

MIDVALE CITY, UTAH

RESOLUTION No. 2023-R-13

**A RESOLUTION AUTHORIZING THE MAYOR TO ENTER INTO AN AMENDED AND RESTATED AGREEMENT WITH BOWEN, COLLINS, AND ASSOCIATES FOR PROFESSIONAL SERVICES**

**WHEREAS**, Midvale City and Bowen, Collins and Associates entered into an Agreement for Professional Services on April 18, 2005 (“Original Agreement”); and

**WHEREAS**, Bowen, Collins and Associates has provided numerous engineering services for Midvale during the term of the Original Agreement on a task order basis; and

**WHEREAS**, in order to continue the contractual relationship, the Original Agreement is now being replaced with an Amended and Restated Agreement for Professional Services (“Amended Agreement”); and

**WHEREAS**, the Amended Agreement continues the existing relationship, updates the insurance requirements, rebalances liability and indemnification obligations, and provides a new dispute resolution process; and

**WHEREAS**, the City Council finds it in the best interest of the City to enter into an Amended Agreement with Bowen, Collins, and Associates for Professional Services,

**NOW, THEREFORE**, be it resolved by the Midvale City Council that the Mayor is authorized to execute the Amended and Restated Agreement with Bowen, Collins and Associates for Professional Services attached hereto.

**PASSED AND APPROVED** this 21<sup>st</sup> day of March 2023.

By:   
Marcus Stevenson, Mayor


[SEAL]



**VOTING:**

Quinn Sperry	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Paul Glover	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Heidi Robinson	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Bryant Brown	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Dustin Gettel	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>

ATTEST:

  
Rori L. Andreason, MMC  
City Recorder



## AMENDED AND RESTATED AGREEMENT FOR PROFESSIONAL SERVICES

This Amended and Restated Agreement for Professional Services is executed on \_\_\_\_\_, 2023, by Midvale City, a Utah municipal corporation and a political subdivision of Utah, and Bowen, Collins and Associates, a Utah corporation (“BC&A”).

### **Background**

Midvale City and Bowen, Collins and Associates entered into an Agreement for Professional Services on April 18, 2005 (“Original Agreement”).

BC&A has provided numerous engineering services for Midvale during the term of the Original Agreement on a task order basis.

As nearly 18 years have passed since the Original Agreement was executed, the Parties now wish to maintain their contractual relationship by replacing the Original Agreement with this Amended and Restated Agreement for Professional Services (“Amended Agreement”).

The Amended Agreement continues the existing relationship between the Parties and updates the insurance requirements, rebalances liability and indemnification obligations, and provides a new dispute resolution process.

Midvale City, in accordance with Midvale Municipal Code 3.02.060(E)(7), finds that it is in its best interest to enter the Amended Agreement with Bowen, Collins and Associates under a professional service exemption because of BC&A’s demonstrated engineering expertise and familiarity with the City’s systems.

Bowen, Collins and Associates finds that it is in its best interest to enter the Amended Agreement with the City so that it may benefit from an updated and continued contractual relationship with the City.

Therefore, in exchange for the mutual promises found in this Amended Agreement, the Parties agree as follows:

### **Agreement**

- 1. Amended and Restated Agreement for Professional Services.** Upon execution of this Amended and Restated Agreement for Professional Services, the Amended and Restated Agreement for Professional Services will supersede and replace the Agreement for Professional Services between the Parties and dated April 18, 2005. The Amended Agreement will represent the entire agreement between the Parties.
- 2. Engineering Services.** BC&A will provide engineering services to Midvale City on as-needed basis (“Services”). Midvale City will issue individual Task Orders for Services under Section 3 of this Amended Agreement.

