

MEMORANDUM OF UNDERSTANDING

This **MEMORANDUM OF UNDERSTANDING** ("MOU") is entered into on this ____ day of August 28, 2017, by and between the **CITY OF NEW BRAUNFELS** (the "City"), a home-rule city under the laws of the State of Texas, and **NEW BRAUNFELS UTILITIES** ("NBU"), a municipally-owned water, wastewater, and electric utility (individually referred to as "Party" or collectively referred to as the "Parties").

RECITALS

WHEREAS, NBU and the City intend to contribute certain infrastructure components to the Projects described in Exhibit A (collectively, the "Project"); and

WHEREAS, NBU and the City acknowledge the benefits of coordinating their respective roles and responsibilities in the Project in order to expedite construction, realize cost savings, increase efficiency, and improve the quality of the Project.

NOW THEREFORE, in consideration of the representations, covenants, and undertakings set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. The Parties enter into this MOU to define the terms and conditions of the joint solicitation and administration of the Project.
2. The Project will be bid and awarded solely pursuant to the provisions set forth in the Competitive Sealed Proposal.
3. The City will use its standard Competitive Sealed Proposal documents as the instruments for solicitation and procurement for the Project. The Parties will mutually agree as to the final terms of the Competitive Sealed Proposal.
4. The Capital Programs Manager will act on behalf of the City as its designated representative. The Chief Engineer of Water System Engineering will act on behalf of NBU as its designated representative.
5. The Chief Engineer of Water System Engineering will coordinate and collaborate with the Capital Programs Manager to establish the qualifying criteria for the Project, and evaluate and rank respondents to the bid solicitation. However, the City will have primary responsibility for the Project solicitation and procurement in accordance with Texas Government Code, Chapter 2269.
6. The Project procurement and delivery timelines will begin with the finalization of the Project Contract Documents.

7. After the bid and the award of the Project, the City and NBU agree to apply the Post Award Funding Formula provided in Exhibit B as a basis for establishing each Party's allocation of contract compensation amount for the Project.
8. The City shall acquire all necessary rights-of-way prior to construction of the Project, and NBU shall acquire all necessary easements and applicable permits prior to construction of the Project.
9. The City will use its Project Contract Documents as the construction contracts for the Project. The Parties will mutually agree as to the final contract forms. The final contract forms will be modified to designate both the City and NBU as dual Project owners. The final contract forms will have separate signature blocks for the City and NBU in their capacity as dual Project owners.
10. The final contracts will establish separate payment obligations for NBU and the City. Such modifications shall require the prime contractor to submit separate applications for payment directly to the City or NBU for each Party's respective portion of the Project. Such modifications shall also require the City and NBU to make direct payments to the prime contractor for each Party's respective portion of the Project.
11. The City and NBU will approve any changes to the Project Contract Documents jointly.
12. NBU and the City each agree to provide timely inspections of completed infrastructure work by the contractor awarded a contract so as not to cause unnecessary Project delays. NBU and the City will be individually responsible for inspections of their respective portions of the Project. Each Party will also provide input on the construction completed for its respective portion of infrastructure work, and will review and approve construction completed throughout the construction period and 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.
13. NBU and the City will designate one engineer with responsibility to serve as the initial arbiter of any disputes related to the Project.
14. Both parties agree to negotiate in good faith to reach a solution when there are any design conflicts between NBU utilities and any other utilities or roadwork.
15. To the extent there is a dispute or claims related to the Project, such disputes or claims will be arbitrated based on the respective scope of work. If such dispute comingles NBU's and the City's respective scopes of work, both Parties will participate equally to resolve such dispute. Upon resolution of any dispute, and if payment is due to one or both Parties, any such payment shall be distributed proportionately to satisfy the claim(s) and reimburse each Party for its proportionate share of legal fees, costs, and

expenses to resolve such dispute.

16. This MOU shall remain in effect until either party elects to terminate the joint endeavor by written notice.
17. This MOU shall become effective upon full execution of the MOU by both Parties.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the City and NBU mutually consent to enter into this MOU on the date set forth above.

NEW BRAUNFELS UTILITIES

CITY OF NEW BRAUNFELS

Ian Taylor, CEO

Robert Camareno, City Manager

Date

Date

APPROVED AS TO FORM:

Valeria Acevedo, City Attorney

Connie C. Lock, NBU General Counsel

Exhibit A

The Project includes, but is not limited to, the following:

1. Alves Lane - Street, Drainage, Water and Wastewater Project;
2. Post Road - Street and Water Project;
3. MSR (Morningside, Solms and Rueckle) - Street, Water and Wastewater Project;
4. Katy - Street, Drainage, Water and Wastewater Project; and
5. Live Oak - Street, Drainage, Water and Wastewater Project.

Exhibit A

Exhibit B - Post Award Funding Formula

Background

The City of New Braunfels and NBU acknowledge that the bid that is the best value from a qualified bidder might not include the lowest construction costs for NBU's Water/Wastewater (W/WW) **and** the City's Roadway scope of work. Below is an example of how this could happen. Bidder A submitted the lowest total bid. While their Roadway cost is the lowest of the three bidders, the W/WW cost is not.

If this happens, the City or NBU will compensate the other entity using a predetermined method. This approach assumes the benefits of a joint bid process outweigh these potential negative bidding outcomes and using this method further mitigates the impact.

Method

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

- If the winning bidder did not submit the lowest bid for W/WW, NBU will be compensated by the City.
- If the winning bidder did not submit the lowest bid for Roadway, the City will be compensated by NBU.

Compensation will be calculated using the following method.

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

The average of all Roadway bids will be subtracted from the winning Roadway bid.

$$X = \text{Winning Roadway Bid} - \text{Average of Roadway Bids}$$

The average of all W/WW bids will be subtracted from the winning W/WW bid.

$$Y = \text{Winning W/WW Bid} - \text{Average of W/WW Bids}$$

If the winning bidder submitted the lowest Roadway bid, but not the lowest W/WW bid, the City will compensate NBU the value of X, or the amount required to bring the total amount paid for construction by the City to the value of the average of all Roadway bids. The City will pay the contractor for the cost of the Roadway work and pay NBU the difference between the average of all Roadway bids and the winning bidder's Roadway costs. 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 of all W/WW bids.

If the winning bidder submitted the lowest W/WW bid, but not the lowest Roadway bid, NBU will compensate the City the value of Y, or the amount required to bring the total amount paid for construction by NBU to the value of the average of all W/WW bids. NBU will 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 bidders 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 of all Roadway bids.

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