



STATE OF NEW MEXICO SOLE SOURCE REQUEST AND DETERMINATION FORM

A sole source *determination* is not effective until the *sole source request for determination* has been posted for thirty (30) calendar days without challenge, and subsequently approved in writing by the State Purchasing Agent or, for Professional Services Agreements, the Secretary of the Department of Finance and Administration. The foregoing requirement is regardless of whether the *sole source request for determination* has been signed by the Agency and/or the Contractor.

I. Name of Agency: New Mexico Office of the Attorney General

Agency Chief Procurement Officer: Theresa Storey/Nick Eckert

Telephone Number: 505-490-4853/505-490-4831

Agency Contact for this request: Nick Eckert

Telephone Number & Email Address: 505-490-4831/neckert@nmag.gov

I. Name of prospective Contractor: Trout, Raley, Montano, Witwer & Freeman

SHARE Vendor Number (must be active): 000004511

Address of prospective Contractor: 1120 Lincoln St., Suite 1600
Denver, CO 80203

Contact Name, Telephone Number and Email Address: Lisa Thompson, (303) 861-1963

Amount of prospective contract:

\$1,100,000 (Plus gross receipts tax / GRT - \$86,625)

Total = \$1,186,625

Term of prospective contract: 07/01/20 to 06/30/21

Note: For terms longer than one year, Request for Policy Exemption from DFA MUST be included.

II. Agency is required to state purpose/need of purchase and thoroughly list the services (scope of work), construction or items of tangible personal property of the prospective contract (if this is an amendment request to an existing contract, include current contract number issued by SPD):

The New Mexico Office of the Attorney General (OAG) duties include representing the State of New Mexico in interstate and other complex water litigation. Further, the OAG has received funding for new and continued litigation concerning the Rio Grande on which

there exists an interstate compact.

- **The contractor shall provide attorney and litigation support services specializing in advice and litigation assistance in the following areas that the OAG anticipates:**
 - a. **All aspects of *Texas v. New Mexico and Colorado* litigation including, working with experts, discovery, pre-trial motions, trial preparation, trial, settlement discussions and other ancillary actions which have arisen and may arise in other courts but are directly related to *Texas v. New Mexico and Colorado*;**
 - b. **Such work may also include providing legal advice from time to time on water policy matters of State-wide importance but may not proceed to litigation, and such other work as directed by the Attorney General and his Assistant Attorneys General.**
 - **The contractor shall give timely written notice to the AG and his designee of any and all pleadings, dispositive motions, rulings, hearings, trials, mediations or settlement negotiations, appeals or notices of appeals and any other legal events relevant to the litigation.**
 - **The contractor will be required to meet, coordinate with and, as requested, submit interim reports to the AG or his designee regarding the nature, progress, costs and extent of legal services rendered or remaining to be completed.**
- III. Provide a detailed explanation of the criteria developed and specified by the agency as necessary to perform and/or fulfill the contract and upon which the state agency reviewed available sources. (Do not use “technical jargon;” use plain English. Do not tailor the criteria simply to exclude other contractors if it is not rationally related to the purpose of the contract.)

In the applicable litigation, The OAG continues its defense of an original action in the United States Supreme Court brought by Texas. Texas alleges New Mexico is not complying with the Rio Grande Compact. The United States has intervened as a Plaintiff aligned against New Mexico, so New Mexico must defend against two plaintiffs and two sets of claims. *Texas v. New Mexico and Colorado*. No. 141, Original. The OAG also remains in litigation in the U.S. District Court in New Mexico against the United States for claims arising from its operation of the Rio Grande Project, although that case remains stayed until the original action parties and issues are determined. *New Mexico and Las Cruces v. United States*. No. 1:11-cv-00691. These cases involve complex issues of federal reclamation and water law, and require significant amounts of scientific evidence and expert testimony to be developed and presented in several specialized fields, including groundwater and surface water modeling, hydrology, geology, crop evapotranspiration, irrigation efficiency, natural resource economics, and analyses of irrigated acreage and water use over time.

The Contractor must:

1. Have requisite litigation expertise and experience to represent OAG in the *Texas v. New Mexico and Colorado, No. 141, Original*.
2. Possess institutional and historical knowledge of the facts and legal arguments at issue in the *Texas v. New Mexico and Colorado, No. 141, Original case*.
3. Have extensive experience advising OAG regarding water litigation matters.

- IV. Provide a detailed, sufficient explanation of the reasons, qualifications, proprietary rights or unique capabilities of the prospective contractor that makes the prospective contractor ***the one source*** capable of providing the required professional service, service, construction or item(s) of tangible personal property. (Please do not state the source is the “best” source or the “least costly” source. Those factors do not justify a “sole source.”)