3. **Task Orders.** For each project, the City will request BC&A to draft a Task Order for Services. The Task Order will include the scope of Services, schedule, and compensation for the project. The City may accept the Task Order by authorizing the BC&A to proceed with work under the Task Order. The Task Order will be subject to this Amended Agreement.
4. **Compensation.** Compensation for the completion of Services will be set by individual Task Orders. Unless otherwise noted in the Task Order, the compensation amount in a Task Order may not be exceeded by BC&A without Midvale's prior written permission.
5. **Invoices.** BC&A must submit invoices for payment to Midvale. Invoices must include an invoice number, the date the Service was provided, the Service performed, the specific rate, a reference to the related Task Order, and the total extended dollar amount. Midvale will issue payments to BC&A for any uncontested charges within 30 days after receipt of invoices. The Parties will resolve any disputed charges in accordance with Section 29 of this Amended Agreement.
6. **Schedule.**
  - A. **Milestones/Deadlines.** BC&A agrees to meet all milestones and deadlines for Services established in an accepted Task Order.
  - B. **Time.** Time is of the essence.
  - C. **Acts of God.** Neither Party to this Amended Agreement will be held responsible for delay or default caused by fire, riot, natural disaster, acts of God, pandemics, war, or a similar event which is beyond that Party's reasonable control. Either Party may terminate this Amended Agreement by written notice to the other Party after determining such delay will prevent successful performance of this Amended Agreement.
  - D. **Cooperation.** Both Parties recognize that Midvale's cooperation may be necessary for BC&A to successfully complete Services in accordance with the schedule provided in the Task Order. In the event the City unreasonably delays BC&A's performance, the affected schedule will be extended by the number of days BC&A's performance was unreasonably delayed by the City.
7. **Standard of Care.** BC&A represents that the Services provided by BC&A under this Amended Agreement are provided in a manner consistent with the level of care and skill ordinarily exercised by or under the direction of members of BC&A's profession currently practicing in the Parties' locality and under similar conditions.
8. **Documents.**

- A. **Ownership.** Midvale acknowledges that BC&A's documents created in performing Services are instruments of professional service. Nevertheless, the documents prepared under this Amended Agreement will become the property of Midvale upon completion and acceptance of the Services performed under the associated Task Order and payment of all compensation owed BC&A. Midvale may not make any modifications to the documents or, subject to Subsection 8(B), reuse the documents without the prior, written authorization from BC&A.
  - B. **Reliance.** Midvale may not rely on any document unless it is signed or sealed by BC&A or one of its subcontractors performing Services under the associated Task Order. Any use of documents that are not signed or sealed are done at the user's sole risk. Documents that are signed or sealed by BC&A or one of its subcontractors performing Services under the associated Task Order may be relied upon by the City and any other entity that the City receives or provides services to. This expressly includes any future work involving a system designed by BC&A under this Amended Agreement whether completed by BC&A or another individual or entity.
  - C. **Retention.** BC&A must retain all working papers, reports, and all necessary records to properly account for BC&A's performance and the payments made by Midvale to BC&A under this Amended Agreement. These records must be retained BC&A for at least five years. The City may extend the retention period by written notice. BC&A agrees to make all documents related to this Amended Agreement available to the City or third parties upon the City's request.
9. **Opinions Regarding Cost.** Midvale recognizes that any opinions regarding the probable cost of construction for projects designed or reviewed by BC&A are estimates. BC&A prepares its opinions based on its experience with past projects of similar construction. BC&A does not have any control over any economic factors or unknown conditions that may have a significant impact on the actual cost for a project prepared under its Services.
10. **Term.** The Amended Agreement will terminate on June 30, 2028, unless terminated earlier under Section 12 of the Amended Agreement.
11. **Default.** In the event of a default under this Amended Agreement, the non-defaulting Party may:
- A. Suspend the BC&A's performance under this Amended Agreement until the default is corrected;
  - B. Withhold payment until the default is corrected;
  - C. Charge 1.5% monthly interest, compounded monthly, on any unpaid amount until the amount is paid in full; and
  - D. Terminate this Amended Agreement in accordance with Section 12.

The list of remedies under this Section is not exhaustive or exclusive. Either Party may pursue any other right or remedy available to it, either in law or equity, on account of the other Party's default. Either Party may use any combination of remedies available.

