KRH
9/20/12
Item No. 5

AN ORDINANCE 2012-09-20-0712

AUTHORIZING EXECUTION OF A PROFESSIONAL SERVICES AGREEMENT WITH PROJECT CONTROL OF TEXAS, INC. IN AN AMOUNT NOT TO EXCEED $8,000,000.00 FOR ON-CALL CAPITAL PROGRAM STAFF AUGMENTATION SERVICES FOR THE HENRY B. GONZALEZ CONVENTION CENTER EXPANSION PROJECT.

* * * * * *

WHEREAS, the City of San Antonio is undertaking an expansion of the Henry B. Gonzalez Convention Center and requires assistance on an as-needed basis, with program, construction and design management, environmental and cultural assessments, project controls, office management, material testing, construction inspections and public relations; and

WHEREAS, a Request for Qualifications for these services was issued in June 2012 and a Selection Committee, consisting of a representative from the City Manager's Office, CIMS, Convention, Sports, & Entertainment Facilities and the Downtown Alliance of San Antonio, evaluated and ranked the 5 responses to the solicitation; and

WHEREAS, based on established criteria including experience & qualifications of the responding firms, the Selection Committee recommends the award of a Professional Services Agreement in an amount not to exceed $8,000,000.00 with Project Control of Texas, Inc. for this work; **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Manager, or her designee, is authorized to negotiate and execute a Professional Services Agreement in an amount not to exceed $8,000,000.00 with Project Control of Texas, Inc. for on-call staff augmentation services for the Henry B. Gonzalez Convention Center Expansion Project. A copy of the Agreement, in substantially final form, is set out in **Exhibit 1.**

SECTION 2. Funding for this Ordinance will be identified when work orders are issued. If funding for any work orders is not previously appropriated, funding will be identified and appropriated through subsequent City Council action. Payment is limited to the amounts budgeted in the Operating and/or Capital Budget funding sources identified. All expenditures will comply with Operating and/or Capital Budgets for current and future fiscal years.

SECTION 3. Payment not to exceed $8,000,000.00 for a four year term is authorized to be encumbered with a purchase order and made payable to Project Control of Texas, Inc., for construction and design services.

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the

City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 5. This Ordinance shall be effective immediately upon the receipt of eight affirmative votes; otherwise, it is effective ten days after passage.

PASSED and APPROVED this 20th day of September, 2012.

M A Y O R
Julián Castro

ATTEST:

Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

Michael D. Bernard, City Attorney

Request for COUNCIL ACTION

City of San Antonio

Agenda Voting Results - 5

Name:	4, 5
Date:	09/20/2012
Time:	10:02:43 AM
Vote Type:	Motion to Approve
Description:	An Ordinance authorizing the negotiation and execution of an on-call Professional Service Agreement, with Project Control of Texas, Inc., in the amount not-to-exceed $8,000,000.00 for a four-year term with two one-year extension options, to augment City staff, on an as-needed basis, on program, construction and design management, environmental and cultural assessments, project controls, office management, material testing, construction inspections and public relations for the Henry B. Gonzalez Convention Center Expansion Project. [Pat DiGiovanni, Deputy City Manager; Mike Frisbie, Director, Capital Improvements Management Services]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x				x
Ivy R. Taylor	District 2		x				
Leticia Ozuna	District 3		x				
Rey Saldaña	District 4		x				
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x			x	
Cris Medina	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x				
Carlton Soules	District 10		x				

EXHIBIT 1

PROFESSIONAL SERVICES AGREEMENT

STATE OF TEXAS
COUNTY OF BEXAR
CITY OF SAN ANTONIO

CAPITAL PROGRAM MANAGEMENT STAFF AUGMENTATION

This Agreement is made and entered into in San Antonio, Bexar County, Texas, between the City of San Antonio, a Municipal Corporation in the State of Texas (hereafter referred to as "Owner") and

Project Control of Texas, Inc.
17300 Henderson Pass, Suite 110
San Antonio, Texas 78232

(hereafter referred to as "Consultant"), said Agreement being executed by Owner pursuant to City Charter, Ordinances and Resolutions of the San Antonio City Council, and by Consultant for Capital Program Management Staff Augmentation for the Henry B. Gonzalez Convention Center Expansion Project and related projects and as set forth herein in connection with the above designated services for Owner.

