

**El Paso  
Metropolitan Planning Organization**

**TRANSPORTATION POLICY BOARD AGENDA PROJECT SUMMARY**

**March 22, 2019**

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**AGENDA ITEM NO. 2:**

Discussion and action to approve amendments to legal services contract for Kemp Smith LLP

**ACTION REQUESTED:**

Request for approval required.

**SUPPORT INFORMATION:**

- Kemp Smith LLP Contract

**DISCUSSION/OPTIONS:**

This item is to be discussed during the Transportation Policy Board meeting.

STATE OF TEXAS           §  
  §   LEGAL SERVICES AGREEMENT  
COUNTY OF EL PASO   §

This Legal Services Agreement is entered into this \_\_\_ day of \_\_\_\_\_, 2019, by and between the El Paso Metropolitan Planning Organization (“EPMPO”) for the El Paso Urban Transportation Study Area, and Kemp Smith, LLP. (“Kemp Smith”), to-wit:

**WITNESSETH:**

**WHEREAS**, the EPMPO is the designated metropolitan planning organization that serves as a forum for cooperative transportation decision-making by state and local governments and local transportation planning agencies in the EPMPO study area; and,

**WHEREAS**, the Transportation Policy Board (TPB) of EPMPO, has determined that professional legal services to the EPMPO is necessary; and,

**WHEREAS**, Kemp Smith has the necessary knowledge, experience and expertise to assist the EPMPO in providing professional legal services; and,

**WHEREAS**, the EPMPO wishes to retain the services of Kemp Smith to assist the EPMPO to perform complex professional legal work.

**NOW THEREFORE, FOR AND IN CONSIDERATION OF THE MUTUAL COVENANTS AND PROMISES RECITED HEREIN, IT IS HEREBY AGREED BY THE PARTIES AS FOLLOWS:**

The EPMPO and Kemp Smith for the consideration and mutual promises as herein set forth agree as follows:

1.    **SCOPE OF SERVICES**

Kemp Smith agrees to provide the services generally described in Attachment “A,” incorporated herein by reference, and to provide interpretation of federal and state laws, rules and regulations governing the development and financing of transportation projects. The provision of legal services hereunder shall not exceed 80 hours of legal work in any annual period, unless any additional amount is expressly authorized by EPMPO and approved by Kemp Smith, in advance.

2.    **TERM**

The Term of this Agreement shall begin on the date this Agreement is executed by both parties, and shall end on March 31, 2021. The EPMPO shall have the exclusive option of extending the term of this Agreement for two (2) additional one (1) year periods, and shall notify Kemp Smith in writing of its intent to do so.

3.    **CONSIDERATION**

The maximum payment by the EPMPO to Kemp Smith for the legal work provided hereunder shall be TWENTY NINE THOUSAND, TWO HUNDRED AND 00/100 DOLLARS (\$29,200) PER YEAR. Periodic payments shall be made to Kemp Smith by the EPMPO within thirty (30) days following the submittal of its monthly invoices. Kemp Smith shall utilize its customary hourly billing rates for its attorneys, with the goal of providing the most qualified attorney for each work assignment.

4. **COMPLIANCE WITH LAWS**

Kemp Smith shall comply with all federal and state laws, statutes, rules, and regulations, and the orders and decrees of any courts or administrative bodies or tribunals in any matter affecting the performance of this agreement.

5. **INDEPENDENT CONTRACTOR**

Nothing contained herein shall be construed as creating the relationship of employer and employee between the EPMPO and Kemp Smith.

6. **ASSIGNMENT**

The services to be provided by Kemp Smith under this Agreement are specific to the EPMPO and shall not be assigned or delegated without the prior written consent of the EPMPO. Any attempt to assign without the prior written consent of the EPMPO shall be void and, may at the option of the EPMPO, result in a termination of this Agreement.

7. **TERMINATION**

- A. Either party may terminate this Agreement if the other is in default upon ten (10) days written notice to the defaulting party, provided that the defaulting party shall be given a reasonable time to cure said default. The EPMPO and Kemp Smith may terminate this Agreement upon thirty (30) days written notice to the other party.
- B. Termination shall be without prejudice as to any obligation by one party to the other, which shall have accrued and be owing prior thereto.
- C. Upon termination, Kemp Smith shall return any materials belonging to the EPMPO, such as all plans, records, and other materials, which are currently in Kemp Smith's possession.

