

PUBLIC WORKS MEMORANDUM
#8-2023

DATE: Feb. 13, 2023
TO: Honorable Mayor Meredith Leighty and City Council Members
THROUGH: Heather Geyer, City Manager *Hmg*
FROM: Kent Kisselman, PE – Director of Public Works *KHK*
SUBJECT: CR-20 – 2023 Water Rights Engineering

PURPOSE

To consider CR-20, a resolution approving an annual contract with Element Water Consulting to provide water resources engineering support and assistance with water rights.

BACKGROUND

The City of Northglenn relies on water resources engineering consultants to provide engineering support and assistance in administering Northglenn's water rights as well as the provision of expert testimony and technical support during any pending or future cases in the State of Colorado District Court, Water Division (Water Court) that affect the City's water rights. Successful water rights engineering requires that consultants develop extensive knowledge of Northglenn's water rights and supply system.

Lamp Rynearson & Associates provided water rights engineering services to the City from 1997 to 2021. That year, Lamp Rynearson closed their Lakewood office permanently and Northglenn hired Element Water Consulting (Element) to provide water resources engineering services. Element has done an excellent job quickly coming up to speed on Northglenn's water rights portfolio as well as the City's current water rights change of use cases.

In 2023, Element Water Consulting would continue to provide engineering support related to the City's water rights, including:

- Using engineering work initiated by Lamp Rynearson, create and verify an engineering report for the FRICO change of use case (18CW3007) and provide engineering support for the City's case under the Water Court process
- Provide water rights engineering support for all other water rights cases impacting the City, including change of use cases filed by neighboring municipalities, and water rights cases the City is opposing
- Provide monthly support for the City's water rights accounting
- Assist the City with water rights engineering work as needed

This amount of work would be higher than average.

Payment History

Utilization of water rights engineering consultants (Lamp Rynearson and then Element Water Consulting) since 2012 is as follows:

Year	Amount
2012	\$117,547.10
2013	\$70,437.36
2014	\$77,231.55
2015	\$78,322.73
2016	\$246,812.00
2017	\$245,788.30
2018	\$107,186.95
2019	\$88,738.40
2020	\$64,549.65
2021	\$121,024.12
2022	\$219,693.75

BUDGET/TIME IMPLICATIONS

The cost to provide engineering services for 2023 is estimated at \$200,000. Funding is available in the Water Fund.

STAFF RECOMMENDATION

Attached is CR-20, a resolution that, if approved, would authorize the Mayor to execute a contract between the City and Element Water Consultants for specialized water engineering services in an amount not to exceed \$200,000. Staff recommends approval of CR-20.

STAFF REFERENCE

If Council members have any questions, please contact Kent Kisselman, Director of Public Works, at kkisselman@northglenn.org or 303.450.4005.

SPONSORED BY: MAYOR LEIGHTY

COUNCIL MEMBER'S RESOLUTION

RESOLUTION NO.

No. CR-20
Series of 2023

Series of 2023

A RESOLUTION APPROVING A PROFESSIONAL SERVICES AGREEMENT BETWEEN THE CITY OF NORTHGLENN AND ELEMENT WATER CONSULTING, INC. FOR WATER AND WATER RIGHTS ENGINEERING SERVICES

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NORTHGLENN, COLORADO, THAT:

Section 1. The Professional Services Agreement between the City of Northglenn and ELEMENT Water Consulting, Inc., attached hereto, in an amount not to exceed \$200,000.00 for water and water rights engineering services, is hereby approved and the Mayor is authorized to execute same on behalf of the City of Northglenn.

DATED at Northglenn, Colorado, this ____ day of _____, 2023.

MEREDITH LEIGHTY
Mayor

ATTEST:

JOHANNA SMALL, CMC
City Clerk

APPROVED AS TO FORM:

COREY Y. HOFFMANN
City Attorney

AGREEMENT FOR PROFESSIONAL SERVICES

THIS AGREEMENT is made and entered into this _____ day of _____ 20____, by and between the City of Northglenn, State of Colorado (hereinafter referred to as the "City") and ELEMENT Water Consulting, Inc. (hereinafter referred to as "Consultant").