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ARTICLE I. DEFINITIONS

As used in this Agreement, the following terms shall have meanings as set out below:

1.1 "Agreement" means this written document signed by Owner and Consultant, including any other document itemized and expressly referenced in or attached to and expressly made part of this Agreement, to include Consultant's proposal, to the extent accepted by Owner and not in conflict with the Articles of this Agreement: Scope of Services and Fee Schedule – attached hereto and labeled as **Exhibit A;** and SBEDA Subcontractor/Supplier Utilization Plan – attached hereto and labeled as **Exhibit B**.

1.2 "Application for Payment" means the electronic filing by the Consultant requesting to be paid for completed Work and materials stored at site.

1.3 "Consultant" means **Project Control of Texas, Inc.,** and its officers, partners, employees, agents, representatives, Sub-Consultants, if any, and all other persons or entities for which Consultant legally is responsible.

1.4 "Consultant's Schedule of Services" means a detailed listing of the services to be performed and the time sequence for the delivery, to include an estimated dollar value which shall be attached for the payment of the services over the term of this Agreement.

1.5 "Certificate of Substantial Completion" means the document issued by Consultant with Owner's consent at the stage in the progress of the Work when the Work, or designated portion thereof, is sufficiently complete in accordance with the Contract, so that Owner may occupy or utilize the Work for its intended use.

1.6 "City" and "Owner" mean the City of San Antonio, Texas.

1.7 "Claim" is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of this Agreement terms, a payment of money, an extension of time or other relief, with respect to the terms of this Agreement. The term "Claim" also includes other disputes and matters in question between Owner and Consultant arising out of or relating to this Agreement.

1.8 "Compensation" means the amount paid by Owner to Consultant for completed services accepted by Owner under this Agreement.

1.9 "Construction Contractor" is the firm hired by Owner to construct the Project.

1.10 "Construction Documents" are the complete set of documents approved by Owner for the Work to complete the Project, including the Construction Drawings and Specifications as set out in paragraph 3.10.2 herein.

1.11 "Construction Drawings and Specifications" are the documents used to convey the intent of Consultant for the purposes of constructing the Project.

1.12 "Director" means the Director of Owner's Capital Improvements Management Services (hereafter referred to as "CIMS") Department, or his/her designated Project Manager identified in the Notice to Proceed.

1.13 "Estimated Cost of Work" means Consultant's estimate of probable construction costs.

1.14 "Final Compensation" means the final amounts paid by Owner to Consultant for completed services accepted by Owner and performed by Consultant pursuant to this Agreement.

1.15 "Invoice" means written request for compensation from Consultant to Owner for services completed under this Agreement.

1.16 "Project" means the capital improvement/construction development undertaking of Owner.

1.17 "Proposed Service Plan" means the proposal for Services submitted by Consultant in response to Owner's request for services.

1.18 "SAMSA" means the San Antonio Metropolitan Statistical Area or Relevant Marketplace, which collectively is comprised by Bexar County and the seven (7) surrounding counties of Atascosa, Bandera, Comal, Guadalupe, Kendall, Medina and Wilson.

1.19 "Schedule of Values" a schedule, submitted by the Consultant before submitting its first Application for Payment, allocating dollar amounts to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as Owner may require. This schedule, unless objected to by Owner, shall be used as the basis for reviewing Consultant's Applications for Payment.

1.20 "Schematic Design Document" shall have the meaning as defined in **Paragraph 3.9.5** of this Agreement.

1.21 "Services" means the services performed by Consultant, as required by **Article III** and **Article IV** of this Agreement.

1.22 "Total Compensation" means the not-to-exceed amount of this Agreement.

1.23 "Work" means the construction work performed by the Construction Contractor.

