

**PROFESSIONAL SERVICES AGREEMENT  
WITH RESOURCE WISE  
TO PROVIDE WATER CONSERVATION CONSULTING SERVICES**

**THIS AGREEMENT** is made and entered into this 11<sup>th</sup> day of May, 2009 by and between the County of Santa Fe, hereinafter referred to as the “**County**” and Resource Wise, whose principle place of business is located at 2918 Beach Rd. NW, Albuquerque, New Mexico 87140-2904, hereinafter referred to as the “**Contractor.**”

**WHEREAS**, the County is committed to water conservation measures in an effort to minimize water costs as well as conserve water; and

**WHEREAS**, the Contractor is willing to provide assistance in planning and developing long term water conservation strategies and performing water conservation audits on select Santa Fe County facilities to improve water conservation and reduce the impact of high energy and water costs.

**NOW, THEREFORE**, in consideration of the mutual covenants and conditions contained herein, the parties hereto mutually agree as follows:

**1. SCOPE OF WORK**

The Contractor Shall:

- A. Provide water conservation audits at County facilities and develop a long-term strategic plan to reduce water consumption;
- B. Develop a plan including:
  - (i) data on domestic and agricultural well inventory for Santa Fe County;
  - (ii) maps of the available data and projected demands of water for future growth;
  - (iii) estimates of the amount of water used for County owned facilities;
  - (iv) water audits on all County owned facilities, including administrative building, maintenance shops, and fire stations;
  - (v) a survey report and analysis of water use within Santa Fe County (preferably not within the city limits) to include the following; residential homes (single family, townhomes/condos, mobile homes, guest houses), commercial buildings (office, lodging facilities, bed and breakfasts, retail stores, neighborhood centers, grocery stores, restaurant, car washes, storage units, warehouses and manufacturing), community facilities (churches, private and public schools, daycare facilities, universities, colleges, medical facilities, hospitals, and doctor and dentist facilities);
- C. Deliver five (5) hard copies and one CD in MS Word and .pdf format of all reports, data, maps, and analysis;
- D. Ensure that all documents support the Water Conservation Program as part of the Bureau of Reclamation Grant requirements. Documents should conform to the Bureau of Reclamation Document titled, “*Achieving Efficient Water Management: A Guidebook for Preparing Agricultural Water Conservation Plans,*” dated December 1996;

- E. Host a meeting with County staff, attend the Santa Fe County Water Conservation Steering Committee meetings, and present their findings to the County upon completion of the report, and meet with stakeholder groups such as the Santa Fe County Water Conservation Steering Committee; and
- F. Submit monthly written and electronic reports (as mentioned in item D) of work performed in association with the water conservation audits no later than June 30, 2009. The remaining items listed in subparagraph "B" above shall be submitted no later than September 30, 2009.

## **2. COMPENSATION AND INVOICING**

The County shall pay the Contractor as follows:

- A. In no event shall the total compensation paid to the Contractor by the County under this Agreement exceed \$25,000 inclusive of gross receipts tax.
- B. Contractor shall be paid at the following hourly rates:
  - (i) Audits of 23 county owned facilities, \$50 per hour, for a total of \$12,200.00
  - (ii) Survey report and analysis of water use within Santa Fe County including residential, commercial, community facilities, and medical facilities, \$60.00 per hour for a total of 104 hours.
  - (iii) All other services \$50.00 per hour for a total of 125 hours.
- C. The Contractor shall submit a written request for payment to the County whenever payment is due under this Agreement but no more frequently than once per month. Within fifteen (15) days of the County's receipt of the written request, the County shall certify complete or partial acceptance or rejection of the contractual items or services for which payment is sought. The Contractor acknowledges and agrees that the County may not make any payment hereunder until it certifies acceptance of the contractual items or services. Within thirty (30) days of certifying the contractual items or services, the County shall tender payment for the accepted items or services. In the event the County fails to tender payment within thirty (30) days of the certification accepting the items or services, the County shall pay late payment charges of one and one-half percent (1.5%) per month, until the amount due is paid in full
- D. In the event the Contractor breaches this Agreement, the County may, without penalty, withhold any payments due the Contractor for the purpose of set-off until such time as the County determines the exact amount of damages it suffered as a result of the breach.
- E. Payment under this Agreement shall not foreclose the right of the County to recover excessive or illegal payment.

## **3. EFFECTIVE DATE AND TERM**

This Agreement shall, upon due execution by all parties, become effective as of the date first written above and shall terminate on May 31, 2013, unless earlier terminated pursuant to Section 5, TERMINATION, of this Agreement. The term of this Agreement shall not exceed four (4) years.

#### 4. ADDITIONAL SERVICES

- A. The parties agree that all tasks set forth in Paragraph 1, SCOPE OF WORK of this Agreement, shall be completed in full, to the satisfaction of the County, for the amount set forth in Paragraph 3, COMPENSATION AND INVOICING of this Agreement, and for no other cost, amount, fee or expense.
- B. The County may from time to time request changes in the Project's scope of work to be performed hereunder. Such changes, including any increase or decrease in the amount of the Contractor's compensation, which are mutually agreed upon by and between the County and the Contractor, shall be incorporated in written amendments to this Agreement.