RECITALS:

- A. The City requires professional services.
- B. Consultant has held itself out to the City as having the requisite expertise and experience to perform the required work for the Project.

NOW, THEREFORE, it is hereby agreed for the consideration hereinafter set forth, that Consultant shall provide to the City, professional consulting services for the Project.

I. SCOPE OF SERVICES

Consultant shall furnish all labor and materials to perform the work and services required for the complete and prompt execution and performance of all duties, obligations, and responsibilities for the Project which are described or reasonably implied from **Exhibit A** which is attached hereto and incorporated herein by this reference.

II. THE CITY'S OBLIGATIONS/CONFIDENTIALITY

The City shall provide Consultant with reports and such other data as may be available to the City and reasonably required by Consultant to perform hereunder. No project information shall be disclosed by Consultant to third parties without prior written consent of the City or pursuant to a lawful court order directing such disclosure. All documents provided by the City to Consultant shall be returned to the City. Consultant is authorized by the City to retain copies of such data and materials at Consultant's expense.

III. OWNERSHIP OF WORK PRODUCT

The City acknowledges that the Consultant's work product is an instrument of professional service. Nevertheless, the products prepared under this Agreement shall become the property of the City upon completion of them and payment for the work.

IV. COMPENSATION

A. In consideration for the services specified herein by Consultant, the City shall pay Consultant an amount not to exceed Two hundred thousand dollars (\$200,000). Payment shall be made in accordance with the schedule of charges in Exhibit B which is attached hereto and incorporated herein by this reference. Invoices will be itemized and include hourly breakdown for all personnel and other charges. The maximum fee specified herein shall include all fees and expenses incurred by Consultant in performing all services hereunder.

B. Consultant may submit monthly or periodic statements requesting payment. Such request shall be based upon the amount and value of the work and services performed by Consultant under this Agreement except as otherwise supplemented or accompanied by such supporting data as may be required by the City.

- 1. All invoices, including Consultant's verified payment request, shall be submitted by Consultant to the City no later than the twenty-fourth (24th) day of each month for payment

pursuant to the terms of this Agreement. In the event Consultant fails to submit any invoice on or before the twenty-fourth (24th) day of any given month, Consultant defers its right to payment pursuant to said late invoice until the twenty-fourth (24th) day of the following month.

2. Progress payments may be claimed on a monthly basis for reimbursable costs actually incurred to date as supported by detailed statements, including hourly breakdowns for all personnel and other charges. The amounts of all such monthly payments shall be paid within thirty (30) days after the timely receipt of invoice as provided by this Agreement.

C. The City has the right to ask for clarification on any Consultant invoice after receipt of the invoice by the City.

D. In the event payment for services rendered has not been made within forty-five (45) days from the receipt of the invoice for any uncontested billing, interest will accrue at the legal rate of interest. In the event payment has not been made within ninety (90) days from the receipt of the invoice for any uncontested billing, Consultant may, after giving seven (7) days written notice and without penalty or liability of any nature, suspend all work on all authorized services specified herein. In the event payment in full is not received within thirty (30) days of giving the seven (7) days written notice, Consultant may terminate this Agreement. Upon receipt of payment in full for services rendered, Consultant will continue with all authorized services.

E. Final payment shall be made within sixty (60) calendar days after all data and reports (which are suitable for reproduction and distribution by the City) required by this Agreement have been turned over to and approved by the City and upon receipt by the City of Consultant's certification that services required herein by Consultant have been fully completed in accordance with this Agreement and all data and reports for the Project.