ARTICLE II. CONSULTANT'S RESPONSIBILITIES

2.1 Consultant shall hold periodic conferences with Director or his/her representatives through the end of each assigned Task so that Consultant has the full benefit of Owner's experience and knowledge of existing needs and facilities, and so each Project is consistent with Owner's current policies and standards. To assist Consultant in this coordination, Owner shall make available, for Consultant's use in planning and designing each Project, all existing plans, maps, statistics, computations and other data in its possession relative to existing facilities and to each particular Project at no cost to Consultant. However, any and all such information shall remain the property of Owner and shall be returned by Consultant upon termination or completion of each Project or if instructed to do so by the Director.

2.2 Consultant warrants that Services provided by Consultant under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances in Bexar County, Texas.

2.3 Unless otherwise required by Owner, Consultant shall apply for and assist Owner in obtaining permits from all governmental authorities having jurisdiction over each Task and such approvals and consents from others as may be necessary for the completion of each Task. Consultant shall provide Owner reasonable assistance in connection with such approvals and permits, such as the furnishing of data compiled by

Consultant pursuant to other provisions of this Agreement, and shall appear on behalf of Owner at meetings with governmental entities as may be required, but Consultant shall not be obligated to develop additional data, prepare extensive reports or appear at hearings or the like, unless compensated therefore under other provisions of this Agreement.

2.4 Consultant shall be represented by a registered professional Architect or Engineer licensed to practice in the State of Texas at meetings of any official nature concerning each Task including, but not limited to, scope meetings, review meetings, pre-bid meetings, preconstruction meetings and other meetings as required by that particular Task. The Texas Board of Architectural Examiners, Hobby Building, 333 Guadalupe, Suite. 2-350, Austin, Texas 78701, (512) 305-9000 and/or Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741, (512) 440-7723 has jurisdiction over individuals licensed under Title 22 of the Texas Administrative Code.

2.5 Consultant shall prepare Change Orders and Field Work Directives and, with concurrence of Owner, have authority to order minor changes in the Work not involving an adjustment in the Total Compensation or an extension of the time for construction, with such changes effected by written order.

2.6 Acceptance of Consultant's services by Owner shall not constitute nor be deemed a release of the responsibility and liability of Consultant, its employees, associates, agents or Sub-Consultants for the accuracy and competency of their designs, drawings, specifications or other documents and Services; nor shall such acceptance be deemed an assumption of responsibility or liability by Owner for any defect in the designs, working drawings, specifications or other documents and Work prepared by said Consultant, its employees, Sub-Consultants and agents.

2.7 Consultant warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Consultant, to solicit or secure this Agreement, and that it has not, for the purpose of soliciting or securing this Agreement, paid or agreed to pay any company or person a commission, percentage, brokerage fee, gift or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach of this warranty, Owner shall have the right to terminate this Agreement under the provisions of **Article XIII** herein.

ARTICLE III. OWNER'S RESPONSIBILITIES

3.1 The Director or a representative appointed by the Director shall act on behalf of Owner, with respect to the Services to be performed under this Agreement. The Director shall have complete authority to transmit instructions, receive information and interpret and define Owner's policies and decisions, with respect to materials, equipment, elements and systems pertinent to Consultant's services.

3.2 Owner shall give prompt written notice to Consultant whenever Owner observes or otherwise becomes aware of any defect in Consultant's Services or any development which affects the scope or timing of Consultant's Services.

3.3 Owner reserves the right to contract directly for the services of Geotechnical Engineers, surveyors, material testing and special testing of materials, as required by the code and Contract Documents. In some instances, however, Owner may request these listed services to be managed by Consultant as an Additional Services. In most instances, Environmental and hazardous waste testing will be contracted by Owner.

ARTICLE IV. SCOPE OF SERVICES

4.1 Consultant understands and agrees that Owner has entered or may enter into multiple Capital Program Management Staff Augmentation agreements with other Consultants and has the authority to assign services at its sole discretion. As stated in **Section 5.4** herein, Consultant understands and agrees that Owner makes no minimum guarantees with regard to the amount of work, if any, which Consultant may be extended under this Agreement.

