

REQUEST AUTHORIZATION FOR MAYOR AND FINANCE OFFICER TO SIGN PROFESSIONAL SERVICES AGREEMENT OR AMENDMENT

Date: July 10, 2007

Project Name & Number: Water Reclamation Facility Digester Repair and Improvements-Phase II CIP #: 50581
WRF07-1549A

Project Description: Development of design drawings and specifications for replacement of the Water Reclamation Facility (WRF) secondary digester cover and mixing equipment.

Consultant: Burns & McDonnell Engineering Company, Inc.

Original Contract Amount: \$77,054.00	Original Contract Date: June 20, 2007	Original Completion Date: 80 days after Notice to Proceed
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Amendment Number:

Amendment Description:

Current Contract Amount: _____	Current Completion Date: _____
Change Requested: _____	
New Contract Amount: _____ \$0.00	New Completion Date: _____

Funding Source This Request:

Amount	Dept.	Line Item	Comments
\$77,054.00	833	4223	Water Reclamation Enterprise Fund
\$77,054.00	Total		

Agreement Review & Approvals

Project Manager _____ Date _____	Division Manager _____ Date _____
Department Director _____ Date _____	City Attorney _____ Date _____

ROUTING INSTRUCTIONS

Route **two** originals of the **Agreement** for review and signatures.
 Finance Office - Retain one original
 Project Manager - Retain second original for delivery to Consultant
 cc: Public Works
 Engineering
 Project Manager

FINANCE OFFICE USE ONLY

(Note to Finance: Please write date of Agreement in appropriate space in the Agreement document)

	Date	Initials	Approved	
Appropriation			Y	N
Cash Flow			Y	N

PROFESSIONAL ENGINEERING SERVICES CONTRACT



Rapid City Water Reclamation Facility Digester Repair and Improvements

Phase II – Secondary Digester Cover and Gas Mixing Equipment Replacement Project

City of Rapid City Project No. WRF07-1549A



Professional Engineering Consultant: Burns & McDonnell Engineering Co., Inc.

PROFESSIONAL ENGINEERING SERVICES CONTRACT

June 20, 2007

Project: Rapid City WRF Digester Repair and Improvements
Phase II – Secondary Digester Cover and Gas Mixing Equipment Replacement Project
City of Rapid City Project No. WRF07-1549A

Owner Information:

City of Rapid City, South Dakota
300 Sixth Street
Rapid City, South Dakota 57701-2724

Contact: Mr. Dan Coon, P.E.
Phone: (605) 394-4154
Fax: (605) 394-6636

Engineer:

Burns & McDonnell Engineering Co., Inc.
9785 Maroon Circle, Suite 400
Centennial, Colorado 80112

Contact: Mr. Darin Brickman, P.E.
Phone: (303) 721-9292
Fax: (303) 721-0563

PROJECT BACKGROUND

The City of Rapid City, South Dakota, (hereinafter OWNER) is in the process of replacing the biosolids handling system at the Rapid City Water Reclamation Facility (WRF). Burns & McDonnell Engineering Company, Inc., (hereinafter ENGINEER) was contracted to conduct Phase I of this project. Phase I consisted of evaluation of the current biosolids management system at the WRF with special emphasis on the original facility. At the completion of Phase I the ENGINEER, in conjunction with the OWNER, finalized the project scope, deliverable end products, and timeline for the project in the Phase I Findings Document.

Based on and in accordance with the Phase I Findings Document, Phase II shall consist of developing design drawings and specifications for replacement of the Secondary Digester Cover and Gas Mixing Equipment.

SCOPE OF SERVICES

The following is the Scope of Services to be provided by ENGINEER for the OWNER.