V. COMMENCEMENT AND COMPLETION OF WORK

Within seven (7) days of receipt from the City of a Notice to Proceed, Consultant shall commence work on all its obligations as set forth in the Scope of Services or that portion of such obligations as is specified in said Notice. Except as may be changed in writing by the City, the Project shall be complete and Consultant shall furnish the City the specified deliverables as provided in Exhibit A.

VI. CHANGES IN SCOPE OF SERVICES

A change in the Scope of Services shall constitute any material change or amendment of services or work, including time of performance, which is different from or additional to the Scope of Services specified in Section I of this Agreement. No such change, including any additional compensation, shall be effective, or paid unless authorized by written amendment executed by the City. If Consultant proceeds without such written authorization, then Consultant shall be deemed to have waived any claim for additional compensation, including a claim based on the theory of unjust enrichment, quantum merit or implied contract. Except as expressly provided herein, no agent, employee, or representative of the City shall have the authority to enter into any changes or modifications, either directly or implied by a course of action, relating to the terms and scope of this Agreement.

VII. PROFESSIONAL RESPONSIBILITY

A. Consultant hereby represents that it is qualified to assume the responsibilities and render the services described herein and has all requisite corporate authority and professional licenses in good standing, required by law.

B. The work performed by Consultant shall be in accordance with generally accepted professional practices and the level of competency presently maintained by other practicing professional firms in the same or similar type of work in the applicable community.

C. Consultant shall be responsible for the professional quality, technical accuracy, timely completion, and the coordination of all designs, drawings, specifications, reports, and other services furnished by Consultant under this Agreement. Consultant shall, without additional compensation, correct or resolve any errors or deficiencies in his designs, drawings, specifications, reports, and other services, which fall below the standard of professional practice, and reimburse the City for construction costs to the extent caused by errors and omissions which fall below the standard of professional practice.

D. Approval by the City of drawings, designs, specifications, reports, and incidental work or materials furnished hereunder shall not in any way relieve Consultant of responsibility for technical adequacy of the work. Neither the City's review, approval or acceptance of, nor payment for, any of the services shall be construed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement, and Consultant shall be and remain liable in accordance with applicable performance of any of the services furnished under this Agreement.

E. The rights and remedies of the City provided for under this Agreement are in addition to any other rights and remedies provided by law.

F. Consultant shall not be in default of its obligations if performance is prevented or delayed by an existing or future *force majeure* condition or any other cause beyond the reasonable control of a party to this Agreement including, without limitation, act of government, act of God, act of City or City's contractor, meteorological phenomenon, power failures or blackouts, strike, shortage of labor or materials, insurrection, embargo, fire, flood, earthquake, electromagnetic interference, explosion, riot, wars or armed conflicts,

G. **Absent willful and wanton misconduct conduct**, the performance of Consultant's services shall not subject the personnel of either party to any personal legal exposure for Project risks, each party waiving such claims and covenanting that any claim shall be made against only a party and not against any of its personnel.

VIII. INDEMNIFICATION

A. **INDEMNIFICATION – GENERAL:** The City cannot and by this Agreement does not agree to indemnify, hold harmless, exonerate or assume the defense of the Consultant or any other person or entity whatsoever, for any purpose whatsoever. Provided that the claims, demands, suits, actions or proceedings of any kind are not the result of professional negligence, the Consultant, to the fullest extent permitted by law and to the extent caused by Consultant, shall defend, indemnify and hold harmless the City, its Council members, officials, officers, directors, agents and employees from any and all claims, demands, suits, actions or proceedings of any kind or nature whatsoever, including worker's compensation claims, to the extent caused by the services rendered by Consultant, its employees, agents or subconsultants, or others for whom the Consultant is legally liable, under this Agreement; provided, however, that the Consultant need not indemnify, defend, or save harmless the City, its Council members, its officers, agents and employees from damages resulting from the negligence or other fault of the Council members, officials, officers, directors, agents and employees.