## 12. Termination.

- A. **Default.** This Amended Agreement may be terminated for cause by the non-defaulting Party by providing written notice to the defaulting Party. The Party in default of this Amended Agreement will be given 10 days after written notification to cure the default. If the default has not been cured, the non-defaulting Party may terminate the Amended Agreement immediately and may avail itself of the remedies in this Amended Agreement.
- B. **Convenience.** This Amended Agreement may be terminated for convenience by either Party by providing 30 days' written notice to the other Party.
- C. **Compensation.** Upon termination of this Amended Agreement, all accounts and payments will be processed according to Sections 4 and 5 for approved and properly performed Services completed prior to the effective date of the written notice. BC&A agrees that in the event of termination for cause or convenience, BC&A's sole remedy and monetary recovery from the City is limited to full payment for all Services approved and properly performed and completed prior to the effective date of the written notice.

## 13. Indemnification.

- A. **Midvale.** Bowen, Collins and Associates agrees to indemnify, ~~defend,~~ and hold harmless Midvale and its elected officials, officers, ~~and employees, volunteers, and agents~~ from and against ~~all~~ damages, ~~and~~ liabilities, ~~and claims~~ (including reasonable legal and attorneys' fees and costs) to the extent caused by ~~or resulting from~~ BC&A's breach of contract, negligence, or recklessness in the performance of Professional Services under this Amended Agreement, intentional misconduct, or BC&A's subcontractor's negligence in the performance of Professional Services under this Amended Agreement.
- B. **BC&A.** Midvale City agrees to indemnify, ~~defend,~~ and hold harmless Bowen, Collins and Associates and its officers, ~~and employees, and agents~~ from and against ~~all~~ damages, ~~and~~ liabilities, ~~and claims~~ (including reasonable legal and attorneys' fees and costs) to the extent caused by ~~or resulting from~~ Midvale's breach of contract, unauthorized reuse or modification of documents described in Section 8(A), negligence, or recklessness in its performance under this Amended Agreement, or intentional misconduct.

14. **Insurance.** BC&A must at all times during the term of this Amended Agreement, without interruption, carry and maintain insurance from an insurance company authorized to do business in the State of Utah in accordance with this Section.

**A. Coverage Amounts.**

- I. Commercial General Liability Insurance.** BC&A must have a Commercial General Liability Insurance policy that includes products and completed operations, bodily injury, property damage, and personal and advertising injury and must be in the amount of at least \$1,000,000 per occurrence and \$3,000,000 aggregate.
  - II. Automobile Liability Insurance.** BC&A must have Automobile Liability Insurance in the amount of at least \$1,000,000 per occurrence and \$3,000,000 aggregate.
  - III. Professional Liability/Errors and Omissions Insurance.** BC&A must have a Professional Liability/Errors and Omissions Insurance policy in the amount of at least \$1,000,000 per claim and \$3,000,000 aggregate. This policy must be maintained for at least three years after the completion of Services.
  - IV. Workers Compensation.** BC&A must have Worker's Compensation Insurance (Part A) that meets Utah's statutory requirements. BC&A must have Employers Liability Insurance (Part B) in the amount of at least \$1,000,000 for each accident, disease, and employee. No owner or officer may be excluded from coverage.
- B. Certificate of Insurance.** BC&A must provide a Certificate of Insurance that meets the requirements of this Section to Midvale five days after a request by the City. If no request has been made by the City, BC&A must provide a Certificate of Insurance that meets the requirements of this Section to the City no later than 30 days after the execution of this Amended Agreement. Failure to provide proof of insurance will be deemed a material breach of this Amended Agreement.
- C. Cancellation/Expiration.** BC&A may not cancel or allow an insurance policy to be cancelled or non-renewed unless written notice has been given to Midvale at least 30 days prior (or in the case of cancellation for non-payment of premium, 10 days prior) to the cancellation or non-renewal.
- D. Additional Insured.** BC&A must add Midvale to its Commercial General Liability and its Automobile Liability insurance policies.
- E. Primary, Noncontributory.** The additional insured coverage provided by BC&A to Midvale under this Section is required to be primary, noncontributory, and not



in excess of any insurance or self-insurance policies available to or maintained by Midvale.