8. **NOTICES**

All notices, communications and reports under this Agreement shall be hand-delivered or mailed, certified, return receipt requested, to the respective parties at their respective addresses shown below, unless and until either party is otherwise notified in writing by the other party:

EPMPO: Executive Director  
Metropolitan Planning Organization  
211 N. Florence, Suite 202  
El Paso, Texas 79901

Kemp Smith: Thomas A Forbes  
Kemp Smith LLP  
221 N. Kansas, Suite 1700  
El Paso, TX 79901

9. **WAIVER**

Action or inaction by either party regarding any default, breach or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent or any other right hereunder.

10. **DEBARMENT CERTIFICATIONS**

The EPMPO is prohibited from entering into any contract or agreement with a party that is debarred or suspended or otherwise excluded from or ineligible for participation in federal assistance programs. By executing this agreement, Kemp Smith certifies that it is not currently debarred, suspended, or otherwise excluded from or ineligible for participation in Federal Assistance Programs, and further certifies that it will not do any business with any party that is currently debarred, suspended or otherwise excluded from or ineligible for participation in Federal Assistance Programs. The EPMPO shall require any party to a subcontract or purchase order awarded under this agreement to certify its eligibility to receive federal funds.

11. **EQUAL EMPLOYMENT OPPORTUNITY**

The parties to this Agreement agree to comply with Executive Order 11246 entitled, "Equal Employment Opportunity" as amended by Executive Order 11375 and as supplemented in Department of Labor Regulations (41 CFR §60).

12. **NON-DISCRIMINATION**

- A. During the performance of this Agreement, the parties agree that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability, be exclude from participation in, be denied the benefits of, or be subjected to discrimination.
- B. Specific Discriminatory Actions prohibited: The parties hereto may not utilize criteria or methods of administration which have the effect of subjecting

individuals to discrimination on the basis of race, creed, color, sex, national origin, age or disability, or having the effect of defeating or substantially impairing accomplishments of the objectives of the project funded pursuant to this Agreement or any written amendment hereto with respect to individuals of a particular race, color, national origin, creed, sex, age or disability.

- C. Specific Assurance: Kemp Smith shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. Kemp Smith agrees with and gives assurances to comply with Appendix A and E of the United States Department of Transportation DOT Order No. 1050.2A. Kemp Smith shall carry out applicable requirements of 49 CFR Part 21 in the award and administration of DOT-assisted contracts. Failure by Kemp Smith to carry out these requirements is a material breach of this Agreement, which may result in the termination of this agreement or such other remedy as the EPMPO deems appropriate.

13. **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement and understanding between the parties hereto, and no verbal or other written commitment shall have any force or effect if not contained herein.

14. **VENUE**

The parties hereto agree that this Agreement shall be enforceable in El Paso, Texas, and if legal action is necessary to enforce it, exclusive venue shall lie in El Paso County, Texas.

15. **CONTRACT INTERPRETATION**

In interpreting the various provisions of this Agreement in a court of law, a court having jurisdiction shall apply the laws of the State of Texas to interpret the terms and provisions in this Agreement.

16. **SEVERABILITY**

If any provision of this Agreement is found by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remainder of this Agreement will not be affected and in lieu of each provision which is found to be illegal, invalid, or unenforceable, there will be added as part of this Agreement a provision which preserves the intention of the unenforceable provision, but which complies with the law.

17. **CAPTIONS**

The captions to the various paragraphs of this Agreement are for informational purposes

only and shall not alter the substance of the terms and conditions of this Agreement.

18. **AUTHORITY.**

Each signatory to this agreement warrants that he or she is duly authorized by their respective principal to sign this agreement on behalf of the said principal and to bind the same.

19. **PROMOTIONAL USE.**

Kemp Smith may not authorize or use any materials or information acquired or produced by the EPMPO in the fulfillment of this agreement for any promotional use without limitation without the prior written consent of the EPMPO.

20. **RECORDS.**

Records and documents prepared by Kemp Smith and provided to Kemp Smith shall be kept and maintained by Kemp Smith for a minimum of five years after the expiration of this agreement. At the request of the EPMPO copies of such records or documents shall be provided by Kemp Smith to the EPMPO at no cost to the EPMPO.

