRACTOR. Further, the Parties expressly agree that the provisions of this paragraph shall be binding upon the Parties and their legal representatives, successors, and assigns.
- 16.4. Royalties and fees for patents covering materials, articles, apparatus, devices, or equipment (as distinguished from processes) used in the work or Services, shall be included in the hourly rate amounts paid to CONTRACTOR in accordance with Exhibit B. No additional compensation shall be due to CONTRACTOR for such items.

CONTRACTOR shall satisfy all demands that may be made at any time for such royalties or fees and they shall be liable for any damages or claims for patent infringements. CONTRACTOR shall, at its own cost and expense, defend all suits or proceedings that may be instituted against UTILITIES, LOWER and/or DISTRICT and hold UTILITIES, LOWER and/or DISTRICT harmless for infringement or alleged infringement of any patents involved in the work and, in case of an award, including any costs and attorney fees awarded, and any and all costs and attorney fees associated with any appeals that may be taken from any judgment rendered on any such suits or proceedings of damages, CONTRACTOR shall pay such award provided UTILITIES, LOWER and/or DISTRICT gives CONTRACTOR prompt notice in writing of such claim and permits CONTRACTOR to contest same through its counsel or, at its option, to settle by securing for UTILITIES, LOWER and/or DISTRICT the right to continue to use such products or by modifying them to avoid infringement, or by reclaiming them and reimbursing UTILITIES the sum paid therefore; and provided UTILITIES, LOWER and/or DISTRICT gives CONTRACTOR all necessary authority and assistance, at the expense of CONTRACTOR, to enable CONTRACTOR to do so. Final payment to CONTRACTOR by UTILITIES, LOWER and/or DISTRICT will not be made while any suit or claim remains unsettled.

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

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

19. Audit. CONTRACTOR shall maintain accurate records of all amounts billable to and payments made by UTILITIES, LOWER and DISTRICT hereunder in accordance with recognized accounting practices and in a format that will permit audit, for a period of three (3) years after payment of the last invoice related to this

Agreement. Such records shall be open to reasonable inspection and subject to audit and/or reproduction, during normal working hours, by UTILITIES, LOWER and DISTRICT or its authorized representative. UTILITIES, LOWER and/or DISTRICT shall give CONTRACTOR advance notice of intended audits.

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

21. Assignment.

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

21.2. Unless expressly provided otherwise in this Agreement: Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owned by UTILITIES, LOWER and DISTRICT or CONTRACTOR to any Contractor, Contractor's subcontractor, supplier, other individual or entity, or to any surety for or employee of any of them. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of UTILITIES, LOWER and DISTRICT and CONTRACTOR and not for the benefit of any other party.

22. Compliance with Laws and Regulations.

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

22.2. Compliance with C.R.S. Sec. 8-17.5.101. Pursuant to Colorado Revised Statutes Section 8-17.5-101, CONTRACTOR certifies that CONTRACTOR shall comply with the provisions of C.R.S. Sec. 8-17.5-101 et seq. CONTRACTOR shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to CONTRACTOR that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. CONTRACTOR represents, warrants, and agrees that it (i) has confirmed that it does not employ any illegal aliens, either through participation in the eVerify program administered by the Social Security Administration and Department of Homeland Security or by means of the Department of Labor program, and (ii) otherwise will comply with the requirements of C.R.S. Sec. 8-17.5-

102(2)(b). CONTRACTOR shall comply with all reasonable requests made in the course of an investigation under C.R.S. Sec. 8-17.5-102 by the Colorado Department of Labor and Employment. If CONTRACTOR fails to comply with any requirement of this provision or C.R.S. Sec. 8-17.5-101 et seq., UTILITIES, LOWER and DISTRICT may terminate this contract for breach.

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

23. Governing Law. This Agreement shall be construed in accordance with the laws of the State of Colorado without reference to conflicts of laws, the Colorado Springs City Charter, City Code, Ordinances, Rules and Regulations. In the event of litigation, this Agreement shall be enforceable by or against the City of Colorado Springs on behalf of UTILITIES as provided in Colorado Springs City Code Sec. 12-1-108. In the event of any dispute over the Agreement's terms and conditions, the exclusive venue and jurisdiction for any litigation arising thereunder shall be in the District Court of El Paso County, Colorado, and, if necessary for exclusive federal questions, the United States District Court for the District of Colorado.

24. Survival. The provisions of this Agreement with respect to confidentiality, copyrights/ intellectual property, dispute resolution, warranties, liability, appropriation of funds, audit, payment and indemnification shall survive the termination of this Agreement.

25. Counterparts; Copies of Signatures. This Agreement may be executed in one or more counterparts, each of which shall be deemed original and all of which together shall constitute one and the same instrument. Copies of signatures shall be permitted for purposes of the binding nature of this Agreement.

26. Time of the Essence. The Parties agree that time is of the essence and performance of the Services under this Agreement shall be developed, completed and implemented according to the Scope of Work. Any delays in performance within the control of CONTRACTOR, its consultants, subcontractors, employees or agents shall not be cause for extending the date for completion of the Services.

27. Entire Agreement. This Agreement with all referenced exhibits or attachments constitutes the entire agreement between the Parties and supersedes all previous written or oral communications, understandings, and agreements between the Parties unless specifically stated herein. This Agreement may only be amended by a written agreement signed by both Parties. Email and all other electronic (including voice) communications from UTILITIES, LOWER and DISTRICT in connection with this Agreement are for informational purposes only. No such communication is intended by UTILITIES, LOWER and DISTRICT to constitute either an electronic record or an electronic signature, or to constitute any agreement by UTILITIES, LOWER and DISTRICT to conduct a transaction by electronic means. Any such intention or agreement is hereby expressly disclaimed.

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

**THE FOUNTAIN CREEK
WATERSHED, FLOOD CONTROL
AND GREENWAY DISTRICT**

**LOWER ARKANSAS VALLEY
WATER CONSERVANCY DISTRICT**

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____

COLORADO SPRINGS UTILITIES

THK, INC.

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____

City Attorney's Office - Utilities Division

Approved As To Form:

Signatures in CDB

By: _____

Name: _____

Title: _____

Date: _____

Approved as to Form:

Attorney for Fountain Creek Watershed, Flood Control and Greenway District

Approved as to Form:

Attorney for Lower Arkansas Valley Water Conservancy District

Approved as to Form:

Attorney for THK, Inc.

EXHIBIT A

STATEMENT OF WORK

(Includes Task Order Template F04-09727 if Applicable)

EXHIBIT B

RATES

INSTRUCTIONS: PLEASE ADD THE FOLLOWING TO EXHIBIT B ON EVERY AGREEMENT:

CURRENT RATE OR FIRM FIXED PRICE

PAYMENT TERM (I.E. NET 30, 2%10N30, ETC.)

PRICE INDEX OR CAP

IF LABOR HOUR CONTRACT ADD:

LIST OF POSITIONS

HOURLY RATE PER POSITION

TRAVEL POLICY OR IF TRAVEL IS INCLUDED IN THE RATE