4.2 This Agreement is an On-Call Agreement, Task Order or indefinite delivery Agreement for Capital Program Management Staff Augmentation services and other such related services that may be required of Consultant to provide. Specific requirements as to location, conditions, procedures and associated services pertaining to a Task shall be negotiated and set out in individual Task Orders for each request, which Task Orders are incorporated into and shall become a part of this Agreement.

4.3 Consultant shall provide all labor, equipment and transportation necessary to complete all services agreed upon in a timely manner throughout the term of the Contract. Additionally, Consultant shall provide staff for regular, overtime, night, weekend and holiday service, as requested by Owner. Persons retained by Consultant to perform work pursuant to this Agreement shall be employees or Sub-Consultants of Consultant.

4.4 Consultant shall not commence service on any Task Order authorized under this Agreement until being thoroughly briefed on the scope of a Project and a Task and being notified by Owner in writing to proceed. Should the scope subsequently change, either Consultant or Owner may request a review of the anticipated services, with an appropriate adjustment in compensation.

4.5 Consultant, in consideration for the compensation herein provided, shall render the professional services described in this **Section IV** and in **Exhibit "A"** hereto necessary for the advancement of the Task and the Project to Substantial Completion.

4.6 Consultant shall perform its obligations under this Agreement in accordance with the Scope of Services outlined herein and in each authorized Task Order, in accordance with the Consultant's Fee Schedule, which is attached hereto, incorporated herein and labeled as **Exhibit "A"**. The Scope of Services fully shall be described in Consultant's Proposal, as revised in accordance with negotiations with and approval by Owner, for each authorized Task Order and as provided in this Agreement.

4.7 Consultant's Fee Schedule, which includes pre-priced tasks and/or hourly rates, is incorporated by reference herein, attached hereto and labeled as **Exhibit "A"**.

ARTICLE V. COMPENSATION

5.1 The Compensation for all services included in this Agreement for the **four (4) year initial term** and for the **two (2) additional one-year "Extension Periods"** of this Agreement **SHALL NOT EXCEED EIGHT MILLION AND ZERO CENTS ($8,000,000.00)**.

5.2 Consultant shall submit a Proposed Service Plan for each Task that Owner requests to be performed under this Agreement. Owner either will approve or disapprove each Proposed Service Plan. Owner's approval shall be evidenced by the Finalized Task Order executed by both parties in Owner's Internet-Based Project Management System. Task Orders shall be numbered sequentially starting with number one (1) and must reference this Agreement. Each Finalized Task Order, as entered into Owner's Internet-Based Project Management System, will become a part of this Agreement.

5.3 Consultant understands and agrees that Owner has entered into multiple professional services Agreements with other Consultants and has the authority to assign work tasks at its sole discretion.

5.4 Consultant understands and agrees that Owner makes no minimum guarantees with regard to the amount of services, if any, Consultant may be extended under this Agreement.

5.5 Each Task Order amount shall be based on the Scope of Services for a particular Project and shall be based on the Not-To-Exceed pre-priced tasks and/or hourly rates reflected in **"Exhibit A"** attached hereto.

5.6 **Reimbursable Expenses**. When authorized by City in writing, the Consultant shall be entitled to reimbursement at actual incurred cost for services and related expenses for the following items:

5.6.1 Travel outside SAMSA only if approved in writing by City prior to such travel.

Reimbursement for travel costs will be limited to costs directly associated with Consultant's performance of Service under the Agreement. Travel costs shall not exceed the per diem rates set annually by the Federal Government's General Services Administration. Consultant shall provide detailed receipts for all reimbursable charges. Travel expenses, if any, shall be negotiated with each Task Order issued. City does not pay for Consultant's travel within SAMSA or within Consultant's office or home region.

5.6.2 Mailing, courier services and copies of documents requested by City in writing in excess of the copies to be provided under Article IV of this Agreement. These costs, if any, shall not exceed the amount noted in Article IV herein, without further approval of City. Consultant shall bear these costs unless agreed to, in writing, by City.

