Item#_____
Munis Contract # 3203896

BUCKMAN DIRECT DIVERSION BOARD

LEGAL SERVICES AGREEMENT

LONG, KOMER, & ASSOCIATES, P.A

THIS AGREEMENT is made and entered into by and between the Buckman Direct Diversion Board, herein after referred to as the "BDDB" and Long, Komer & Associates, P. A. herein after referred to as the "Contractor".

1. Scope of Services.

Serve as legal counsel to the BDD Board at the direction of the BDD Board and/or management;

A. Provide legal services and support to the BDD Board, with particular reference to matters of administrative law and any other applicable law, at all public BDD Board meetings and BDDB hearings, or in court if required.

B. Represent the Board in litigation and administration matters.

C. Providing legal advice on state and federal permitting such as, but not limited to; 1) the Environmental Impact Statement (EIS) for the BDD Project, 2) NEPA 3) the Biological Opinion covering the Project, and 4) NPDES permitting for the Project;

D. Advise and represent the BDD Project on the public procurement process, including but not limited to, review of procurement documents, participation in required negotiations, assistance with solicitations, review and preparation of contracts;

E. Advise and represent the BDD Board on legal matters related to Project funding, operations, construction, warranty, repairs and replacement, other residual issues on existing contracts, and management plans as directed by the Board;

F. Prepare written opinions, resolutions, contracts, and other documents necessary to assist the Board with implementation, operation and management of the BDD Project as directed by the Board;

G. Attend all Board meetings and relevant meetings of the Governing Body of the City of Santa Fe, the BDD Board of County Commissioners, and BDD Project Staff meetings;

H. Brief BDD Project Partners' officials and staff members, as directed by the BDD Board; and

I. Perform other duties as may be directed by the BDD Board or (PUD) Public Utilities Department Director or designee.

2. <u>Standard of Performance; Licenses.</u>

A. Contractor represents that Contractor possesses the personnel, experience and knowledge necessary to perform the Scope of Services described in this Agreement. Contractor shall perform its services in accordance with generally accepted standards and practices customarily utilized by competent consulting firms in effect at the time Contractor's services are rendered.

B. The Contractor agrees to obtain and maintain throughout the term of this Agreement, all applicable professional and business licenses required by law, for itself, its employees, agents, representatives and subcontractors.

3. Compensation.

A. The BDDB shall pay to the Contractor in full payment of services rendered, a sum not to exceed one hundred and twenty thousand dollars.($120,000.000), plus New Mexico Gross Receipts Tax based on the Rate Schedule attached.

B. Contractor shall be responsible for payment of gross receipts taxes levied by the State of New Mexico on the sums paid under this Agreement.

C. Payment shall be made upon receipt and approval by the BDDB of detailed statements containing a report of services completed. Compensation shall be paid only for services performed.

D. Filing fees, services and statutory fees shall be charged at actual rate charged by court. All amounts provided must include all labor, materials, equipment, transportation, configuration, installation, training and profit to provide the goods and/or services described in Section IV.A

4. Term and Effective Date.

The contractual agreement will commence when all parties sign and upon approval of the BDDB. The Term will be (4) years based on the final signature date of all parties.

5. Termination.

A. This Agreement may be terminated by the BDDB upon 30 days written notice to Contractor. In the event of such termination:

1) Contractor shall render a final report of the services performed up to the date of termination and shall turn over to the BDDB original copies of all work product, research or papers prepared under this Agreement.

2) If payment has not already been made, Contractor shall be paid for services rendered and expenses incurred through the date Contractor receives notice of such termination. If full payment has been made, Contractor agrees to prorate for work accomplished and refund all amounts earned.

6. Appropriations.

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the BDDB for the performance of this Agreement. If sufficient appropriations and authorization are not made, this Agreement shall terminate upon written notice being given by the BDDB to Contractor. The BDDB's decision as to whether sufficient appropriations are available shall be accepted by Contractor and shall be final.

7. Status of Contractor; Responsibility for Payment of Employees and Subcontractors.

A. Contractor and its agents and employees are independent contractors performing professional services for the BDDB and are not employees of the BDDB. Contractor, and its agents and employees, shall not accrue leave, retirement, insurance, bonding, use of BDDB vehicles, or any other benefits afforded to employees of the BDDB as a result of this Agreement.

B. Contractor shall be solely responsible for payment of wages, salaries and benefits to any and all employees or contractors retained by Contractor in the performance of the services under this Agreement.