#### 5. TERMINATION

- A. Termination of Agreement for Cause. Either party may terminate the Agreement based upon any material breach of this Agreement by the other party. The non-breaching party shall give the breaching party written notice of termination specifying the grounds for the termination. The termination shall be effective seven (7) days from the breaching party's receipt of the notice of termination, during which time the breaching party shall have the right to cure the breach. If, however, the breach cannot with due diligence be cured within seven (7) days, the breaching party shall have a reasonable time to cure the breach, provided that, within seven (7) days of its receipt of the written notice of termination, the breaching party (i) began to cure the breach and (ii) advised the non-breaching party in writing that it intended to cure.
- B. Termination for Convenience of County. The County may, in its discretion, terminate this Agreement at any time for any reason by giving the Contractor written notice of termination. The notice shall specify the effective date of termination, which shall not be less than seven (7) days from the Contractor's receipt of the notice. The County shall pay the Contractor for acceptable work, determined in accordance with the specifications and standards set forth in this Agreement, performed before the effective date of termination but shall not be liable for any work performed after the effective date of termination.

#### 6. INDEPENDENT CONTRACTOR

The Contractor and its agents and employees are independent contractors and are not employees or agents of the County. Accordingly, the Contractor and its agents and employees shall not accrue leave, - participate in retirement plans, insurance plans, or liability bonding, use the County vehicles, or participate in any other benefits afforded to employees of the County. Except as may be expressly authorized elsewhere in this Agreement, the Contractor has no authority to bind, represent or otherwise act on behalf of the County and agrees not to purport to do so.

#### 7. PERSONNEL

- A. All work performed under this Agreement shall be performed by the Contractor or under its supervision.

- B. The Contractor represents that it has, or will secure at its own expense, all personnel required to discharge its obligations under this Agreement. Such personnel (i) shall not be employees of or have any contractual relationships with the County and (ii) shall be fully qualified and licensed or otherwise authorized or permitted under federal, state, and local law to perform such work.

## **8. ASSIGNMENT**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the advance written approval of the County. Any attempted assignment or transfer without the County's advance written approval shall be null and void and without any legal effect.

## **9. SUBCONTRACTING**

The Contractor shall not subcontract or delegate any portion of the services to be performed under this Agreement without the advance written approval of the County. Any attempted subcontracting or delegating without the County's advance written approval shall be null and void and without any legal effect.

## **10. INDEMNITY & INSURANCE**

- A. The Contractor shall defend, indemnify, and hold harmless the County and its Elected Officials, agents, and employees from any losses, liabilities, damages, demands, suits, causes of action, judgments, costs or expenses (including but not limited to court costs and attorneys' fees) resulting from or directly or indirectly arising out of the Contractor's performance or non-performance of its obligations under this agreement, including but not limited to the Contractor's breach of any representation or warranty made herein. The Contractor shall name the County as an additional insured party on all relevant insurance policies.
- B. The Contractor agrees (i) that the County shall have the right to control and participate in the defense of any such demand, suit, or cause of action concerning matters that relate to the County and (ii) that such suit will not be settled without the County's consent, such consent not to be unreasonably withheld. If a conflict exists between the interests of the County and the Contractor in such demand, suit, or cause of action counsel shall be retained to represent the County's interest.
- C. The Contractor's obligations under this section shall not be limited by the provisions of any insurance policy the Contractor is required to maintain under this agreement.

## **11. RECORDS AND INSPECTIONS**

To the extent its books and records relate to the performance of this Agreement or any subcontract entered into pursuant to it, the Contractor agrees to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under this Agreement; (ii) allow the County or its designee to audit such books and records at reasonable times

and upon reasonable notice; and (iii) to keep such books and records in accordance with generally accepted accounting principles (“GAAP”).

## **12. APPROPRIATIONS AND AUTHORIZATIONS**

This Agreement is contingent upon sufficient appropriations and authorizations being made for performance of this Agreement by the Board of County Commissioners of the County and/or, if state funds are involved, the Legislature of the State of New Mexico. If sufficient appropriations and authorizations are not made in this or future fiscal years, this Agreement shall terminate upon written notice by the County to the Contractor. Such termination shall be without penalty to the County, and the County shall have no duty to reimburse the Contractor for expenditures made in the performance of this Agreement. The County is expressly not committed to expenditure of any funds until such time as they are programmed, budgeted, encumbered and approved for expenditure by the County. The County’s decision as to whether sufficient appropriations and authorizations have been made for the fulfillment of this Agreement shall be final and not subject to challenge by the Contractor in any way or forum, including a lawsuit.

## **13. PERMITS, FEES, AND LICENSES**

The Contractor shall procure all permits and licenses, pay all charges, fees, and royalties, and give all notices necessary and incidental to the due and lawful performance of its obligations hereunder.

## **14. RELEASE**

Upon its receipt of all payments due under this Agreement, the Contractor releases the County, its Elected Officials, officers, agents and employees from all liabilities, claims, and obligations whatsoever arising from or under or relating to this Agreement.