5.6.3 Graphics, physical models, and presentation boards requested by City in writing in excess of the copies to be provided under Article IV of this Agreement. These costs shall not exceed the amount noted in Article IV herein without further approval of City. Consultant shall bear these costs unless agreed to, in writing, by City.

5.6.4 City does not allow a markup on any of the above reimbursable items and only will reimburse approved hard costs incurred.

5.7 **Sub-Consultant Work**. City will not pay a markup to Consultant for Sub-Consultant work.

ARTICLE VI. METHOD OF PAYMENT

6.1 Payments to Consultant shall be in the amount shown on the invoices consistent with the issued Task Order and its supporting documentation submitted and shall be subject to Owner's approval. All services shall be performed to Owner's satisfaction, which satisfaction shall be judged by the Director in his/her sole discretion, and Owner shall not be liable for any payment under this Agreement for services which are unsatisfactory and which previously have not been approved by Owner. The Final Compensation due hereunder will not be paid until all reports, data and documents have been submitted, received, accepted and approved by Owner.

6.1.1 Payment may be made based solely on the units of services completed and approved by the Director, and the associated unit price for such service as may be described in Consultant's proposal/fee schedule reflected on **Exhibit "A"** hereto and the approved Task Order.

6.1.2 Monthly payments for services performed in the various additional services shall be reviewed by Director upon Consultant entering itemized invoices, along with all required back-up and reference to the individual Task Order within Owner's Internet-Based Project Management System. The invoice shall indicate the value of the additional services performed to date on that Task Order and any other invoices or payments made related to that Task Order.

6.2 Consultant shall, within ten (10) days following receipt of Compensation from Owner, pay all bills for services performed and furnished by others in connection with the Task and the performance of the Work and shall, if requested, provide Owner with evidence of such payment. Consultant's failure to make payments within such time shall constitute a material breach of this Agreement, unless Consultant is able to demonstrate to Owner a bona fide dispute associated with an unpaid Sub-Consultant and its services. Consultant shall include a provision in each of its Sub-Consultant agreements imposing the same payment obligations on the Sub-Consultants as are applicable to Consultant hereunder and, if Owner so requests, shall provide copies of such payments by Consultant to Owner. If Consultant fails to make payment promptly to a Sub-Consultant for Services for which Owner has made payment to Consultant, Owner shall be entitled to withhold future payments to Consultant to the extent necessary to protect Owner.

6.3 Consultant warrants that title to all Services covered by an Application for Payment will pass to Owner no later than the time of payment. Consultant further warrants that, upon submittal of an Application for Compensation, all Services for which Applications for Compensation have been previously issued and payments received from Owner shall, to the best of Consultant's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrance in favor of Consultant or other persons or entities making a claim by reason of having provided labor

or services relating to this Agreement. **CONSULTANT SHALL INDEMNIFY AND HOLD OWNER HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY ANYONE CLAIMING BY, THROUGH OR UNDER THE ITEMS COVERED BY PAYMENTS MADE BY OWNER TO CONSULTANT.**

6.4 Consultant may submit a request for Partial Compensation prior to Task Order's completion. A request for Partial Compensation must be accompanied by a progress report detailing Services performed by Consultant. Any partial payment made to Consultant shall be in proportion to the Services performed by Consultant, as reflected in the progress report and approved by Owner at Owner's sole discretion. Compensation also may be made based solely on the tasks and Services completed and approved by Owner and the associated unit price for each Service/Project, as described in fee schedule and/or hourly rates included on **Exhibit "A"** hereto.