C. Contractor shall comply with City of Santa Fe Minimum Wage, Article 28-1-SFCC 1987, as well as any subsequent changes to such article throughout the term of this Agreement.

8. Assignment; Subcontracting.

Contractor shall not assign or transfer any rights, privileges, obligations or other interest under this Agreement, including any claims for money due, without the prior written consent of the BDDB. Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the BDDB.

9. Release.

Contractor, upon acceptance of final payment of the amount due under this Agreement, releases the BDDB, City of Santa Fe, Santa Fe County, Las Campanas Water and Sewer Cooperative and The Club at Las Campanas; their officers, officials and employees, from all liabilities, claims and obligations whatsoever arising from or under this Agreement. If not completed at the time of final payment, Contractor shall remain obligated to complete the Scope of Services and other obligations of this Agreement. Contractor agrees not to purport to bind the BDDB to any obligation not assumed herein by the BDDB unless Contractor has express written authority to do so, and then only within the strict limits of that authority.

10. Confidentiality.

Any confidential information provided to or developed by Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by Contractor without the prior written approval of the BDDB.

11. Conflict of Interest.

Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement. Contractor further agrees that in the performance of this Agreement no persons having any such interests shall be employed.

12. Amendment.

This Agreement shall not be altered, changed or modified except by an amendment in writing executed by the parties hereto.

13. Merger.

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

14. Penalties for violation of law.

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

15. Non-Discrimination; Equal Opportunity Compliance.

During the term of this Agreement, Contractor shall not discriminate against any employee or applicant for an employment position to be used in the performance of services by Contractor hereunder, on the basis of ethnicity, race, age, religion, creed, color, national origin, ancestry, sex, gender, sexual orientation, physical or mental disability, medical condition, or citizenship status.

The Contractor agrees to abide by all federal and state laws and rules and regulations, and Santa Fe City Code, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental

handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

16. Applicable Law; Choice of Law; Venue.

Contractor shall abide by all applicable federal and state laws and regulations, and all ordinances, rules and regulations of the BDDB. In any action, suit or legal dispute arising from this Agreement, Contractor agrees that the laws of the State of New Mexico shall govern. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

17. Workers Compensation.

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the BDDB.

18. Insurance.

A. Contractor shall not begin the Professional Services required under this Agreement until it has: (i) obtained, and upon the BDDB's request provided to the BDDB, insurance certificates reflecting evidence of all insurance required herein; however, the BDDB reserves the right to request, and Contractor shall submit, copies of any policy upon reasonable request by the BDDB; (ii) obtained BDDB approval of each company or companies as required below; and (iii) confirmed that all policies contain the specific provisions required. Contractor's

liabilities, including but not limited to Contractor's indemnity obligations, under this Agreement, shall not be deemed limited in any way to the insurance coverage required herein. Maintenance of specified insurance coverage is a material element of this Agreement and Contractor's failure to maintain or renew coverage or to provide evidence of renewal during the term of this Agreement may be treated as a material breach of Agreement by the BDDB.

B. Further, Contractor shall not modify any policy or endorsement thereto which increases the BDDB's exposure to loss for the duration of this Agreement.

C. **Types of Insurance.** At all times during the term of this Agreement, Contractor shall maintain insurance coverage as follows:

1) **Commercial General Liability.** Commercial General Liability (CGL) Insurance must be written on an ISO Occurrence form or an equivalent form providing coverage at least as broad which shall cover liability arising from any and all bodily injury, personal injury or property damage providing the following minimum limits of liability.

General Annual Aggregate (other than Products/Completed Operation)	$1,000,000
Products/Completed Operations Aggregate Limit	$1,000,000
Personal Injury Limit	$1,000,000
Each Occurrence	$1,000.000

2) **Automobile Liability.** For all of Contractor's automobiles including owned, hired and non-owned automobiles, Contractor shall keep in full force and effect, automobile liability insurance providing coverage at least as broad for bodily injury and property damage with a combined single limit of not less than $1 million per accident. An insurance certificate shall be submitted to the BDDB that reflects coverage for any automobile [any auto].

3) **Professional Liability.** For Contractor and all of Contractor's employees who are to perform professional services under this Agreement, Contractor shall keep in full force and effect, Professional Liability insurance for any professional acts, errors or omissions. Such policy shall provide a limit of not less than $1,000,000 per claim and $1,000,000 annual aggregate. Contractor shall ensure both that: (i) the policy retroactive date is on or before the date of commencement of the first work performed under this Agreement; and (ii) the policy will be maintained in force for a period of three years after substantial completion of the project or termination of this Agreement whichever occurs last. If professional services rendered under this Agreement include work relating to environmental or pollution hazards, Contractors policy shall not contain exclusions for those activities.

