

## **AGREEMENT BETWEEN THE ARIZONA WATER BANKING AUTHORITY AND <subcontractor> FOR M&I FIRMING**

This Agreement (“M&I Firming Agreement”) is made between the Arizona Water Banking Authority, an agency of the State of Arizona (“AWBA”) and <Full Name> (“<Subcontractor>”), a municipal and industrial (“M&I”) subcontractor of the Central Arizona Water Conservation District (“CAWCD”). <Subcontractor> and AWBA are sometimes each referred to in this M&I Firming Agreement as a “Party” and collectively as the “Parties.”

### **RECITALS**

- A. <Subcontractor> has the authority to receive Central Arizona Project (“CAP”) M&I Priority water pursuant to Subcontract No. \_\_\_\_\_.
- B. CAWCD’s diversions from the Colorado River are subject to reductions during the Interim Period pursuant to Section 2.D of the *Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* (73 Fed. Reg. 19873, 19886 (April 11, 2008)) (“2007 Guidelines”) and pursuant to Section III.B.1 of the Lower Basin Drought Contingency Operations (“LBOps”), Exhibit 1 to the Lower Basin Drought Contingency Plan Agreement (“LBDCP”).
- C. The AWBA has accrued or acquired long-term storage credits (“Credits”) that are intended to be distributed to CAWCD or to M&I subcontractors “to the extent necessary to meet the demands of M&I subcontractors during times in which CAWCD’s diversions from the Colorado river have been or will be disrupted by shortages on the Colorado river or by disruptions in operation of the [CAP],” pursuant to Arizona Revised Statutes § 45-2457(B)(7).
- D. On March 4, 2019, the AWBA adopted the AWBA Policy Regarding the Distribution of Long-Term Storage Credits for Firming CAP Municipal and Industrial Subcontractors (“M&I Firming Policy”) to assist with Arizona’s implementation of the LBDCP. Through 2026, the AWBA will distribute Credits to meet all reductions to CAP M&I subcontractors for scheduled M&I Priority water due to shortage reductions or required Drought Contingency Plan (“DCP”) Contributions. The AWBA will use the operating experience gained during this period to inform future AWBA policies on Credit distribution.
- E. M&I subcontractors may enter into a firming agreement with the AWBA to request a direct distribution of AWBA Credits for firming purposes pursuant to A.R.S. § 45-2457(B)(7).
- F. The Parties desire to enter into this M&I Firming Agreement to establish an annual process to implement the direct transfer of Credits for this purpose.

## DEFINITIONS

In this M&I Firming Agreement, the definitions of terms set forth in Arizona Revised Statutes Title 45, in the 2007 Guidelines, in the LBDCP, and in the LBOps are hereby incorporated by reference, unless such terms are defined otherwise herein. In addition to the terms defined in context within this M&I Firming Agreement, the following terms shall have the following meanings:

1. "CAP M&I Priority Water" means CAP water having municipal and industrial delivery priority.
2. "Firming" shall have the same definition as that provided in the CAP System Use Agreement, dated February 2, 2017.
3. "Firming Water" shall have the same definition as that provided in the CAP System Use Agreement dated February 2, 2017.
4. "Full Order" means the M&I subcontractor's initial CAP water delivery order that has not been modified to account for the projected reduced CAP supply.
5. "Recovered Water" means the water resulting from the recovery of Credits from wells pursuant to a valid recovery well permit issued by the Arizona Department of Water Resources ("ADWR") pursuant to A.R.S. § 45-834.01.
6. "Water Shortage" means available CAP water is insufficient to fully meet the Full Orders of M&I subcontractors for CAP M&I Priority Water.
7. "Water Shortage Year" means a year in which a Water Shortage is in effect.
8. "Year" means a calendar year beginning on January 1 and ending on December 31 of the same year.

## AGREEMENT

NOW THEREFORE, the parties hereby agree as follows:

1. Term. This M&I Firming Agreement shall commence on the date of execution by all parties and continue in full force and effect until December 31, 2026, unless it is terminated as set forth in Sections 8 or 9.
2. M&I Firming Method. The AWBA may, in each Year of this M&I Firming Agreement in which there is a Water Shortage, distribute Credits for Firming CAP M&I Priority Water directly to CAP M&I subcontractors in accordance with A.R.S. § 45-2457(B)(7) and the M&I Firming Policy if requested by the <Subcontractor>. This M&I Firming Agreement does not obligate the AWBA to offer any Credits for direct distribution in any Year; nor does it obligate <Subcontractor> to accept any Credits through direct distribution in any Year. <Subcontractor> may request delivery of Firming Water from CAWCD in lieu of a direct distribution of Credits.