B. **INDEMNIFICATION FOR PROFESSIONAL NEGLIGENCE:** The Consultant shall, to the fullest extent permitted by law and to the extent caused by Consultant, defend, indemnify and hold harmless the City, its Council members, and any of its officials, officers, directors, and employees from and against damages, liability, losses, costs and expenses, including reasonable attorneys fees, but only to the extent caused by the negligent acts, errors or omissions of the Consultant, its employees, agents or subconsultants, or others for whom the Consultant is legally liable, in the performance of professional services under this Agreement. The Consultant is not obligated under this subparagraph IX.B. to indemnify, defend, or hold harmless the City for the negligent acts or other fault of the City, its Council members, or any of its officials, officers, directors, agents and employees.

C. **INDEMNIFICATION – COSTS:** Consultant shall, to the fullest extent permitted by law, defend, investigate, handle, respond to, and provide defense for and defend against, any such liability,

claims or demands at the sole expense of Consultant or, at the option of the City, agrees to pay the City or reimburse the City for the defense costs incurred by the City in connection with any such liability, claims or demands. Consultant shall, to the fullest extent permitted by law, defend and bear all other costs and expenses related thereto, including court costs and attorney fees, whether or not any such liability, claims or demands alleged are groundless, false or fraudulent. If it is determined by the final judgment of a court of any competent jurisdiction that such injury, loss or damage was caused in whole or in part by the act, omission or other fault of the City, its Council members, officials, officers, directors, agents and employees, the City shall reimburse Consultant for the portion of the judgment attributable to such act, omission or other fault of the City, its Council members, officials, officers, directors, agents and employees or others for whom the City is legally liable.

D. To the extent this Agreement is subject to C.R.S. § 13-50.5-102(8), Contractor's liability under this provision shall be to the fullest extent of, but shall not exceed, that amount represented by the degree or percentage of negligence or fault attributable to Contractor, any subcontractor of Contractor, or any officer, employee, representative, or agent of Contractor or of any subcontractor of Contractor. If Contractor is providing architectural, engineering, surveying or other design services under this Agreement, the extent of Contractor's obligation to defend, indemnify and hold harmless the City may be determined only after Contractor's liability or fault has been determined by adjudication, alternative dispute resolution or otherwise resolved by mutual agreement of the Parties, as provided by C.R.S. § 13-50.5-102(8)(c).

IX. INSURANCE

A. Consultant agrees to obtain and maintain during the life of this Contract, a policy or policies of insurance against all liability, claims, demands, and other obligations assumed by Consultant pursuant to Section IX, above. Such insurance shall be in addition to any other insurance requirements imposed by this Agreement or by law. Consultant shall not be relieved of any liability, claims, demands, or other obligations assumed pursuant to Section IX, above, by reason of its failure to obtain or maintain during the life of this Contract insurance in sufficient amounts, durations, or types.

B. Consultant shall obtain and maintain during the life of this Contract and shall cause any subcontractor of Consultant to obtain and maintain during the life of this Contract, the minimum insurance coverages listed below. Such coverages shall be obtained and maintained with forms and insurers acceptable to the City. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by Consultant pursuant to Section IX, above. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

1. Worker's Compensation Insurance to cover obligations imposed by applicable law for any employee engaged in the performance of the work under this Contract, and Employers Liability Insurance with minimum limits of five hundred thousand dollars (\$500,000) each incident, five hundred thousand dollars (\$500,000) disease - policy limit, and five hundred thousand dollars (\$500,000) disease - each employee.

2. Commercial general liability insurance with minimum combined single limits of one million dollars (\$1,000,000) each occurrence and two million dollars (\$2,000,000) general aggregate. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, products, and completed operations. The policy shall contain a severability of interests provision.

3. Professional liability insurance on projects over \$1,000,000 with minimum limits of six hundred thousand dollars (\$600,000) each claim and one million dollars (\$1,000,000) general aggregate.

