

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE CITY OF NEW BRAUNFELS
AND NEW BRAUNFELS UTILITIES
TO COORDINATE CAPITAL PROJECTS UNDER THE
CAPITAL IMPROVEMENTS PROGRAM**

This Memorandum of Understanding (“MOU”) is entered into between the **City of New Braunfels, Texas** (hereafter referred to as “CONB” or “City”), a home-rule city under the laws of the State of Texas, and **New Braunfels Utilities** (hereafter referred to as “NBU”), a municipally-owned electric, water, and wastewater utility (collectively, the “Parties”).

RECITALS

WHEREAS, the City and NBU have agreed to coordinate, where appropriate, on CONB’s capital improvements plan (“Capital Improvements Plan”) and NBU’s water and wastewater capital improvement projects plan;

WHEREAS, the City has an extensive Capital Improvements Plan funded through various funding programs, including bonds, New Braunfels Economic Development Corporation, Alamo Area Metropolitan Planning Organization, Texas Department of Transportation, roadway impact fees, park development fees, and other sources;

WHEREAS, NBU has current and planned multi-year water and wastewater capital infrastructure projects, some of which may be jointly developed under the CONB’s funding programs detailed above;

WHEREAS, CONB and NBU agree to coordinate on additional future projects where appropriate, for the benefit of both Parties;

WHEREAS, CONB and NBU are entering into this MOU to define the terms and conditions of each parties’ capital program, project coordination, and joint solicitation and administration of Joint Projects (defined hereafter); and

WHEREAS, CONB and NBU acknowledge the benefits of coordinating their respective public works projects, where appropriate, in order to reduce project costs, minimize closure of City streets and rights-of-way, reduce inconvenience to the public, and expedite project construction.

NOW THEREFORE, in consideration of the representations, covenants, and undertakings set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, CONB and NBU mutually consent to enter into this MOU effective as of the date last signed by the Parties (the “Effective Date”):

I. Terms of MOU

A. Review of CONB's Capital Improvements Plan.

1. To engage in active coordination with the CONB's Capital Improvements Plan, NBU agrees to perform the following:
 - a. review at an early initial stage of each proposed project for horizontal and vertical utility conflicts (water and sewer) based on existing plan of record information;
 - b. review each proposed project for conflict with the NBU 5-year Capital Improvements Plan and Maintenance/Replacement Plan;
 - c. provide feedback to CONB regarding potential schedule impacts to CONB's proposed project schedule based on planned NBU projects;
 - d. when possible, prioritize NBU planned projects to align with the CONB's project schedule;
 - e. identify a single point of contact for coordination with each NBU utility division who is authorized to adjust NBU project timelines to resolve conflicts with CONB projects; and
 - f. establish an escalation process to resolve conflicts as necessary when they arise during the coordination process.
2. CONB agrees to perform the following:
 - a. provide annually to NBU an updated Capital Improvements Plan containing funded projects;
 - b. attend regular meetings with NBU to discuss project coordination;
 - c. review each proposed NBU capital improvement project and Maintenance/Replacement Project in conjunction with the CONB Capital Improvements Plan to determine potential conflicts and coordination;
 - d. when possible, work with NBU to align CONB capital projects to coordinate with NBU planned projects;
 - e. identify a single point of contact for coordination with CONB who is authorized to adjust CONB project timelines to accommodate project coordination; and
 - f. establish an escalation process to resolve conflicts as necessary when they arise during the coordination process.

B. Internet-Based Project Management System for Joint Bid Projects Only. CONB administers its design and construction management through an Internet-based project management system. For joint bid projects only, NBU and CONB agree to primarily conduct communications that relate to processing project administrative functions through the CONB's project-management system. Project administrative functions include correspondence, submittals, requests for information, vouchers, payments requests and tracking for project record, amendments and change orders. CONB shall administer the software and shall provide training and access to NBU identified project team members. However, any provisions contained herein notwithstanding, the Parties acknowledge and understand that staff will continue to

communicate through email and other forms of communications regarding other aspects of the joint bid projects. These other forms of communication will not be of any less relevance or importance than those that occur through the CONB's Internet-based project management system.

C. Construction Conflict Coordination. CONB and NBU shall assess the risk of unforeseen NBU utility conflicts on each project during the design process. Based on this assessment, the Parties will propose and agree upon a utility allowance amount to be added to the bid award, which will be used to address NBU utility conflicts that arise. NBU shall reimburse the CONB for any expenses incurred to address unforeseen NBU utility conflicts paid from the utility allowance. The utility allowance is intended to address the following potential NBU utility conflicts, but can be used on other work as agreed upon between CONB and NBU:

1. lower existing water and sewer services;
2. cap abandoned water and sewer services;
3. adjust unidentified valves and manholes;
4. adjust unidentified or unknown water or sewer mains; and
5. cut and grout any mains noted to be abandoned under pavement.

When the work listed above requires engineered drawings, the CONB project engineer shall create the necessary engineered documents to address the NBU utility conflicts. NBU shall be entitled to review and approve the engineered documents so the CONB contractor can provide the cost to complete the work. NBU shall be responsible for the additional engineering fees and the cost for the CONB contractor to complete the work.