## **15. PUBLICATION, REPRODUCTION, AND USE OF MATERIAL; COPYRIGHTS**

- A. The County has the unrestricted right to publish, disclose, distribute and otherwise use, in whole or in part, any reports, data, or other material prepared under or pursuant to this Agreement.
- B. The Contractor acknowledges and agrees that any material produced in whole or in part under or pursuant to this Agreement is a work made for hire. Accordingly, to the extent that any such material is copyrightable in the United States or in any other country, the County shall own any such copyright.

## **16. CONFLICT OF INTEREST**

The Contractor represents that it has no relationship and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of its obligations under this Agreement.

**17. NO ORAL MODIFICATIONS; WRITTEN AMENDMENTS REQUIRED**

This Agreement may not be modified, altered, changed, or amended orally but, rather, only by an instrument in writing executed by the parties hereto. The Contractor specifically acknowledges and agrees that the County shall not be responsible for any changes to Section 1, "SCOPE OF WORK", of this Agreement unless such changes are set forth in a duly executed written amendment to this Agreement.

**18. ENTIRE AGREEMENT; INTEGRATION**

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof, and all such agreements, covenants and understandings have been merged into this written Agreement. No prior or contemporaneous agreement, covenant or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**19. EQUAL OPPORTUNITY COMPLIANCE**

- A. The Contractor agrees to abide by all Federal, State, and local laws, ordinances, and rules and regulations pertaining to equal opportunity and unlawful discrimination. Without in any way limiting the foregoing general obligation, the Contractor specifically agrees not to discriminate against any person with regard to employment with the Contractor or participation in any program or activity offered pursuant to this Agreement on the grounds of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity.
- B. The Contractor acknowledges and agrees that failure to comply with this Section shall constitute a material breach of this Agreement.

**20. SEVERABILITY**

If any term or condition of this Agreement shall be held invalid or non-enforceable by any court of competent jurisdiction, the remainder of this Agreement shall not be affected and shall be valid and enforceable to the fullest extent of the law.

**21. COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW**

- A. In performing its obligations hereunder, the Contractor shall comply with all applicable laws, ordinances, and regulations.
- B. This Agreement shall be construed in accordance with the substantive laws of the State of New Mexico, without regard to its choice of law rules.

**22. NOTICE OF PENALTIES**

The Procurement Code, NMSA 1978, Section 13-1-28 through 13-1-199, imposes civil and criminal penalties for its violation. In addition, New Mexico criminal statutes impose felony penalties for bribes, gratuities, and kickbacks.

**23. NO THIRD-PARTY BENEFICIARIES**

This Agreement was not intended to and does not create any rights in any persons not a party hereto.

**24. FACSIMILE SIGNATURES**

The parties hereto agree that a facsimile signature has the same force and effect as an original for all purposes.

**25. LIMITATION OF LIABILITY**

The County's liability to the Contractor for any breach of this Agreement by the County shall be limited to direct damages and shall not exceed the maximum amount of potential compensation specified in Section 2, "COMPENSATION AND INVOICING", of this Agreement. In no event shall the County be liable to the Contractor for special or consequential damages, even if the County was advised of the possibility of such damages prior to entering into this Agreement.

**26. NEW MEXICO TORT CLAIMS ACT**

No provision of this Agreement modifies or waives any sovereign immunity or limitation of liability enjoyed by the County or its "public employees" at common law or under the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1, et seq.

**27. CONTRACTOR'S REPRESENTATIONS AND WARRANTIES**

This Agreement has been duly authorized by the Contractor, the person executing this Agreement has authority to do so, and, once executed by the Contractor, this Agreement shall constitute a binding obligation of the Contractor.

**28. NOTICES**

All notices required to be given to the County under this Agreement shall be mailed to:

Santa Fe County  
Legal Department  
102 Grant Ave.  
Santa Fe, NM 87502

All notices required to be given to the Contractor under this Agreement shall be mailed to:

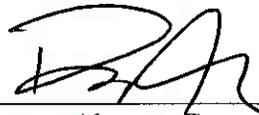
Resource Wise  
Attention: Lonnie Burke  
2918 Beach Rd. NW  
Albuquerque, NM 87140-2904

**29. AMENDMENT**

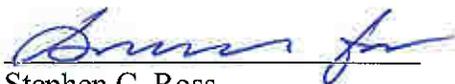
This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.

**WITNESS WHEREOF**, the parties have executed this Agreement as of the date first written above.

**SANTA FE COUNTY**

  
\_\_\_\_\_  
Roman Abeyta, County Manager

**APPROVED AS TO LEGAL FORM:**

  
\_\_\_\_\_  
Stephen C. Ross,  
Santa Fe County Attorney

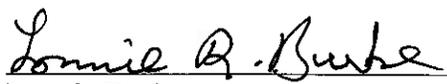
05.06.2009  
Date

**FINANCE DEPARTMENT APPROVAL:**

  
\_\_\_\_\_  
Teresa Martinez  
Santa Fe County Finance Director

5/11/09  
Date

**RESOURCE WISE:**

  
\_\_\_\_\_  
Lonnie Burke

5/11/09  
Date

36-4601090  
FEDERAL IDENTIFICATION NO.