### 3. Firming Proposal

- 3.1. The AWBA shall evaluate the potential for a future Water Shortage in coordination with the Bureau of Reclamation (“BOR”), the CAWCD, and ADWR.
- 3.2. If BOR’s April five-year probabilistic projections indicate a greater than fifteen percent probability of a Water Shortage in the third Year, the Parties shall begin consultations on the potential for Firming and the anticipated Firming method(s) that will be used (i.e., request for Firming Water and/or direct distribution of AWBA Credits). See Exhibit A, attached hereto and incorporated herein, for a graphical representation of activities occurring during this time period.
- 3.3. If the BOR’s April 24-Month Study “Minimum Probable” forecast reflects a Water Shortage in the second Year, the Parties will assume the following activities, as further described in Exhibit A:
  - a) Within three (3) months following the April 24-Month Study, the Parties, in consultation with CAWCD, shall estimate the volume of CAP M&I Priority Water the AWBA shall firm for the potential Water Shortage Year. <Subcontractor> shall indicate the estimated number of Credits intended to be requested for direct distribution and/or the estimated volume of Firming Water to be delivered through the CAP.
  - b) If <Subcontractor> proposes to receive Credits directly from the AWBA, the Parties shall begin development of a “Firming Proposal,” including the estimated number of Credits for direct distribution from the AWBA, whether <Subcontractor> intends to recover the Credits during the Water Shortage Year, the estimated volume of Firming Water to be delivered through the CAP (if applicable), and the participation of any delivery partners, as described in Section 4 of this M&I Firming Agreement. <Subcontractor> may also identify preferred storage locations of Credits to be provided to subcontractor for AWBA consideration.
  - c) In the month of December following the activities described in Section 3.3.a, the AWBA shall report to its governing body the Firming Proposal, including the estimated number of Credits identified for direct distribution by the AWBA.
- 3.4. If BOR’s April 24-Month Study “Most Probable” forecast reflects a Water Shortage in the following Year, the Parties shall confirm the Firming Proposal according to the following schedule (See Exhibit A, for activities occurring during this time period):

- a) By May 1 of the Year prior to a projected Water Shortage Year, the AWBA shall provide an estimate of the volume of CAP water likely to be available to <Subcontractor>. This estimate shall be developed in consultation with CAWCD, BOR and ADWR, but does not constitute a determination by the United States or CAWCD.
- b) By May 15 of the Year prior to a projected Water Shortage Year, the <Subcontractor> shall provide an estimate of the number of Credits for direct distribution and the estimated volume of Firming Water for delivery through the CAP in the projected Water Shortage Year. The Firming Proposal shall be revised accordingly.
- c) If the Firming Proposal includes the direct distribution of Credits to <Subcontractor>, the AWBA shall identify the location(s) of Credits for direct distribution to <Subcontractor> no later than August 1.
- d) By September 1, the Parties shall confirm in writing the estimated volume of CAP M&I Priority Water the AWBA shall firm based on water availability estimates provided by CAWCD in response to the findings of the BOR's August 24-Month Study ("Firming Plan").
- e) The AWBA shall incorporate as a component of its preliminary draft annual plan of operation ("APO") that is adopted pursuant to A.R.S. § 45-2456 the Firming Plan that will be implemented in the Water Shortage Year.
- f) The AWBA shall provide its preliminary APO to <Subcontractor> at the same time it provides its preliminary APO to the public for comment.
- g) By October 1, or such date as required by CAWCD, of that same Year, <Subcontractor> shall submit its Full Order for CAP Water to CAWCD for the following Year and include in its submittal the confirmed Firming method(s) identified in the Firming Plan.
- h) The AWBA shall include in its final APO the final volume of CAP M&I Priority Water the AWBA shall firm based on <Subcontractor>'s Full Order submitted to CAWCD, the Firming Plan, and CAWCD's final accounting of M&I Priority supplies available for the Water Shortage Year.

#### 4. Credit Distribution

- 4.1. The AWBA shall distribute Credits to <Subcontractor> for Firming in a Water Shortage Year pursuant to the Firming Plan and in accordance with State regulations and policies.