6.5 Task Order Close Out and Final Compensation:

6.5.1 Final billing shall indicate "Final Bill - no additional compensation is due to Consultant".

6.5.2 Owner may withhold compensation to such extent as may be necessary, in Owner's sole opinion, to protect Owner from damage or loss for which Consultant is responsible, because of:

6.5.2.1 delays in the performance of Consultant's work;

6.5.2.2 third-party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to Owner is provided by Consultant;

6.5.2.3 failure of Consultant to make payments properly to Sub-Consultants or vendors for labor, materials or equipment;

6.5.2.4 reasonable evidence that Consultant's work cannot be completed for the amount unpaid under this Agreement;

6.5.2.5 damage to Owner; or

6.5.2.6 persistent failure by Consultant to carry out the performance of its services in accordance with this Agreement.

6.5.3 When the above reasons for withholding are removed or remedied by Consultant, compensation of the amount withheld by Owner shall be made within a reasonable time. Owner shall not be deemed in default by reason of withholding compensation as provided for in this **Article VI**.

6.5.3.1 In the event of any dispute(s) between the parties regarding the amount properly compensable for any Phase or as Final Compensation, or regarding any amount that may be withheld by Owner, Consultant shall be required to make a claim pursuant to and in accordance with the terms of this Agreement and follow the procedures provided herein for the resolution of such dispute. In the event Consultant does not initiate and follow the claims procedures provided in this Agreement in a timely manner and as required by the terms thereof, any such claim shall be waived.

6.5.3.2 Owner shall make Final Compensation of all sums due Consultant not more than thirty (30) days after Consultant's execution and delivery of a final Pay Application.

6.5.3.3 Acceptance of Final Compensation by Consultant shall constitute a waiver of claims except those previously made in writing and identified by Consultant as unsettled at the time of final application for compensation.

6.5.3.4 Consultant agrees to maintain adequate books, payrolls and records satisfactory to Owner in connection with any and all Services performed hereunder. Consultant agrees to retain all such books, payrolls and records (including data stored in computer) for a period of not less than four (4) years after completion of
Services. At all reasonable times, Owner and its duly authorized
Representative(s) shall have access to all personnel of Consultant and all such books, payrolls and records, and shall have the right to audit same.

6.6 **Internet-Based Project Management System**. Owner will administer its services through an Internet-Based Project Management System. In such case, Consultant shall conduct communication through this medium and perform all Task-related functions utilizing this database system. This includes correspondence, submittals, requests for information, vouchers, compensation requests and processing, amendment. Change Orders and other administrative activities. Owner shall administer the software, shall provide training to Consultant Team Members and shall make the software accessible via the Internet to all necessary Consultant Team Members. All invoices shall be submitted through Owner's Internet-Based Project Management System

ARTICLE VII. SERVICES REQUEST PROCESS

7.1 Necessary inspection requirements will be established with each Project-specific Task Order.

7.2 When Owner has a Project for which it desires to procure **Capital Program Management Staff Augmentation**, Owner shall notify Consultant by issuing a proposed Task Order Request. Each proposed Task Order Request shall include, at minimum: name of Project, location of Project, copies of or access to Project documentation (such as specifications, environmental reports, or drawings) needed by Consultant to prepare a Proposal, Project schedule and any specific deadlines for performance of **Capital Program Management Staff Augmentation**, any Project specific insurance requirements necessitated by the work which may require additional types of coverage or higher levels of coverage than required by the Agreement and a deadline for providing Director with a Proposal based on the above items.

7.3 Consultant shall prepare and submit to Owner, within the timeline stated in a proposed Task Order Request, a Proposal for the desired services which shall include, at minimum: Scope of Services, specific staffing, an estimate of Project cost, based on rates and fees agreed upon and reflected in **Exhibit "A"** hereto and consistent with the approved Fee Schedule. Consultant shall submit the Proposal in editable electronic format to Owner. By submitting a Proposal, Consultant agrees to perform the requested service within the time stated in the proposed Task Order Request.

7.4 Consultant and Owner shall negotiate the Proposal. Once Consultant and Owner reach mutual agreement as to Scope of Services, staffing, scheduling and cost, Owner shall issue a finalized Task Order in Owner's Internet-Based Project Management System, to be executed by both parties evidencing the agreed to scope and costs.