1. Design Document Preparation

- 1.1. Project Kick-off Meeting – The ENGINEER will conduct a project kick-off meeting at the OWNER'S facilities if the meeting can coincide with a Utility System Master Plan Project Meeting. If this can not be arranged, the Kick-Off Meeting will be held via teleconference. The Kick-Off Meeting Agenda shall include the following items:
 - 1.1.1. Review goals, objectives, and project approach
 - 1.1.2. Review project schedule, budget, and deliverables

- 1.1.3. Discuss project team and roles
- 1.1.4. Outline communication protocol
- 1.1.5. Review construction phasing issues
- 1.1.6. Confirm general contract bidding requirements
- 1.1.7. Confirm general contractor prequalification preferences and procedures
- 1.1.8. Determine any OWNER related material and equipment preferences
- 1.2. Status Meetings – Conduct two (2) status meetings between the OWNER and ENGINEER at the 50% and 95% design completion milestones. The ENGINEER shall provide a status report at each meeting and prepare meeting minutes for distribution to the Project Team. The status meetings shall be held at the OWNER facilities.
- 1.3. Based upon the Phase I Finding Document implementation plan, bidding documents shall be prepared for General Contractor bidding. Three (3) hard copies each of the drawing sets (11”x17” sheet size) and specifications packages shall be submitted at the 50 percent and 95 percent completion stages for review and approval by the OWNER. The OWNER’S “Front-End Documents (i.e., Bidding Requirements, Contract Forms, and Contract Conditions) shall be reviewed by the ENGINEER and all recommended modifications and changes shall be provided to the OWNER. Upon approval of recommended modifications and/or changes by the OWNER, the documents shall be finalized for bidding. The Bidding Documents shall generally include the following:
 - 1.3.1. Drawings:
 - A. General Sheets
 - B. Process Sheets (includes Structural Details, if applicable)
 - C. Electrical Sheets
 - D. Reference Sheets (if required)
 - 1.3.2. Documents and Specifications:
 - A. Documents (based on OWNER standard contract documents):
 - 1. Notice for Bids (City of Rapid City Document)
 - 2. Information and Instructions to Bidders (City of Rapid City Document)
 - 3. Insurance Requirements (City of Rapid City Document)
 - 4. Bidder’s Proposal (City of Rapid City Document)
 - 5. Contract Between Contractor and the City of Rapid City (City of Rapid City Document)
 - 6. Performance Bond (City of Rapid City Document)
 - 7. General Conditions (City of Rapid City Document)
 - 8. Other Documents recommended by ENGINEER and accepted by OWNER.
 - B. General Requirement and Technical Specifications:
 - 1. Summary of Work
 - 2. Project Meetings, Schedules and Reports
 - 3. Submittals
 - 4. Definitions and Standards
 - 5. Barriers and Temporary Controls
 - 6. Temporary Utilities and Facilities
 - 7. Equipment and Materials

8. Manufacturer's Field Services
 9. Contract Closeout
 10. Warranties
 11. Demolition
 12. Valves and Accessories
 13. Concrete Repair and Protection Materials
 14. Coated Polyurethane Foam Roofing System
 15. Protective Coatings
 16. Anaerobic Digester Gas Holder Cover Equipment
 17. Anaerobic Digester Mixing Equipment
- 1.4. An opinion of probable construction cost shall be prepared at the 50% design stage and the 100% design stage.
2. Bid Phase Services (Pre and Post Bidding):
- 2.1. Provide OWNER Reproducible Bidding Documents for OWNER Distribution of Bidding Documents (and Addenda, if applicable). OWNER shall be responsible for developing, maintaining, and distributing Plan Holder's List. ENGINEER shall provide a recommendation on where OWNER should advertise the project beyond normal channels.
 - 2.2. The ENGINEER shall provide services for one (1) General Contractor Prequalification effort including Qualification Statement preparation, review of General Contractor Prequalification Statements, interviews (as required), compilation of information, and recommendation to OWNER.
 - 2.3. Prepare the Pre-Bid Meeting Agenda and Attend Pre-Bid Meeting
 - 2.4. Respond to Bidders Questions (Prior to Bid Date) including:
 - 2.4.1. Maintain formal log of all calls and communications requesting interpretation(s). Oral responses will be documented in writing. Any official changes shall be made by addenda, issued to all Plan Holders.
 - 2.4.2. If required, one (1) addendum shall be provided where clarification of uncertainty will necessitate modification of Bidding Documents. If more than one is required, the OWNER shall be consulted with regard to postponing or amending the bid opening date.
 - 2.5. The ENGINEER shall not attend the Bid Opening unless it coincides with a schedule meeting for the Utility System Master Plan project.
 - 2.6. Review General Contractor Bids and provide recommendation to OWNER.
 - 2.7. The ENGINEER shall assist the OWNER in preparation of Contract Documents for signature including Contract, Notice of Award, and Notice to Proceed.
 - 2.8. The OWNER shall:
 - 2.8.1. Reproduce and Distribute Bidding Documents (see 2.1.1)
 - 2.8.2. Draft Bid Advertisement for publication
 - 2.8.3. Determine which media and locations are appropriate for advertisement of the General Contractor Prequalification and the General Contract Bidding Documents.