D. Joint Projects. Joint projects are capital projects involving both a CONB project and an NBU current or planned infrastructure project ("Joint Projects"). CONB and NBU shall designate Joint Projects prior to the selection of any consultants or contractors to work on said projects. Both Parties agree to use the same consultants or contractors for all Joint Projects. The following terms and conditions will govern the joint solicitation and administration of Joint Projects.

1. CONB and NBU will each be a party to contracts for design and construction of Joint Projects.
2. CONB shall be the lead contracting agency on Joint Projects. CONB shall have primary responsibility for the project solicitation and procurement in accordance with Texas Government Code, Chapters 2254 and 2269.
3. CONB shall establish a selection panel to select engineers, architects, and other consultants that will be assigned to work on Joint Projects related to the Capital Improvements Plan. NBU will be represented in the selection panel.
4. For the design or engineering contract, the final contract and insurance documents will designate both CONB and NBU as dual project owners. The design or engineering contract will have separate signature blocks for CONB and NBU in their capacity as dual project owners.
5. For the design or engineering contract, NBU shall reimburse the CONB for the design costs associated with water and/or wastewater infrastructure scope of

- services, as applicable, within sixty (60) days of receiving the CONB invoice together with a copy of the engineer's invoice for the work.
6. NBU shall, within fifteen (15) working days, review plans submitted to the CONB at each design milestone and provide feedback to the engineers, architects, and other consultants regarding water and/or wastewater infrastructure, as applicable.
 7. CONB shall use the mutually agreed upon competitive sealed proposal ("CSP") documents as the instruments for solicitation and procurement for the Joint Project. The Parties shall mutually agree as to the terms of the CSP ninety (90) days before advertising.
 8. The Joint Project procurement and delivery timelines will begin with the finalization of the project contract documents.
 9. The Joint Project will be solicited and awarded solely pursuant to the provisions set forth in the CSP.
 10. After the solicitation and the award of the Joint Project, CONB and NBU agree to apply the Post Award Funding Formula provided in Exhibit A as a basis for establishing each Party's allocation of contract compensation amount for the Joint Project.
 11. CONB shall acquire all necessary rights-of-way and permits prior to commencement of construction of the Joint Project. NBU shall acquire all necessary easements that relate to its portion of the Joint Project prior to commencement of construction of the Joint Project.
 12. CONB shall use the mutually agreed upon contract documents as the construction contracts for the Joint Project. The contract documents and insurance will include both CONB and NBU as dual project owners. The contract documents will have separate signature blocks for CONB and NBU in their capacity as dual project owners.
 13. The contract documents will establish separate payment obligations for NBU and CONB which will require the prime contractor to submit separate applications for payment directly to CONB or NBU for each Party's respective portion of the Joint Project. CONB and NBU will make direct payments to the prime contractor for each party's respective portion of the Joint Project.
 14. CONB and NBU shall be entitled to review and approve any change orders submitted in accordance with the contract documents. CONB and NBU will process change orders in a timely manner as not to delay construction progress or cause additional costs. If change order review and approval by one entity is delayed to the point of causing additional costs to the Joint Project, the entity causing the delay will be responsible for paying the additional costs.
 15. NBU and CONB each agree to provide timely inspections of completed infrastructure work by the contractor so as not to cause unnecessary project delays. NBU and CONB shall be individually responsible for inspections of their respective portions of the Joint Project. Each Party shall also provide input on the construction completed for its respective portion of infrastructure work and shall review and approve construction completed throughout the construction period. Each Party shall attend all progress meetings. Upon request, the Parties shall make available to each other all project-related communications, including, but not limited to, correspondence, submittals, requests for information, vouchers, payment requests and processing, amendments, change orders,

engineering/design documents, construction documents, and other administrative communication activities as appropriate.