4) **Workers' Compensation.** For all of Contractor's employees who are subject to this Agreement and to the extent required by any applicable state or federal law, Contractor shall keep in full force and effect, a Workers' Compensation policy & Employers Liability policy. That policy shall provide Employers Liability Limits as follows:

Bodily Injury by Accident	$500,000	Each Accident
Bodily Injury by Disease	$500,000	Each Employee
Bodily Injury by Disease	$500,000	Policy Limit

Contractor shall provide an endorsement that the insurer waives the right of subrogation against the BDDB, City of Santa Fe, Santa Fe County, Las Campanas Water and Sewer Cooperative and The Club at Las Campanas; their respective elected officials, officers, employees, agents, volunteers and representatives.

D. **Cancellation.** Except as provided for under New Mexico law, all policies of insurance required hereunder must provide that the BDDB is entitled to thirty (30) days prior written notice (10 days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies as evidence by an endorsement to the policies which shall be attached to the certificates of insurance. Cancellation provisions in insurance certificates shall not contain the qualifying words "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives". In the event Contractor's insurance carriers will not agree to this notice requirement, Contractor will provide written notice to the BDDB within four working days of Contractor's receipt of notice from its insurance carrier(s) of any cancellation, nonrenewal or material reduction of the required insurance.

E. **Insurer Requirements.** All insurance required by express provision of this Agreement shall be carried only by responsible insurance companies that have rated "A-" and "V" or better by the A.M. Best Key Rating Guide, that are authorized to do business in the State of New Mexico, and that have been approved by the BDDB. The BDDB will accept insurance

provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of New Mexico.

F. **Deductibles.** All deductibles or co-payments on any policy shall be the responsibility of Contractor.

G. **Specific Provisions Required.**

1) Each policy shall expressly provide, and an endorsement shall be submitted to the BDDB, that the policy or policies providing coverage for Commercial General Liability must be endorsed to include as an Additional Insured, the BDDB, City of Santa Fe, Santa Fe County, Las Campanas Water and Sewer Cooperative and The Club at Las Campanas; their respective elected officials, officers, employees, agents, volunteers and representatives.

2) All policies required herein are primary and non-contributory to any insurance that may be carried by the BDDB, City of Santa Fe, Santa Fe County, Las Campanas Water and Sewer Cooperative and The Club at Las Campanas; their respective elected officials, officers, employees, agents, volunteers and representatives, as reflected in an endorsement which shall be submitted to the BDDB.

1. Contractor agrees that for the time period defined above, there will be no changes or endorsements to the policy that increase the BDDB's exposure to loss.

2. Before performing any Professional Services, Contractor shall provide the BDDB with all Certificates of Insurance accompanied with all endorsements.

i. The BDDB reserves the right, from time to time, to review Contractor's insurance coverage, limits, and deductible and self-insured retentions to

determine if they are acceptable to the BDDB. The BDDB will reimburse Contractor for the cost of the additional premium for any coverage requested by the BDDB in excess of that required by this Agreement without overhead, profit, or any other markup.

3. Contractor may obtain additional insurance not required by this Agreement.

4. Contractor may obtain additional insurance not required by this Agreement.

19. Third Party Beneficiaries.

By entering into this Agreement, the parties do not intend to create any right, title or interest in or for the benefit of any person other than the BDDB and Contractor. No person shall claim any right, title or interest under this Agreement or seek to enforce this Agreement as a third-party beneficiary of this Agreement.

20. Scope of Agreement.

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the services to be performed hereunder, and all such agreements, covenants and understandings have been merged into this Agreement. This Agreement expresses the entire Agreement and understanding between the parties with respect to said services. No prior agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

21. Severability.

In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and

enforceability of the remaining provisions contained herein, and any other application thereof shall not in any way be affected or impaired thereby.

22. Records, Document Control and Financial Audit.

A. Contractor shall conform with and participate in the Document Control policies of the BDDB or City of Santa Fe. Contractor shall maintain, throughout the term of this Agreement and for a period of three years thereafter, all records that relate to the scope of services provided under this Agreement.

B. Detailed records that indicate the date, time and nature of services rendered shall also be retained for a period of three years after the term of this agreement expires. These records shall be subject to inspection by City of Santa Fe, the Department of Finance and Administration, the State Auditor. The BDDB and City of Santa Fe shall have the right to audit the billing both before and after payment to Contractor. Payment under this Agreement shall not foreclose the right of the BDDB or City of Santa Fe to recover excessive or illegal payments.