RESPONSIBILITIES OF OWNER

The OWNER shall provide the following:

Assistance by placing at ENGINEER's disposal all available information pertinent to the assignment including water reclamation facility as-constructed drawings and other water reclamation facility data required and requested by ENGINEER. ENGINEER shall rely on information made available by the OWNER as accurate without independent verification.

DELIVERABLES

The ENGINEER shall provide the deliverables stated in the Scope of Services. The draft documents for review by the OWNER shall be provided in MSWord electronic file format. All final documents shall be provided in PDF file format on CD. Drawings shall be provided in AutoCAD format. One (1) final set of drawings shall be provided on reproducible Mylar.

Reuse of Documents: All documents prepared or furnished by ENGINEER (and ENGINEER'S independent professional associates and consultants) pursuant to this Agreement are instruments of service in respect of the Project, and ENGINEER shall have the ownership and property interest therein whether or not the Project is completed. Any reuse without written verification or adaptation by ENGINEER for the specific purpose intended will be at OWNER'S sole risk and without liability or legal exposure to ENGINEER, or to ENGINEER'S independent professional associates or consultants, and OWNER shall indemnify and hold harmless ENGINEER and ENGINEER'S independent professional associates and consultants from and against all claims, damages, losses, and expenses, including attorneys' fees arising out of or resulting there from. Any such verification or adaptation will entitle ENGINEER to further compensation at rates to be agreed upon by OWNER and ENGINEER.

Electronic Media: Any electronic media (computer disks, CDs, tapes, and similar items) furnished with respect to ENGINEER'S services are for OWNER'S information and convenience only. Such media are not to be considered part of ENGINEER'S instruments of service. (Due to the potential that information contained in electronic media can be modified by OWNER or others, ENGINEER, at its option, may remove all indicia of ENGINEER'S ownership and involvement from each electronic display.) ENGINEER shall not be liable for loss or damage directly or indirectly, arising out of use of electronic media including, but not limited to, any loss of business or incidental or consequential damage. OWNER shall assume all risk and release, indemnify, and hold harmless ENGINEER, its officers, directors, employees, servants, agents, successors, and assigns, from and against each and every claim or cause of action that OWNER or others may have or which may arise in the future respecting use of the electronic media.

TIME OF SERVICE

ENGINEER will proceed with providing the services set forth herein immediately upon execution of this Agreement. The Phase II design services shall be completed within 80 calendar days of the Notice to Proceed.

COST REIMBURSIBLE NOT TO EXCEED

A. Amount of Payment:

1. For services performed, OWNER shall pay ENGINEER the sum of amounts determined as follows:
 - a. For time spent by personnel, payment at the hourly rates indicated on the attached fee schedule (Exhibit A). Such rates include overhead and profit. The schedule is effective for the Design and Bidding Phase of the contract.
 - b. For expenses incurred by ENGINEER, such as authorized travel and subsistence including airfare, food, lodging, automobile rental, commercial services, and incidental expenses, the cost to ENGINEER.
 - c. For reproduction, printing, long-distance telephone calls, facsimile transmissions, company vehicle usage, testing apparatus, computer services and computer-assisted drafting (CAD), amounts will be charged according to the ENGINEER's standard rates as identified in this contract (Exhibit B).
 - d. For professional services rendered by others as subcontractor(s) to ENGINEER will be billed at the cost to ENGINEER plus 10 percent.
2. Total payment for the Scope of Services described herein shall not exceed Seventy Seven Thousand and Fifty Four dollars (\$77,054) without written approval of OWNER. Exhibit C presents a detailed Professional Engineering Services Fee Estimate.
3. ENGINEER shall not begin work on any phase of the project without written authorization by the OWNER.