7.5 The Project Manager has the authority to execute a Task Order in Owner's Internet-Based Project Management System on behalf of Owner, so long as such finalized Task Order does not exceed the total contract value and funds are provided for in the Project budget, as allocated by the San Antonio City Council.

7.6 Consultant shall not proceed with services until a finalized Task Order has been executed, Consultant receives a written Notice to Proceed from Owner and all documents required by Owner in advance of commencement of work, including Consultant's proof of required insurance, have been provided. Any services provided or expenses incurred, prior to receiving a Notice to Proceed or after the expiration of this Agreement on a particular finalized Task Order, will be at Consultant's sole risk and expense and may not be reimbursable by Owner.

7.7 Actual amounts billed shall not exceed the total amount as set out in the finalized Task Order.

7.8 Each Task Order shall be entered into Owner's Internet-Based Project Management System and

incorporated herein for all purposes. Each Task Order shall be numbered sequentially starting with number one (1) and must reference this Agreement.

7.9 Consultant shall not invoice for any work associated with a proposed Task Order Request process, including development of Proposal and the associated Task Order negotiation.

ARTICLE VIII. SCOPE OF SERVICES

8.1 Consultant shall hold periodic conferences with Owner through the end of the Task. The Task shall have the full benefit of Owner's experience and knowledge of existing needs and facilities and be consistent with Owner's current policies and standards. To assist Consultant in this coordination, Owner shall make available, for Consultant's use in planning and designing its Task, all existing plans, maps, statistics, computations and other data in Owner's possession, relative to existing facilities and to a particular Task, at no cost to Consultant. However, any and all such information shall remain the property of Owner and shall be returned by Consultant upon termination, the completion of the Task or if instructed to do so by Owner.

ARTICLE IX.

(Reserved)

ARTICLE X. TIME AND PERIOD OF SERVICE

10.1 The term of this Agreement shall commence upon its approval by the San Antonio City Council and the execution by both parties and shall remain in force for the period of **four (4) years**, herein referred to as the "Initial Term".

10.2 As the enabling Ordinance provides, Owner shall retain an option to extend this Agreement for **two (2) additional one (1) year periods,** herein referred to as the "Extension Period". The Director shall have the authority to exercise such options at his/her discretion. In the event such options are exercised and any material provision of the Agreement is modified, such amendment must be approved by the City Council.

10.3 Time is of the essence of this Agreement. Consultant shall perform and complete its obligations for the various Tasks of services under **Article IV and Exhibit "A"** herein in a prompt and continuous manner so as to not delay the development of the design services and/or so as to not delay the construction of the work for the Project in accordance with the schedules approved by Owner and Construction Contractor. If, upon review of Task Orders, corrections, modifications, alterations or additions are required of Consultant, these items shall be completed by Consultant before that Task Order is approved.

10.4 Consultant shall not proceed with the next appropriate Task Order without written authorization from Owner. Owner may elect to discontinue Consultant's services at the end of any Task Order for any reason. However, if circumstance dictates, Owner may make adjustments to the scope of Consultant's obligations at any time to achieve the required services.

10.5 Consultant shall not be liable or responsible for any delays due to strikes, riots, acts of God, national emergency, acts of the public enemy, governmental restrictions, laws or regulations or any other causes beyond Consultant's reasonable control. Within twenty one (21) days from the occurrence of any event, for which time for performance by Consultant shall be significantly extended under this provision, Consultant shall give written notice thereof to Owner stating the reason for such extension and the actual or estimated time thereof. If Owner determines that Consultant is responsible for the need for extended time, Owner shall have the right to make a Claim as provided in this Agreement.

10.6 This Agreement shall remain in force for a period which may reasonably be required for the performance of the assigned Task, including any extra work and any required extensions thereto, unless discontinued as provided for elsewhere in this Agreement.

ARTICLE XI. INSURANCE REQUIREMENTS

11.1 Prior to the commencement of any work under this Agreement, Consultant shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to the City's Capital Improvements Management Services Department, which shall be clearly labeled "**Capital Program Management Staff Augmentation**" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The City will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the City. The City shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the City's Capital Improvements Management Services Department. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

11.2 The City reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will City allow modification whereby City may incur increased risk.