C. The policy required by paragraph 2. above shall be endorsed to include the City and the

City's officers, employees, and consultants as additional insureds. Every policy required above shall be primary insurance, and any insurance carried by the City, its officers, its employees, or its consultants shall be excess and not contributory insurance to that provided by Consultant. No additional insured endorsement to the policy required by paragraph 1. above shall contain any exclusion for bodily injury or property damage arising from completed operations. Consultant shall be solely responsible for any deductible losses under any policy required above.

The certificate of insurance provided for the City shall be completed by Consultant's insurance agent as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be reviewed and approved by the City prior to commencement of the Agreement. No other form of certificate shall be used. If the City is named as an additional insured on any policy which does not allow for the automatic addition of additional insureds, the Consultant's insurance agent shall also provide a copy of all accompanying endorsements recognizing the City as an additional insured. The certificate shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be cancelled, terminated or materially changed until at least thirty (30) days prior written notice has been given to the City. The completed certificate of insurance shall be sent to:

City of Northglenn
Attn: Kathy Kvasnicka
11701 Community Center Drive Northglenn, Colorado 80233-8061

D. Failure on the part of Consultant to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of agreement upon which the City may immediately terminate this Agreement, or at its discretion, the City may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the City shall be repaid by Consultant to the City upon demand, or the City may offset the cost of the premiums against any monies due to Consultant from the City.

E. The City reserves the right to request and receive a certified copy of any policy and any endorsement thereto.

F. The parties hereto understand and agree that the City, its officers, and its employees, are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations (presently three hundred fifty thousand dollars (\$350,000) per person and nine hundred ninety thousand dollars (\$990,000) per occurrence) or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, Colo. Rev. Stat. §§ 24-10-101, et seq., as from time to time amended, or otherwise available to the City, its officers, or its employees.

X. **NON-ASSIGNABILITY**

Neither this Agreement, nor any of the rights or obligations of the parties hereto, shall be assigned by either party without the written consent of the other.

XI. **TERMINATION**

This Agreement shall terminate at such time as the work in Section I is completed and paid for and the requirements of this Agreement are satisfied, or upon the City's providing Consultant with seven (7) days advance written notice, whichever occurs first. In the event the Agreement is terminated by the City's issuance of said written notice of intent to terminate, the City shall pay Consultant for all expenses and work previously authorized and completed prior to the date of termination. If, however, Consultant has substantially or materially breached the standards and terms of this Agreement, the City shall have any remedy or right of set-off available at law and equity. If the Agreement is terminated for any reason other than cause prior to completion of the Project, any use of documents by the City thereafter shall be at the City's sole risk, unless otherwise consented to by Consultant.

XII. CONFLICT OF INTEREST

The Consultant shall disclose any personal or private interest related to property or business within the City. Upon disclosure of any such personal or private interest, the City shall determine if the interest constitutes a conflict of interest. If the City determines that a conflict of interest exists, the City may treat such conflict of interest as a default and terminate this Agreement.

XIII. VENUE

This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in the County of Adams, State of Colorado.

XIV. INDEPENDENT CONTRACTOR

Consultant is an independent contractor. Notwithstanding any provision appearing in this Agreement, all personnel assigned by Consultant to perform work under the terms of this Agreement shall be, and remain at all times, employees or agents of Consultant for all purposes. Consultant shall make no representation that it is the employee of the City for any purposes.

XV. NO WAIVER

Delays in enforcement or the waiver of any one or more defaults or breaches of this Agreement by a party shall not constitute a waiver of any of the other terms or obligation of this Agreement.

XVI. ENTIRE AGREEMENT

This Agreement and the attached Exhibits A and B is the entire Agreement between Consultant and the City, superseding all prior oral or written communications. None of the provisions of this Agreement may be amended, modified, or changed, except as specified herein.

XVII. SUBJECT TO ANNUAL APPROPRIATION

Consistent with Article X, Section 20 of the Colorado Constitution, any financial obligations of the City not to be performed during the current fiscal year are subject to annual appropriation, and thus any obligations of the City hereunder shall extend only to monies currently appropriated.