TERMS AND CONDITIONS

The attached Terms and Conditions for Professional Services is incorporated and made a part of this Agreement.

BURNS & MCDONNELL ENGINEERING CO.

ACCEPTED:

ATTEST:

By _____

By _____

Title Vice President

Title Associate

Date _____

Date _____

CITY OF RAPID CITY, SOUTH DAKOTA

ACCEPTED:

ATTEST:

By _____

By _____

Title Mayor

Title Finance Officer

Date _____

Date _____

EXHIBIT A: SCHEDULE OF HOURLY PROFESSIONAL SERVICE BILLING RATES

Position Classification	Classification Level	Hourly Billing Rate
General Office	5	\$51.00
Technician	6	\$55.00
Assistant	7	\$64.00
	8	\$89.00
	9	\$98.00
Staff	10	\$107.00
	11	\$119.00
Senior	12	\$128.00
	13	\$141.00
Associate	14	\$153.00
	15	\$164.00
Principal	16	\$169.00
	17	\$176.00

BMR907A

Notes:

1. Position classifications listed above refer to the firm's internal classification system for employee compensation. For example, "Associate", "Senior", etc., refer to such positions as "Associate Engineer", "Senior Architect", etc.
2. The hourly rates shown above are effective for services through completion of the design and bidding phase of the contract, and are subject to revision thereafter.
3. For outside expenses incurred by Burns & McDonnell and for services rendered by others such as subcontractors, the client shall pay the cost to Burns & McDonnell plus 10%.
5. Monthly invoices will be submitted for payment covering services and expenses during the preceding month. Invoices are due upon receipt.

EXHIBIT B - SCHEDULE OF REIMBURSABLE EXPENSES

Schedule of Reimbursable Expenses	
Description	Unit Cost
Personal Mileage:	\$0.485
Reproduction/Printing:	8.5"x 11" Copies White = \$0.09/sheet 8.5"x 11" Copies Color = \$1.00/sheet 11"x 17" Copies White = \$0.18/sheet 11"x 17" Copies Color = \$1.50/sheet 22" x 34" Drawings White Bond = \$0.93/sheet 22" x 34" Drawings Mylar = \$9.90/sheet 24" x 36" Drawings White Bond = \$1.08/sheet
Long Distance Telephone:	Cost
Postage:	Cost
Courier:	2 hour: \$22 1 hour: \$35
Travel Expenses:	
Airfare:	Cost
Lodging:	Cost
Meals:	Cost
Rental Car:	Cost
Vehicle Expense:	
Sedan (4-door)	\$58/day + \$0.27/mile
SUV – 4WD	\$65/day + \$0.33/mile

Total of billable hours plus reimbursable expenses shall not exceed the maximum Cost Reimbursable Not to Exceed Amount allowed under the contract, without a written amendment executed by the parties.

EXHIBIT C
Burns & McDonnell Engineering Co.