- 4.2. In determining the Credits that shall be distributed for a Water Shortage Year, the AWBA will take into consideration <Subcontractor's> location, recovery partnership agreements, recharge facilities where the <Subcontractor> has stored water, annual operational issues/needs, and any other relevant concerns, including provisions in this M&I Firming Agreement that may be applicable.
- 4.3. By accepting AWBA Credits in lieu of a Firming Water delivery from CAP, <subcontractor> agrees that:
  - a) The Credits received satisfy the Firming Plan for that Water Shortage Year, and
  - b) The Credits received shall not be sold, and
  - c) <Subcontractor> is responsible for all costs associated with the recovery of those Credits.
- 4.4. The AWBA shall distribute all Credits by December 31 of the Water Shortage Year as follows:
  - a) Credits shall be assigned using ADWR's procedures for assigning Credits in effect at the time of the assignment.
  - b) The AWBA may distribute Credits through the course of the Year with preference given to Credits that will be recovered by <Subcontractor> during the Water Shortage Year.
  - c) The AWBA shall assign Credits in accordance with the Firming Plan for that Water Shortage Year. The Parties shall coordinate regarding completion and submittal to ADWR of any forms necessary for assignment of Credits.
  - d) <Subcontractor> shall pay any administrative fees established by ADWR to effectuate the assignment of AWBA Credits to <Subcontractor's> Long-Term Storage Credit Account.

## 5. Amendments to a Firming Plan

- 5.1. <Subcontractor> and AWBA shall amend the Firming Plan included in the APO during a Water Shortage Year if any of the following apply:
  - a) There are substantive changes to the volume of the Water Shortage as applicable to <Subcontractor> that affect the Firming Plan included in the APO.
  - b) The Firming Plan included in the APO cannot be implemented as anticipated during the Water Shortage Year.

- 5.2. Any amendments to the Firming Plan included in the AWBA's APO resulting from Section 5.1 shall be through mutual agreement between <Subcontractor> and the AWBA.
- 5.3. If necessary, the AWBA shall amend its APO for the Year to identify any substantive changes to the Firming Plan.
6. Water Quality. The AWBA does not warrant the quality of Recovered Water from Credits distributed by the AWBA pursuant to this M&I Firming Agreement and the AWBA is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of any Recovered Water by <Subcontractor>. <Subcontractor> assumes all responsibility for meeting applicable water quality standards established by federal, state or local authorities. <Subcontractor> waives its rights to make a claim against the AWBA for the quality of <Subcontractor's> Recovered Water.
7. Default. Unless otherwise provided, the failure of either Party to perform any material term, covenant, or condition of this M&I Firming Agreement results in default of that Party if that failure continues for thirty days following the receipt of written notice from the other Party.
8. Remedies. If an event of default occurs, the non-defaulting Party may immediately terminate this M&I Firming Agreement by written notice to the defaulting Party and/or may pursue specific performance.
9. Termination of Contract. In addition to other rights set forth elsewhere in this M&I Firming Agreement, each Party reserves the right to terminate this M&I Firming Agreement, without cause, effective thirty (30) calendar days after receipt of written notice of termination to the other Party. If this M&I Firming Agreement is terminated during a Shortage Year, such termination shall not terminate any commitments, obligations or benefits of either Party for the current Shortage Year.
10. Miscellaneous Provisions.
  - 10.1. Interpretation. This M&I Firming Agreement is governed by and must be construed and interpreted in accordance with and in reference to the laws of the State of Arizona.
  - 10.2. No Third-Party Beneficiaries. This M&I Firming Agreement is solely for the benefit of the Parties and does not create, nor shall it be construed to create, rights in any third party unless expressly provided herein. No third party may enforce the terms and conditions of this M&I Firming Agreement.
  - 10.3. Conflict of Interest. This agreement is subject to cancellation by the State of Arizona and the Water Bank under A.R.S. § 38-511 if any person significantly involved in the agreement on behalf of the State of Arizona or the Water Bank is an employee or consultant of the <Subcontractor> at any time while the agreement or any extension of the agreement is in effect.

- 10.4. Permits. The Parties shall obtain and maintain all licenses, permits and authority necessary to perform their obligations pursuant to this M&I Firming Agreement, and shall comply with all applicable state, federal and local laws, including but not limited to those regarding employment insurance, disability insurance and worker's compensation. This M&I Firming Agreement does not relieve either party from any obligation or responsibility imposed upon it by law.
- 10.5. No Employment. Neither Party shall be considered an officer, employee or agent of the other. No monitoring or supervisory responsibility over the other Party's activities arises as a result of, or pursuant to, this M&I Firming Agreement other than as expressly provided herein.
- 10.6. Severability. The provisions of this M&I Firming Agreement are severable to the extent that if any provision is held unenforceable under applicable law, the remaining provisions of the M&I Firming Agreement shall remain in effect.
- 10.7. No Indemnification. Each Party to this M&I Firming Agreement is independently responsible in the event of its own negligence. Neither Party agrees to indemnify the other Party.
- 10.8. Resolution of Disputes. The Parties shall attempt to resolve all claims, disputes, controversies, or other matters in question between the Parties arising out of, or relating to, this M&I Firming Agreement ("Dispute") promptly, equitably, and in a good faith manner. Any Dispute arising out of this M&I Firming Agreement is subject to arbitration to the extent required by A.R.S. §§ 12-133 and 12-1518.
- 10.9. Amendments. This M&I Firming Agreement may be modified, amended, or revoked only by the express written agreement of the Parties.
- 10.10. Entire Agreement. This M&I Firming Agreement constitutes the entire agreement between the Parties as to the subject matter described herein and no understandings or obligations not expressly set forth in this M&I Firming Agreement are binding upon the Parties. Nothing in this M&I Firming Agreement shall amend or otherwise modify any other existing written contracts between or amongst the Parties.
- 10.11. Waiver. No delay in exercising any right or remedy shall constitute a waiver unless such right or remedy is waived in writing signed by the waiving party. A waiver by any Party of any right or remedy hereunder shall not be construed as a waiver of any other right or remedy, whether pursuant to the same or a different term, condition or covenant.
- 10.12. Captions. All captions, titles, or headings in this M&I Firming Agreement are used for the purpose of reference and convenience only and do not limit,