16. NBU and CONB shall designate one engineer with responsibility to serve as the initial arbiter of any disputes related to the Joint Project.
 17. Both Parties agree to negotiate in good faith to reach a solution when any design conflicts exist between NBU utilities and any other utilities or roadwork.
 18. To the extent disputes or claims arise related to the Joint Project, such disputes or claims will be resolved based on the respective scope of work. If such dispute relates to NBU's and CONB's respective scopes of work, both Parties shall participate equally to resolve such dispute. Upon resolution of any dispute, and if payment is due to one or both Parties, any such payment will be distributed proportionately to satisfy the claim(s) and reimburse each Party for its proportionate share of legal fees and expenses to resolve such dispute.
- E. Entire Agreement.** This MOU supersedes all other agreements, either oral or written, between the Parties with respect to the subject matter of this MOU: Coordination of Capital Projects within both Parties' Capital Improvement Plans. This MOU contains the entire understanding of the Parties and the covenants and agreements between the Parties with respect to the subject matter of this MOU. The Recitals and all terms defined therein are incorporated into this MOU for all intents and purposes.
- F. Funding.** This MOU shall be of no force or effect should either body fail to fund the obligations assumed hereunder. Completion of the terms of this MOU by either Party shall be contingent on the authorized funding by the City and NBU.
- G. Termination.** This Agreement may be terminated by either party by giving the other party thirty (30) days' written notice of termination without the necessity of determining default or giving cause.
- H. Force Majeure.** In the event that the performance by the City or NBU or any of its obligations or undertakings hereunder shall be interrupted or delayed by any occurrence not occasioned by its own conduct, whether such occurrence be an act of God, common enemy, or the result of war, riot, civil commotion, pandemic, sovereign conduct, or the act or conduct of any person or persons not a party or privy hereto, then it shall be excused from such performance for such period of time as is reasonably necessary after such occurrence to remedy the effects hereto.
- I. Third Party Rights Not Created.** This MOU is not intended and shall not be construed to create any rights or remedies in any person or legal entity that is not a party to it and the Parties are not waiving any defenses or immunity to which they are entitled against any person or legal entity that is not a party to this MOU.
- J. Term.** This MOU shall remain in effect for five (5) years unless or until it is superseded by another MOU or City ordinance. This MOU period may be extended by an amendment approved administratively by the City Manager and NBU CEO. If this MOU expires while Joint Projects are ongoing, the terms of this MOU shall remain in effect for such ongoing Joint Projects until the final completion of the Joint

Projects.

- K. Notices.** All Notices to either Party by the other required under this Agreement will be delivered personally or sent by certified U.S. mail, postage prepaid or sent by electronic mail, (electronic notice being permitted to the extent permitted by law, but only after a separate written consent of the Parties), addressed to such Party at the following addresses:

CONB	NBU
City of New Braunfels Transportation and Construction Services Attention: Garry Ford, Director 550 Landa Street New Braunfels, Texas 78130	New Braunfels Utilities Attention: Mike Short, Director of Engineering 1488 South Seguin Avenue New Braunfels, Texas 78130

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IN WITNESS WHEREOF, the Parties hereto agree to enter into this MOU for their mutual benefit.

City of New Braunfels

New Braunfels Utilities

Robert Camareno
City Manager

Ryan Kelso
Chief Executive Officer

Date

Date

Exhibit A

Post Award Funding Formula

Background

The City and NBU acknowledge that the proposal that is the best value from a qualified respondent might not include the lowest construction costs for NBU's Water/Wastewater ("W/WW") and the City's Roadway scope of work. For example, Respondent A submitted the lowest total monetary proposal. While the Roadway cost is the lowest of the three respondents, the W/WW cost is not.

If this discrepancy occurs, the City or NBU shall compensate the other entity using a predetermined method specified in the "Method" section. This approach assumes the benefits of a joint selection process outweigh potential negative outcomes and using this method further mitigates the impact. The method below should be applied to most proposal scenarios, but when it is beneficial and agreeable to both parties, an alternative method of evaluating the cost to each entity may be used.

Method

The qualified respondent with the proposal that is the best value will be selected to construct the Project. If the winning respondent submitted the lowest W/WW monetary proposal *and* the lowest Roadway monetary proposal, then no other consideration will be made and the following method will not be used.

- If the winning respondent did not submit the lowest monetary proposal for W/WW, NBU shall be compensated by the City.
- If the winning respondent did not submit the lowest monetary proposal for Roadway, the City shall be compensated by NBU.

Compensation will be calculated using the following method.

A bid tabulation will be created showing each respondent's cost for W/WW, Roadway, and overall monetary proposal. Then the average will be calculated for all W/WW and Roadway proposals.

The average monetary value of all Roadway proposals will be subtracted from the winning Roadway proposal.

$X = | \text{Winning Roadway Proposal} - \text{Average of Roadway Proposals} |$

The average monetary value of all W/WW proposals will be subtracted from the winning W/WW proposal.

$Y = | \text{Winning W/WW Proposal} - \text{Average of W/WW Proposals} |$

If the winning respondent submitted the lowest Roadway monetary proposal, but not the lowest W/WW monetary proposal, the City shall compensate NBU the absolute

value of X, or the amount required to bring the total amount paid for construction by the City to the value of the average monetary value of all Roadway proposals. The City shall pay the contractor for the cost of the Roadway work and pay the difference between the average monetary value of all Roadway proposals and the winning respondent's Roadway costs to NBU. The compensation paid by the City to NBU will never exceed the value of Y. In other words, the compensation paid to NBU will never reduce NBU's total costs below the average monetary value of all W/WW proposal.

If the winning respondent submitted the lowest W/WW monetary proposal, but not the lowest Roadway monetary proposal, NBU shall compensate the City the absolute value of Y, or the amount required to bring the total amount paid for construction by NBU to the value of the average monetary value of all W/WW proposals. NBU shall pay the contractor for the cost of the W/WW work and pay the City the difference between the average of all W/WW bids and the winning respondent's W/WW costs. The compensation paid by NBU to the City will never exceed the value of X. In other words, the compensation paid to the City will never reduce the City's total costs below the average monetary value of all Roadway proposals.

In the event payment of the reimbursable average to either party exceeds the budgeted amount for either party, this MOU is voidable by either party.