City of Rapid City, South Dakota
 Phase II - Secondary Digester Cover and Gas Mixing Equipment Replacment Project
 Professional Engineering Services Fee Estimate

	Principal Engineer	Project Manager	Process Engineer	Electrical Engineer	Structural Engineer	Technician ACAD	Word Processing	QA/QC	TOTAL HOURS	LABOR	EXPENSES	SUBCON	TOTAL	
TASK SERIES 1 - Design Document Preparation														
1.1 Kickoff Meeting (1)		2	2	2			1		7	\$ 932	\$ 103	\$ -	\$ 1,035	
1.2 Status Meetings (2)		20	20	10			2		52	\$ 7,278	\$ 1,300	\$ -	\$ 8,578	
1.3 Drawing and Specification Preparation														
(A) Cover and Drawing Index Sheet		1	4	1		8		1	15	\$ 1,833	\$ 225	\$ -	\$ 2,058	
(B) Detail and Section Legend, Site Map, and Vicinity Map		1	8			8		1	18	\$ 2,192	\$ 269	\$ -	\$ 2,461	
(C) Demolition Plan and Section Sheet		6	10	6	4	22		2	50	\$ 6,400	\$ 776	\$ -	\$ 7,176	
(D) Digester Improvements Plan		6	18		4	24		2	54	\$ 6,720	\$ 821	\$ -	\$ 7,541	
(E) Digester Improvements Sections and Details		6	24		4	24		2	60	\$ 7,488	\$ 914	\$ -	\$ 8,402	
(E) Digester Electrical Plan and Sections				24		24		2	50	\$ 6,558	\$ 790	\$ -	\$ 7,348	
(F) Digester Electrical Details and Notes				24		24		2	50	\$ 6,558	\$ 790	\$ -	\$ 7,348	
(G) Specifications (~25 Sections)	1	12	32	2	4		6	6	63	\$ 8,357	\$ 1,004	\$ -	\$ 9,361	
1.4 50% and 100% Complete Opinion of Probable Construction Costs	2	4	6	4	2				18	\$ 2,636	\$ 309	\$ -	\$ 2,945	
Person-hour Subtotal	3	58	124	73	18	134	9	18	437	\$ 56,952	\$ 7,301	\$ -	\$ 64,253	
													Task Series 1 Total =	\$ 64,253
TASK SERIES 2 - Bidding Phase Services														
2.1 Document Distribution Assistance			1			2			3	\$ 342	\$ 43	\$ -	\$ 385	
2.2 General Contractor Prequalification	2	8	8				1		19	\$ 2,650	\$ 315	\$ -	\$ 2,965	
2.3 Pre-Bid Agenda and Meeting		10	2						12	\$ 1,786	\$ 405	\$ -	\$ 2,191	
2.4 Provide Interpretation of Documents and Issue Addendum		6	26	4	2	2	2		42	\$ 5,506	\$ 664	\$ -	\$ 6,170	
2.5 Bid Opening									0	\$ -	\$ -	\$ -	\$ -	
2.6 Contractor Bid Review and Recommendation		2	1						3	\$ 434	\$ 51	\$ -	\$ 485	
2.7 Preparation of Documents of Signing		1	2				2		5	\$ 537	\$ 68	\$ -	\$ 605	
Person-hour Subtotal	2	27	40			4	5	0	84	\$ 11,255	\$ 1,545	\$ -	\$ 12,801	
													Task Series 2 Total =	\$ 12,801
Contract Total	5	85	164	73	18	138	14	18	521	\$ 68,207	\$ 8,846	\$ -	\$ 77,054	

BURNS & MCDONNELL ENGINEERING COMPANY, INC.
TERMS AND CONDITIONS FOR PROFESSIONAL SERVICES

Project: PHASE II - ROOSTER REPAIR AND IMPROVEMENTS

Date of Letter, Proposal or Agreement: _____

Client: CITY OF RAPID CITY, SOUTH DAKOTA

Client Signature: _____
5. PROFESSIONAL RESPONSIBILITY - LIMITATION OF REMEDIES

1. SCOPE OF SERVICES

For the above-referenced Project, Burns & McDonnell Engineering Company, Inc. ("BMCD") will perform the services set forth in the above-referenced Letter, Proposal or Agreement, in accordance with these Terms and Conditions. BMCD has relied upon the information provided by Client in the preparation of the Proposal, and shall rely on the information provided by or through Client during the execution of this Project as complete and accurate without independent verification.