- F. Material Breach.** BC&A's failure to maintain this insurance in accordance with this Section for the term of this Amended Agreement is a material breach of this Amended Agreement for which Midvale may immediately terminate this Amended Agreement.
- 15. Survival.** The Parties' obligations under Sections 8 *Documents*, 13 *Indemnification*, 14.A.III *Professional Liability Insurance*, and 19 *GRAMA* will survive the termination of this Amended Agreement.
- 16. Relationship of Parties.** BC&A is an independent contractor of Midvale. No other legal relationship has been formed by this Amended Agreement, and in no manner is BC&A an employee or agent of the City. BC&A is not entitled to any of the benefits associated with such employment. BC&A is responsible for all applicable federal, state, and local taxes and all FICA contributions. The Parties have no authorization, express or implied, to bind the other Party. The Parties agree not to perform any such acts as an agent for the other Party.
- 17. Not Exclusive.** BC&A understands that the Services under this Amended Agreement are not exclusive. Midvale may contract with other individuals or entities to provide the same or similar services. This Amended Agreement does not guarantee any amount of work.
- 18. Status Verification.** Under the Utah Immigration Accountability and Enforcement Act, Utah Code Ann. §§ 63G-12-101 to -402, any entity physically performing services within Utah for a public employer is required to participate in Utah's Status Verification System. BC&A will provide Midvale a certification of its compliance with this requirement within 30 days of the execution of this Amended Agreement.
- 19. GRAMA.** Midvale is a governmental entity that is subject to Utah's Government Records Access and Management Act, Utah Code Ann. §§ 63G-2-101 to -901. Any documents produced or collected under this Amended Agreement may be subject to public access. If BC&A believes that a document should be protected under Utah Code Ann. §§ 63G-2-305(1) or (2), BC&A must clearly mark such documents as "Proprietary" or "Confidential" and provide a written claim of business confidentiality to the City that complies with Utah Code Ann. § 63G-2-309(1). BC&A agrees to cooperate with and to supply any requested records to the City with any public records request. This obligation will survive any suspension of this Amended Agreement.
- 20. Laws and Regulations.** At all times during this Amended Agreement, BC&A and all Services performed under this Amended Agreement must comply with applicable federal, state, and City constitutions, laws, rules, codes, orders, and regulations, including, but not limited to, applicable licensure and certification requirements. This includes not discriminating against any individual in an employment decision, including but not limited to hiring, selection of training, promotion, transfer, recruitment, or rates of pay,



because of the individual's race, color, sex, age, religion, national origin, disability, pregnancy, familial status, veteran status, genetic information, sexual orientation, or gender identity.

- 21. Subcontractors.** Performance of Services under this Amended Agreement may not be subcontracted to another entity without Midvale's prior written consent. The City may withhold its consent at its sole discretion. If a subcontractor is permitted to perform Services under this Amended Agreement, BC&A is responsible for the subcontractor's performance of the Services. The subcontractor is subject to all of the terms of this Amended Agreement that apply to BC&A except for invoices and payments. The City will accept invoices from only BC&A and will make payments to only BC&A for Services.
- 22. Notices.** Any notice required under this Amended Agreement will be deemed sufficiently given or served if personally delivered or sent by United States Certified Mail, return receipt requested, addressed as follows:

*Midvale City*  
Midvale City  
Attn: City Engineer  
7505 S. Holden Street  
Midvale, UT 84047  
Phone: 801-567-7258  
Email: ludwigk@midvale.com

*Bowen, Collins and Associates*  
Bowen, Collins and Associates  
Attn: Brian Romrell, P.E.  
154 East 14075 South  
Draper, Utah 84020  
Phone: 801-495-2224  
Email: bromrell@bowencollins.com

With a copy to:  
Midvale City  
Attn: Contract Analyst  
7505 S. Holden Street  
Midvale, UT 84047  
Phone: 801-567-7254  
Email: sstengel@midvale.com

The Parties have the right, from time to time, to change their respective notice addresses under this Section by providing written notice to the other Party.