modify, or otherwise affect any of the provisions of this M&I Firming Agreement.

10.13. Rules, Regulations and Amendment or Successor Statutes. All references in this M&I Firming Agreement to the Arizona Revised Statutes include all rules and regulations promulgated by ADWR under such statutes and all amendment statutes and successor statutes, rules, and regulations to such statutes, rules, and regulations existing as of the date of this M&I Firming Agreement.

10.14. Notices. Any notice, demand, or request authorized or required by this M&I Firming Agreement shall be in writing and shall be deemed to have been duly delivered by email to a valid email address designated by the Parties, or if mailed, first-class or delivered, to the following address:

For the AWBA:

Manager  
Arizona Water Banking Authority  
P.O. Box 36020  
Phoenix, Arizona 85067-6020  
[insert email address]

For the <subcontractor>:

<subcontractor>  
Attn: <contact>  
Address 1  
address 2  
email address

The designation of the address or addressee, including email addresses, may be changed by notice given as provided in this Section.

Notice is deemed to have been given on the date on which notice is personally delivered, delivered to an overnight delivery service, mailed, or emailed. Notice is deemed to have been received on the date on which the notice is actually received, or delivery is refused.

10.15. Equal Opportunity. The Parties shall comply with State Executive Order No. 75-5, as amended by State Executive Order No. 2009-9, and all other applicable Federal and State laws, rules and regulations relating to equal opportunity and non-discrimination, including the Americans with Disabilities Act.

10.16. Records and Inspections. All books, accounts, reports, files and other records in relation to this M&I Firming Agreement shall be subject at all reasonable times to inspection and audit by the Parties throughout the term of this M&I Firming Agreement and for a period of five years after the completion of this M&I Firming Agreement. Upon request, a Party must produce the original of any or all such records for inspection.



10.17. Uncontrollable Forces. No Party will be considered to be in default in the performance of any of its obligations hereunder (other than obligations to make payments) when a failure of performance is due to Uncontrollable Forces. The term "Uncontrollable Forces" shall mean any cause beyond the control of the Party unable to perform such obligation, including, but not limited to, failure of or threat of failure of facilities, flood, earthquake, storm, fire, lightning and other natural catastrophes, epidemic, pandemic, war, riot, civil disturbance or disobedience, strike, labor dispute, labor or material shortage, sabotage, terrorism, or restraint by court order or public authority, and action or nonaction by, or failure to obtain the necessary authorizations or approvals from, any governmental agency or authority, which by exercise of due diligence such Party could not reasonably have been expected to avoid and which by exercise of due diligence it shall be unable to overcome. Drought is not an Uncontrollable Force for the purposes of this M&I Firming Agreement. Nothing contained herein shall be construed to require a Party to settle any strike or labor dispute in which it is involved.

10.18. This M&I Firming Agreement may be executed in counterparts, each of which shall be an original and all of which, together, shall constitute only one M&I Firming Agreement.

IN WITNESS WHEREOF, both the <subcontractor> and the AWBA have executed this M&I Firming Agreement.

[Signature pages follow]

Draft 9-2-2022

<Subcontractor>-AWBA M&I Firming Agreement

**ARIZONA WATER BANKING AUTHORITY**

By: \_\_\_\_\_

Thomas Buschatzke, Chair

Date: \_\_\_\_\_

Attest:

By: \_\_\_\_\_

Alexandra Arboleda, Secretary

Date: \_\_\_\_\_

Approved as to Form:

By: \_\_\_\_\_

[Name], Counsel

Date: \_\_\_\_\_

Draft 9-2-2022

<Subcontractor>-AWBA M&I Firming Agreement

**<SUBCONTRACTOR>**

By: \_\_\_\_\_

Name, Title

# Exhibit A

## CAP M&I Firming Timeline