2. PAYMENTS TO BMCD

A. Compensation will be as stated in the above-referenced Letter, Proposal or Agreement. Statements will be in BMCD's standard format and are payable upon receipt. Time is of the essence in payment of statements, and timely payment is a material part of the consideration of this Agreement. A late payment charge will be added to all amounts not paid within 30 days of statement date and shall be calculated at 1.5 percent per month from statement date. Client shall reimburse any costs incurred by BMCD in collecting any delinquent amount, including reasonable attorney's fees. If a portion of BMCD's statement is disputed, Client shall pay the undisputed portion by the due date. Client shall advise BMCD in writing of the basis for any disputed portion of any statement.

B. Taxes as may be imposed on professional consulting services by state or local authorities shall be in addition to the payment stated in the above-referenced Letter, Proposal or Agreement.

3. INSURANCE

A. During the course of performance of its services, BMCD will maintain Worker's Compensation insurance with limits as required by statute, Employer's Liability insurance with limits of \$1,000,000 and Commercial General Liability and Automobile Liability insurance each with combined single limits of \$1,000,000. *PROFESSIONAL LIABILITY IN THE AMOUNT OF \$1,000,000 PER CLAIM.*

B. If the Project involves on-site construction, construction contractors shall be required to provide (or Client may provide) Owner's Protective Liability Insurance naming Client as a Named Insured and BMCD as an Additional Insured or to endorse Client and BMCD using ISO form CG 20 10 11 85 endorsement or its equivalent as Additional Insureds on all construction contractor's liability insurance policies covering claims for personal injuries and property damage in at least the amounts required of BMCD in 3 A above. Construction contractors shall be required to provide certificates evidencing such insurance to Client and BMCD. Contractor's compensation shall include the cost of such insurance including coverage for contractual and indemnification obligations herein.

C. Client and BMCD release each other and waive all rights of subrogation against each other and their officers, directors, agents, or employees for damage covered by property insurance during and after the completion of BMCD's services. A provision similar to this shall be incorporated into all construction contracts entered into by Client, and all construction contractors shall be required to provide waivers of subrogation in favor of Client and BMCD for damage covered by any construction contractor's property insurance.

4. INDEMNIFICATION

A. To the extent allowed by law, Client will require all construction contractors to indemnify, defend and hold harmless Client and BMCD from any and all loss where loss is caused or alleged to be caused in whole or in part by the construction contractors, their employees, agents, subcontractors or suppliers.

B. If this Project involves construction and BMCD does not provide consulting services during construction including, but not limited to, on-site monitoring, site visits, site observation, shop drawing review and/or design clarifications, Client agrees to indemnify and hold harmless BMCD from any liability arising from this Project or Agreement, ~~except to the extent caused by BMCD's negligence.~~

THE CONSTRUCTION ACTIVITIES UNDERTAKEN FOR THIS PROJECT, EXCEPT TO THE EXTENT SUCH LIABILITY IS CAUSED BY BMCD'S NEGLIGENCE.

A. BMCD will exercise reasonable skill, care and diligence in the performance of its services and will carry out its responsibilities in accordance with customarily accepted professional practices. If BMCD fails to meet the foregoing standard, BMCD will perform at its own cost, the professional services necessary to correct errors and omissions reported to BMCD in writing within one year from the completion of BMCD's services for the Project. No warranty, express or implied, is included in this Agreement or regarding any drawing, specification, or other work product or instrument of service.

~~B. In no event will BMCD be liable for any special, indirect or consequential damages including, without limitation, damages or losses in the nature of increased Project costs, loss of revenue or profit, lost production, claims by customers of Client or for governmental fines or penalties.~~

C. BMCD's aggregate liability for all damages connected with its services for the Project not excluded by the preceding subparagraph, whether or not covered by BMCD's insurance, will not exceed the greater of \$100,000 or the compensation paid for BMCD's services. *a 1,000,000 OR BIDDING'S INSURANCE LIMIT AS STATED IN SECTION 3.*

D. These mutually negotiated obligations and remedies stated in this Paragraph 5, Professional Responsibility - Limitation of Remedies, are the sole and exclusive obligations of BMCD and remedies of Client, whether liability of BMCD is based on contract, warranty, strict liability, tort (including negligence), indemnity or otherwise.