23. INDEMNIFICATION.

General Indemnification. To the greatest extent permitted by law, Contractor shall indemnify, hold harmless and defend the BDDB, City of Santa Fe, Santa Fe County, Las Campanas Water and Sewer Cooperative and The Club at Las Campanas; their respective elected officials, officers, employees, agents, volunteers and representatives from all losses, damages, claims or judgments, including payments of all attorneys' fees and costs on account of any suit, judgment, execution, claim, action or demand whatsoever arising from Contractors performance or non-performance under this Agreement as well as the performance or non-performance of Contractor's employees, agents, representatives and subcontractors or any tier.

Indemnification for Professional Acts, Errors or Omissions. Except for professional

acts, error or omissions that are the result of established gross negligence or willful misconduct on the part of Contractor, or its employees, agents, representatives or sub-consultants, the General Indemnification shall not apply to professional acts, errors or omissions unless covered by Professional Liability insurance required in this Agreement.

24. NEW MEXICO TORT CLAIMS ACT.

Any liability incurred by the BDDB in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1, *et seq.*, as amended. The BDDB and their "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

25. Invalid Term or Condition.

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

26. Notices.

Any notices requests, demands, waivers and other communications given as provided in this Agreement will be in writing and will be deemed to have been given if delivered in person (including by Federal Express or other personal delivery service), or mailed by certified or registered mail, postage prepaid, and addressed to Seller or Buyer at the following addresses:

BDDB:
Rick Carpenter
Facilities Manager
Buckman Direct Diversion
341 Caja Del Rio Road Santa Fe, NM 87506
Email: rrcarpenter@ci.santa-fe.nm.us
With a copy to: City of Santa Fe Attorney
PO Box 909 Santa Fe, NM 87504

CONTRACTOR:
Long, Komer & Associates, P. A
1800 Old Pecos Trail #A
Santa Fe, NM 87505

Any such notice sent by registered or certified mail, return receipt, shall be deemed to have been duly given and received seventy-two (72) hours after the same is so addressed and mailed with postage prepaid. Notice sent by recognized overnight delivery service shall be effective only upon actual receipt thereof at the office of the addressee set forth above, and any such notice delivered at a time outside of normal business hours shall be deemed effective at the opening of business on the next business day. Notice sent by email shall be effective only upon actual receipt of the original unless written confirmation is sent by the recipient of the email stating that the notice has been received, in which case the notice shall be deemed effective as of the date specified in the confirmation. Any party may change its address for purposes of this paragraph by giving notice to the other party as herein provided. Delivery of any copies as provided herein shall not constitute delivery of notice hereunder.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date set forth below.

[BALANCE OF PAGE INTENTIONALLY LEFT BLANK;

SIGNATURE PAGE FOLLOWS]

BUCKMAN DIRECT DIVERSION BOARD

By: _____
BDDB Chair

Date: _____

CONTRACTOR:

By: _____
Nancy Long
Title: President/Partner

Date: _____

ATTEST:

_____
Kristine Bustos Mihelcic, City Clerk

File Date:_____

CITY ATTORNEY'S OFFICE:

Marcos Martinez
Marcos Martinez (Feb 17, 2023 13:57 MST)
Senior Assistant City Attorney

APPROVED FOR FINANCES:

_____
Emily Oster, City Finance Director

Org/Object Code:

EXHIBIT A
Fee Schedule

Description	Quantity	Unit	Cost per Item
Senior Partner (or equivalent)	2	Hourly Rate	$225.00
Partner (or equivalent)	1	Hourly Rate	$225.00
Associate (or equivalent)	1	Hourly Rate	$225.00
Law Clerk (or equivalent)	N/A	Hourly Rate	$
Paralegal (or equivalent)	2	Hourly Rate	$100.00
Administrative Staff (or equivalent)	2	Hourly Rate	no charge
Paper Copies	1	Per Page	no charge unless large
			jobs done out of house,
			then at cost

Note:
Filing fees, services and statutory fees shall be charged at actual rate charged by court. All amounts provided must include all labor, materials, equipment, transportation, configuration, installation, training and profit to provide the goods and/or services described in Section IV.A.