21. **OWNERSHIP OF DOCUMENTS.**

Each party shall have ownership of the documents it prepares or causes to be made in fulfillment of its obligations under this agreement. Each party shall provide to the other, at no cost, records or reports prepared or made to fulfill this agreement.

**IN WITNESS WHEREOF**, the parties have executed this Agreement on this \_\_\_\_ day of \_\_\_\_\_, 2019.

**THE EL PASO METROPOLITAN PLANNING ORGANIZATION**

By: \_\_\_\_\_  
**Roger Williams**  
**Interim Executive Director**

**THE CITY OF EL PASO, Fiscal Agent**

By: \_\_\_\_\_  
Tommy Gonzalez, City Manager

or Designee

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Leslie B. Jean-Pierre  
Assistant City Attorney

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Scott Foster  
Legal Counsel for the MPO

**Kemp Smith LLP**

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

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

## ATTACHMENT “A” SCOPE OF WORK

- Attend EPMPO Board, Executive, and advisory committee meetings as needed.
- Provide legal advice and counsel to EPMPO Board and staff to ensure compliance with Federal, State, and local statutes, rules, and regulations. This may lead to presentations by the Legal Counsel to the EPMPO Board if and when needed.
- Review, consult and advice on any complicated and controversial EPMPO Board recommendations.
- Respond to EPMPO Board Members inquiries by providing legal advice.
- Perform legal research and develop legal opinions upon request by EPMPO Board or Executive Director on a variety of legal issues.
- Prepare, review, consult and approve for legal sufficiency continuing and proposed EPMPO contracts, bylaws and agreements (including inter-local agreements, grant agreements, etc.)
- Assist the EPMPO in federal and state grant processes when needed.
- Advise and assist staff in responding to claims and complaints regarding violations of civil rights, both federal and state
- Monitor the annual session of the Legislature to identify, analyze, and track the passage of bills of interest to the EPMPO upon request.
- Represent the EPMPO before any Board or Commissions when necessary.
- Act as an intermediary between the EPMPO and counsel of outside agencies.
- Provide general legal advice to EPMPO staff on routine matters.
- Explain, justify, and defend EPMPO programs, policies, and activities; negotiate and resolve sensitive, significant, and controversial issues.
- Perform other legal services as may on occasion be specifically requested.



## APPENDIX A

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the “contractor”) agrees as follows:

1. **Compliance with Regulations:** The contractor (hereinafter includes consultants) will comply with the Acts and the Regulations relative to Nondiscrimination in Federally-assisted programs of the U.S. Department of Transportation, the Federal Highway Administration, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.
2. **Nondiscrimination:** The contractor, with regard to the work performed by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.
3. **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding, or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the contractor of the contractor's obligations under this contract and the Acts and the Regulations relative to Nondiscrimination on the grounds of race, color, or national origin.
4. **Information and Reports:** The contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Recipient or the Federal Highway Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the contractor will so certify to the Recipient or the Federal Highway Administration, as appropriate, and will set forth what efforts it has made to obtain the information.
5. **Sanctions for Noncompliance:** In the event of a contractor's noncompliance with the Nondiscrimination provisions of this contract, the Recipient will impose such contract sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:
  - a. withholding payments to the contractor under the contract until the contractor complies; and/or
  - b. cancelling, terminating, or suspending a contract, in whole or in part.
6. **Incorporation of Provisions:** The contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment,

unless exempt by the Acts, the Regulations and directives issued pursuant thereto. The contractor will take action with respect to any subcontract or procurement as the Recipient or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the contractor may request the Recipient to enter into any litigation to protect the interests of the Recipient. In addition, the contractor may request the United States to enter into the litigation to protect the interests of the United States

## APPENDIX E

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the “contractor”) agrees to comply with the following nondiscrimination statutes and authorities; including but not limited to:

### **Pertinent Nondiscrimination Authorities:**

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21.
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 et seq.), (prohibits discrimination on the basis of sex);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 U.S.C. § 4 71, Section 4 7123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, subrecipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 C.F.R. parts 37 and 38;
- The Federal Aviation Administration's Nondiscrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take

reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);

- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 et seq).