6. PERIOD OF SERVICE AND SCHEDULE

The provisions of this Agreement have been agreed to in anticipation of the orderly and continuous progress of the Project through completion of the services stated in the Proposal. BMCD's obligation to render services hereunder will extend for a period, which may reasonably be required for the completion of said services. BMCD shall make reasonable efforts to comply with deliverable schedules (if any) and consistent with BMCD's professional responsibility.

7. COMPUTER PROGRAMS OR MODELS

Any use, development, modification, or integration by BMCD of computer models or programs does not constitute ownership or a license to Client to use or modify such computer models or programs.

8. ELECTRONIC MEDIA AND DATA TRANSMISSIONS

A. Any electronic media (computer disks, tapes, etc.) or data transmissions furnished (including Project Web Sites or CAD file transmissions) are for Client information and convenience only. Such media or transmissions are not to be considered part of BMCD's instruments of service. BMCD, at its option, may remove all indicia of its ownership and involvement from each electronic display.

B. BMCD shall not be liable for loss or damage directly or indirectly, arising out of Client's use of electronic media or data transmissions.

9. DOCUMENTS

A. All documents prepared by BMCD pursuant to this Agreement are instruments of service in respect of the Project specified herein. They are not intended or represented to be suitable for reuse by Client or others in extensions of the Project beyond that now contemplated or on any other Project. Any reuse, extension, or completion by Client or others without written verification, adaptation, and permission by BMCD for the specific purpose intended will be at Client's sole risk and without liability or legal exposure to BMCD.

B. In the event that BMCD is to reuse, copy or adapt all or portions of reports, plans or specifications prepared by others, Client represents that Client either possesses or will obtain permission and necessary rights in copyright, patents or other proprietary rights and will be responsible for any infringement claims by others. Client warrants the completeness, accuracy and efficacy of the information, data, and design provided by or through Client (including prepared for Client by others), for which BMCD shall rely on to perform and complete its services.

(continued on reverse side)

10. ESTIMATES, SCHEDULES, FORECASTS, AND PROJECTIONS

Estimates, schedules, forecasts, and projections prepared by BMCD relating to loads, interest rates and other financial analysis parameters, construction costs and schedules, operation and maintenance costs, equipment characteristics and performance, and operating results are opinions based on BMCD's experience, qualifications and judgment as a professional. Since BMCD has no control over weather, cost and availability of labor, material and equipment, cost of fuel or other utilities, labor productivity, construction contractor's procedures and methods, unavoidable delays, construction contractor's methods of determining prices, economic conditions, government regulations and laws (including the interpretation thereof), competitive bidding or market conditions and other factors affecting such estimates or projections, BMCD does not guarantee that actual rates, costs, quantities, performance, schedules, etc., will not vary significantly from estimates and projections prepared by BMCD.

11. POLLUTION

In view of the uncertainty involved in investigating and recommending solutions to environmental problems and the abnormal degree of risk of claims imposed upon BMCD in performing such services, notwithstanding the responsibility of BMCD set forth in Paragraph 5.A; to the maximum extent allowed by law, Client agrees to release, defend, indemnify and hold harmless BMCD and its officers, directors, employees, agents, consultants and subcontractors from all liability, claims, demands, damages, losses, and expenses, including, but not limited to, claims of Client and other persons and organizations, reasonable fees and expenses of attorneys and consultants, and court costs, except where there has been a final adjudication that the damages were caused by BMCD's willful disregard of its obligations under this Agreement. Such indemnification includes claims arising out of or in any way relating to the actual, alleged, or threatened dispersal, escape, or release of, or failure to detect or contain, chemicals, wastes, liquids, gases or any other material, irritant, contaminant or pollutant.

12. ON-SITE SERVICES

A. Project site visits by BMCD during investigation, observation, construction or equipment installation, or the furnishing of Project representatives shall not make BMCD responsible for construction means, methods, techniques, sequences or procedures; for construction safety precautions or programs; or for any construction contractor(s)' failure to perform its work in accordance with the contract documents.