Revised
Buckman Direct Diversion Board
Major Repair and Replacement Fund Policy

This revised Major Repair and Replacement Fund Policy ("MRRF Policy") amends and replaces the MRRF Policy approved by the Buckman Direct Diversion Board ("BDDB") in 2014 in order to clarify the language regarding annual contributions to the Major Repair and Replacement Fund ("MRR Fund") established pursuant to this policy. This policy is adopted in accordance with the BDDB's intergovernmental agreements and in order to secure resources assuring the BDDB's ability to cover the repair and replacement cost of capital assets within the Buckman Direct Diversion Facility ("BDD Facility"). The MRRF Policy provides for annual contributions to ensure funding is available to repair and/or replace capital equipment when the capital equipment has reached the end of its effective useful life or requires repair before that time. Capital equipment is defined as any equipment costing more than five thousand dollars ($5,000.00) and with a life expectancy of more than three (3) years ("Equipment"). Replacement prioritization for the Equipment is generally related to a specific time or duration of service identified as the Equipment's life cycle. Typical examples of such Equipment include: SCADA system hardware, vehicles and heavy equipment, variable speed drives, raw and finished water pumps, solids handling process equipment and other related equipment.

The purpose of the MRRF Policy is to define what constitutes a major repair or replacement, how annual contributions to the MRR Fund are determined and how access to the MRR Fund is obtained.

Definition of a Major Repair or Replacement:

A major repair or replacement is defined as a repair, or replacement which is infrequent in nature, and which meets one or both of the following conditions:

a. is to Equipment where failure of the Equipment will significantly affect performance and/or operation of the BDD Facility or;

b. where the complexity of the repair or replacement of Equipment may significantly affect performance and/or operation of the BDD Facility.

Annual Contributions to the Major Repair and Replacement Fund

The annual contribution amount from the BDD partners shall be set forth in each year's BDDB annual approved budget and is subject to change annually, as approved by the BDDB. This annual contribution amount will be informed by and consistent with available funds in the MRR Fund and

an asset management and capital improvement spend plan developed and updated annually by the BDD Facility Manager and available to the BDD partners upon request. Contributions to the MRR Fund shall be made in accordance with the cost sharing principles contained in the Fiscal Operations and Procedures Agreement.

Access to the MRR Fund:

The MRR Fund shall be designated as a restricted reserve fund. The purpose of the MRR Fund is to provide available cash flow to ensure that major repair and replacement of Equipment can be expeditiously accomplished without having to first secure funding from the BDD partners. To access the necessary funds for a major repair or replacement, the following steps shall be followed:

1. The BDD Facility Manager and Equipment Maintenance Superintendent will identify and evaluate all major repairs and replacements.

2. The BDD Facility Manager and Equipment Maintenance Superintendent will develop an initial plan of action.

3. After the initial plan of action is developed, the BDD Facility Manager shall notify the BDDB partners.

4. The BDD Facility Manager will access the MRR Fund in accordance with procurement policy.

5. Upon resolution of the major repair or replacement, the BDD Facility Manager and BDD Financial Manager shall provide a written report to the BDDB at the next regularly scheduled BDD meeting.

The MRRF will be monitored by the BDD Financial Manager and may earn interest income on cash balances as provided in the adopted BDD Working Capital and Billing Policy.

Approved by the Buckman Direct Diversion Board at its Meeting of March 2, 2023.

_____

Anna Hamilton, BDDB Chair

ATTEST:

_____

Katharine E. Clark, Santa Fe County Clerk

Memorandum

Buckman Direct Diversion

Date: **March 2, 2023**

To: **Buckman Direct Diversion Board**

From: **Nancy R. Long via Rick Carpenter and Antoinette Armijo-Rougemont**

Subject: **Revised Major Repair and Replacement Fund Policy**

ITEM AND ISSUE:

Request for the Approval of the Revised Major Repair and Replacement Fund Policy ("MRRF Policy").

BACKGROUND AND SUMMARY:

In line with the requirements of the Project Management Fiscal Services Agreement between the Buckman Direct Diversion Board ("BDDB") and the City of Santa Fe, the BDDB's yearly budget shall include annual Operations, Maintenance, Repair and Replacement costs and provide for a major repair and replacement fund.

In 2014, the BDDB approved the MRRF Policy to address the details of the fund including contributions, the definition of a major repair or replacement and how the funds could be accessed. Annual contributions to the fund have been provided for in the annual budget since 2014.

The policy has been revised to address ambiguous language in the existing policy regarding annual contributions and to link the contributions and the MRRF balance to a plan for necessary or recommended repairs and replacement of equipment.

The proposed Revised MRRF Policy is attached.

ACTION REQUESTED:

It is recommended that the BDDB approve the Revised Major Repair and Replacement Fund Policy.