1. Due to the unique and highly complex current procedural posture of this litigation, it would be highly detrimental if not fatal to the litigation strategy and the ultimate outcome of the case to try and retain new legal counsel at this state. In addition to the prospective Contractor’s expertise in this area, its history in the case at this point is crucial to the success of litigating the State’s position. Any new firm would lack the wealth of knowledge and experience already acquired by Contractor with respect to this case. The prospective Contractor has expended significant time and has been integral to the development of the State’s legal strategy at nearly every step in this litigation over a three-year period and is uniquely positioned to see the case through to resolution. In sum, it is in the State’s best interest to maintain the same legal counsel for this litigation because the costs and logistical obstacles of bringing a different law firm up to speed are prohibitive.

2. Further because there are impending, upcoming court deadlines, Contractor is uniquely qualified to provide highly skilled legal representation to OAG in these matters. No other attorneys, other than one that have associated with Contractor on these cases, could pick up mid-stream to provide effective legal counsel in time with these deadlines, and further in the pursuit of settlements, negotiations, or defense of these cases.

- V. Provide a detailed, sufficient explanation of how the professional service, service, construction or item(s) of tangible personal property is/are ***unique and how this uniqueness is substantially related to the intended purpose of the contract***.

The professional services associated with litigation are nearly always unique; they take shape according to the particular case at hand and the evidence and issues presented in that case. Contractor’s involvement coincided with a much more time-intensive phase of the case including heavy motion practice, discovery and work with expert witnesses. As discussed above, Contractor is uniquely positioned to provide competent and effect legal counsel in the litigation. The contractor also has extensive subject-matter knowledge about relevant case law and statutes applicable to the complex water litigation, knowledge which prompted OAG to contract for legal services in the first instance.

The contractor is the only source who has the required water litigation expertise, specific knowledge of this case, experience and institutional knowledge of OAG which is necessary in order to provide competent legal representation to OAG in the pending litigation. Contractor not only has specialized knowledge pertaining to water litigation in general, but at this important stage of the litigation, is the only source of legal service that can understand the complex facts and legal theory underlying these cases. .

Contractor has already made appearances in court in above-mentioned cases and cannot withdraw or be replaced by another legal counsel without judicial consent. Because the cases are long-standing, it is doubtful that judicial consent would be given to withdraw from these on-going legal actions.

- VI. Explain why other similar professional services, services, construction or item(s) of tangible personal property *cannot* meet the intended purpose of the contract.

As described above, Contractor has handled this litigation at the State's direction for the past several years, acquiring intensive experience and knowledge of the complicated matters of the case (including its witnesses, relevant documents, and specific legal issues in contention). The contractor possesses specialized knowledge and expertise in these very complex areas of water litigation. General legal service providers would not have the specialized knowledge and expertise necessary to represent or advise OAG in these matters. OAG has determined that no other businesses other than the prospective contractor has the expertise and knowledge necessary to perform the contract. Because of the ongoing litigation matters, other contractors would not have the unique understanding and specific, specialized knowledge of current case approach and methods undertaken by the current legal team for these matters. At this point, the cost to the State of bringing in a different contractor with little to no experience in water litigation, specifically Texas V. New Mexico and Colorado, No. 141, Original to complete the trial phase of the litigation would be cost prohibitive and logistically difficult, if not impossible.

- VII. Provide a narrative description of the agency's due diligence in determining the basis for the procurement, including procedures used by the agency to conduct a review of available sources such as researching trade publications, industry newsletters and the internet;; contacting similar service providers; and reviewing the State Purchasing Divisions' Statewide Price Agreements. Include a list of businesses contacted (*do not state that no other businesses were contacted*), date of contact, method of contact (telephone, mail, e-mail, other), and documentation demonstrating an explanation of why those businesses could not or would not, under any circumstances, perform the contract; or an explanation of why the agency has determined that no businesses other than the prospective contractor can perform the contract.

OAG has determined that no business other than the prospective contractor can perform the contract. The prospective contractor has specific and extensive subject matter expertise in water litigation. The contractor was most recently procured by OAG pursuant to a request for proposal, RFP No. 16-305-0501-20048. From July 2016 – June 2019 and a sole source professional services contract July 2019 - June 2020. The Contractor has worked extensively with OAG in understanding the underlying complex facts of the Texas V. New Mexico and Colorado, No. 141, Original cases and in developing the legal strategy and theory of this case. It is essential that OAG continue to work with this contractor in order to implement the legal strategy of these cases which has developed over many years and timely meet court deadlines.

Certified by:

Date: _____

Agency Chief Procurement Officer

Agency Approval by:

Date: _____

Cabinet Secretary/Agency or Entity Head or Designee

APPROVED:

Date: _____

State Purchasing Agent

If this sole source is being submitted by a governmental agency or governmental entity not under the final authority of the State Purchasing Agent, the State Purchasing Agent’s signature is not required. The signature line may be removed from this form or marked as N/A. Hard Copy Documentation for Courtesy Postings do not need to be submitted to SPD for approval.