B. Client shall disclose to BMCD the location and types of any known or suspected toxic, hazardous or chemical materials or wastes existing on or near the premises upon which work is to be performed by BMCD's employees or subcontractors. If any hazardous wastes not identified by Client are discovered after a Project is undertaken, Client and BMCD agree that the scope of services, schedule and compensation may be adjusted accordingly. Client agrees to release BMCD from all damages related to any pre-existing pollutant, contaminant, toxic, or hazardous substance at the site.

13. CHANGES

Client shall have the right to make changes within the general scope of BMCD's services, with an appropriate change in compensation and schedule, upon execution of a mutually acceptable amendment or change order signed by authorized representatives of Client and BMCD.

14. TERMINATION

Services may be terminated by Client or BMCD by seven (7) days' written notice in the event of substantial failure to perform in accordance with the terms hereof by the other party through no fault of the terminating party. If so terminated, Client shall pay BMCD all amounts due BMCD for all services properly rendered and expenses incurred to the date of receipt of notice of termination, plus reasonable costs incurred by BMCD in terminating the services. In addition, Client may terminate the services for Client's convenience upon payment of twenty percent of the yet unearned and unpaid estimated, lump sum, or not-to-exceed fee, as applicable.

15. DISPUTES, NEGOTIATIONS, MEDIATION

A. If a dispute arises relating to the performance of the services to be provided and should that dispute result in litigation, it is agreed that the substantially prevailing party (as determined in equity by the court) shall be entitled to recover all reasonable costs of litigation, including staff time, court costs, attorney's fees and other related expenses.

~~B. The parties shall participate in good faith negotiations to resolve any and all disputes. Should negotiations fail, the parties agree to submit to and participate in a third party facilitated mediation as a condition precedent to resolution by litigation. Unless otherwise agreed to, mediation shall be conducted under the rules of the American Arbitration Association.~~ PDF

C. Causes of action between the parties shall accrue, and applicable statutes of limitation shall commence to run the date BMCD's services are substantially complete.

16. WITNESS FEES

A. BMCD's employees shall not be retained as expert witnesses, except by separate written agreement.

B. Client agrees to pay BMCD pursuant to BMCD's then current schedule of hourly labor billing rates for time spent by any employee of BMCD responding to any subpoena by any party in any dispute as an occurrence witness or to assemble and produce documents resulting from BMCD's services under this Agreement.

17. CONTROLLING LAW AND VENUE SOUTH DAKOTA

This Agreement shall be subject to, interpreted and enforced according to the laws of the State of Colorado, without regard to any conflicts of law provisions. Parties agree to submit to the exclusive venue and jurisdiction of the 48th Judicial District in the County of Douglas, State of Colorado, or the United States District Court for the District of Colorado. STATE OF SOUTH DAKOTA, 1ST JUDICIAL CIRCUIT, PENNINGTON COUNTY. PDF

18. RIGHTS AND BENEFITS - NO ASSIGNMENT COUNTY.

BMCD's services will be performed solely for the benefit of Client and not for the benefit of any other persons or entities. Neither Client nor BMCD shall assign or transfer interest in this Agreement without the written consent of the other.

19. ENTIRE CONTRACT

These Terms and Conditions and the above-referenced Letter, Proposal or Agreement contain the entire agreement between BMCD and Client relative to BMCD's services for the Project herein. All previous or contemporaneous agreements, representations, promises and conditions relating to BMCD's services for the Project are superseded. Since terms contained in purchase orders do not generally apply to professional services, in the event Client issues to BMCD a purchase order, no preprinted terms thereon shall become part of this Agreement. Said purchase order documents, whether or not signed by BMCD, shall be considered only as an internal document of Client to facilitate administrative requirements of Client's operations.

20. SEVERABILITY

Any unenforceable provision herein shall be amended to the extent necessary to make it enforceable; if not possible, it shall be deleted and all other provisions shall remain in full force and affect.

- END -