- 23. Amendments/Modifications.** This Amended Agreement may only be modified by the mutual written agreement of the Parties. Any such amendment will be attached to this Amended Agreement.
- 24. Assignment/Delegation.** A Party may not assign or delegate any part of this Amended Agreement without the other Party's prior written consent. Unless otherwise noted in the Amended Agreement, a Party may not unreasonably withhold its consent.
- 25. Waiver.** Failure by either Party to insist upon the strict performance of any condition of this Amended Agreement or to exercise any right or remedy found under the Amended

Agreement does not constitute a waiver. Either Party may waive any of its rights or any conditions by written notice to the other Party. No waiver may affect or alter the remainder of this Amended Agreement. Every other condition in the Amended Agreement will remain in full force with respect to any existing or subsequently occurring default.

26. **Severability.** In the event that any provision of the Amended Agreement is held to be void, the voided provision will be considered severable from the remainder of the Amended Agreement and will not affect any other provision in the Amended Agreement. If the provision is invalid due to its scope or breadth, the provision will be considered valid to the extent of the scope or breadth permitted by law.
27. **Governing Law and Venue.** This Amended Agreement is governed by the laws, rules, and regulations of the State of Utah. Any action or proceeding arising from this Amended Agreement must be brought in a court of competent jurisdiction in Salt Lake County, Utah.
28. **Dispute Resolution.** Any dispute arising under or relating to this Amended Agreement will be resolved in the following order:
  - A. Good faith negotiations between the Parties;
  - B. Good faith mediation with a mutually agreed upon mediator and with each Party paying one half of the mediation costs; and
  - C. Litigation.

If a Party incurs any legal or attorneys' fees or costs in litigation to resolve a dispute arising under or relating to this Amended Agreement, the prevailing Party may recover such fees and costs.

29. **Conflicts of Interest.**
  - A. **Officer or Employee.** BC&A represents that none of its officers or employees are elected officials, officers, employees, volunteers, or agents of Midvale or its affiliates, unless it has made such disclosure to the City prior to execution of this Amended Agreement. BC&A represents and warrants that none of its officers, employees, or immediate family members of its officers or employees is or has been an elected official, officer, employee, volunteer, or agent of Midvale or its affiliates who influences the City's procurement process. This includes, but is not limited to, anyone involved in Midvale's drafting of procurement and project documents or the City's selection of a bidder.
  - B. **Gift.** BC&A represents and warrants that it has not provided any compensation or gift in any form, whether directly or indirectly, to an elected official, officer, employee, volunteer, or agent of Midvale or its affiliates who influences the

City's procurement process. This includes, but is not limited to, anyone involved in the City's drafting of procurement and project documents or the City's selection of a bidder.

30. **Publicity.** BC&A must submit all advertising and publicity matters relating to this Amended Agreement to Midvale for written approval. It is the City's sole discretion whether to provide approval.
31. **Performance Evaluation.** Midvale may conduct a performance evaluation of BC&A's Services. Results of any evaluation may be made available to the BC&A upon BC&A's request.
32. **Entire Agreement.** This Amended Agreement constitutes the entire agreement between the Parties and supersedes any and all other prior and contemporaneous agreements, including, but not limited to, the Original Agreement, and understanding between the Parties, whether oral or written.

*Signature Page to Follow*

Midvale City and Bowen, Collins and Associates have read and understood the Amended and Restated Agreement for Professional Services. Both Parties have demonstrated their willingness to enter into the Amended Agreement as of the date above by having their Authorized representatives sign below.

MIDVALE CITY

\_\_\_\_\_  
Marcus Stevenson, Mayor                      Date

ATTEST:

\_\_\_\_\_  
Rori L. Andreason, City Recorder      Date

BOWEN, COLLINS AND ASSOCIATES

\_\_\_\_\_  
[Name of Authorized Signer], [Title]      Date