XVIII. NOTICE

Any notice or communication between Consultant and the City which may be required, or which may be given, under the terms of this Agreement shall be in writing, and shall be deemed to have been sufficiently given when directly presented or sent pre-paid, first class United States Mail, addressed as follows:

The City: City of Northglenn
11701 Community Center Drive
Northglenn, Colorado 80233-8061

Contractor: Element Water Consulting Inc.
12596 West Bayaud Ave, Suite 330
Lakewood, CO 80228

IN WITNESS WHEREOF, the parties hereto each herewith subscribe the same in duplicate.

CITY OF NORTHGLENN, COLORADO

By:

Meredith Leighty
Print Name

Mayor
Title

ATTEST:

Johanna Small, CMC Date
City Clerk

APPROVED AS TO FORM:

Corey Y. Hoffmann Date
City Attorney

CONTRACTOR:

By: Beorn Courtney

Beorn Courtney
Print Name

President, ELEMENT Water 1/13/23
Title Date

ATTEST:

By: Miranda Larsen-Funk
Miranda Larsen-Funk
Print Name
Water Resources Engineer 11/13/23
Title Date

EXHIBIT A SCOPE OF SERVICES

The following sections describe water rights engineering services to be completed by ELEMENT Water Consulting, Inc. (ELEMENT) in 2023 to support the City of Northglenn's (City) water rights-related activities.

1. CASE NO. 18CW3007

ELEMENT has been providing water rights engineering and supporting the City and its legal counsel in settlement negotiation efforts in Case No. 18CW3007, to change water rights associated with Northglenn's 615.151 shares in the Farmers Reservoir and Irrigation Company, Standley Lake Division. The case is scheduled for trial in December 2022. ELEMENT's services in 2023 will depend upon the results of the pre-trial settlement or trial and may include but not be limited to the following:

- Supporting decree revisions and preparing final decree exhibits.
- Preparing accounting updates to comply with the final decree.
- Supporting dry-up documentation.

2. ACCOUNTING SUPPORT

ELEMENT will work with City staff to provide in-depth accounting training related to data acquisition, projecting future values, identifying operational changes needed as a result of changes in calls and water use, and submitting accounting to the state. City staff will manage and update the daily accounting. ELEMENT will provide up to weekly reviews of the draft accounting and address City staff questions as they arise.

3. OTHER WATER RIGHTS-RELATED WORK

In addition to Case No. 18CW3007, ELEMENT will support the City's ongoing water rights work in other active water court cases and efforts to develop standard operating procedures for diligence on new water supplies.

4. WATER RESOURCES PLANNING

ELEMENT will support the City's ongoing water resources planning work including updating water supply and demand models and providing guidance on water resources planning efforts. This work may include but not be limited to the following:

- Water supply and demand planning to inform water resources operations at Bull Reservoir.
- Water conservation planning and technical support including analysis and implementation of programs defined in the City's current Water Efficiency Plan.
- Updates to Northglenn's water supply model to reflect new supply and demand information such as data from Northglenn's aquifer storage and recovery investigation, newly acquired water rights or storage, improvements to the system that reduce water loss, or other changes in supplies or demand.

EXHIBIT B

ELEMENT WATER CONSULTING, INC.

2023 FEE SCHEDULE

<u>Position</u>	<u>Hourly Rate</u>
Senior Project Manager	\$205.00
Project Manager	\$195.00
Senior Engineer/Hydrologist	\$185.00
Project Engineer/Hydrologist	\$160.00
Staff Engineer/Hydrologist	\$140.00
Administrative	\$75.00

The above hourly rates include indirect expenses. Reimbursable expenses for travel, including airfare, automobile rental, mileage at the then-current Internal Revenue Service standard mileage rate, lodging, etc. are billed at cost. Sub-consultants to ELEMENT are billed at cost plus five percent.