11.3 A Consultant's financial integrity is of interest to the City; therefore, subject to Consultant's right to maintain reasonable deductibles in such amounts as are approved by the City, Consultant shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Consultant's sole expense, insurance coverage written on an occurrence basis, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:

TYPE	AMOUNTS
1. Workers' Compensation 2. Employers' Liability	Statutory $500,000/$500,000/$500,000
3. Broad form Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations *b. Independent Contractors c. Products/Completed Operations d. Personal Injury e. Contractual Liability f. Environmental Impairment/ Impact – sufficiently broad to cover disposal liability. g. Explosion, Collapse, Underground h. Damage to property rented by you	For Bodily Injury and Property Damage of $1,000,000 per occurrence; $2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage h. $100,000
4. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of $1,000,000 per occurrence
5. Professional Liability (Claims-made basis) To be maintained and in effect for no less than two years subsequent to the completion of the professional service.	$1,000,000 per claim, to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error, or omission in professional services.

11.4 Consultant agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverages required of Consultant herein, and provide a certificate of insurance and endorsement that names the Consultant and the City as additional insureds. Consultant shall provide the City with said certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by City's Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this agreement. Such modification may be enacted by letter signed by City's Risk Manager, which shall become a part of the contract for all purposes.

11.5 As they apply to the limits required by the City, the City shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Consultant shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City at the address provided below within 10 days of the requested change. Consultant shall pay any costs incurred resulting from said changes.

City of San Antonio
Attn: Capital Improvements Management Services Department
P.O. Box 839966
San Antonio, Texas 78283-3966

11.6 Consultant agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

11.6.1 Name the City, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the City, with the exception of the workers' compensation and professional liability policies;

11.6.2 Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the City is an additional insured shown on the policy;

11.6.3 Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of the City.

11.6.4 Provide advance written notice directly to City of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance notice for nonpayment of premium.

11.7 Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, Consultant shall provide a replacement Certificate of Insurance and applicable endorsements to City. City shall have the option to suspend Consultant's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

11.8 In addition to any other remedies the City may have upon Consultant's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the City shall have the right to order Consultant to stop work hereunder, and/or withhold any payment(s) which become due to Consultant hereunder until Consultant demonstrates compliance with the requirements hereof.

11.9 Nothing herein contained shall be construed as limiting in any way the extent to which Consultant may be held responsible for payments of damages to persons or property resulting from Consultant's or its subcontractors' performance of the work covered under this Agreement.

11.10 It is agreed that Consultant's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the City of San Antonio for liability arising out of operations under this Agreement.

11.11 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement and that no claim or action by or on behalf of the City shall be limited to insurance coverage provided..

11.12 Consultant and any Subcontractors are responsible for all damage to their own equipment and/or property.

ARTICLE XII. OWNERSHIP OF DOCUMENTS

12.1 All previously owned documents not relating to this Project, including any original drawings, estimates, specifications and all other documents and data of Consultant, will remain the property of Consultant as instruments of service. However, Consultant understands and agrees that Owner shall have free access to all such information with the right to make and retain copies of previously-owned drawings, estimates, specifications and all other documents and data. Any reuse of any documents and data without the specific written verification or adaptation by Consultant shall be at Owner's sole risk and without liability or legal exposure to Consultant.

12.2 All completed documents submitted by Consultant for final approval or issuance of a permit, as necessary, shall bear the seal with signature and date adjacent thereto of a Texas registered Architect or Engineer Consultant licensed to practice in Texas.

12.3 Consultant acknowledges and agrees that, upon payment, Owner exclusively shall own any and all information in whatsoever form and character produced and/or maintained in accordance with, pursuant to or as a result of this Project and Agreement and shall be used as Owner desires. All documents, including the original drawings, estimates, specifications and all other documents and data, shall be delivered to Owner at no additional cost to Owner upon request or termination or completion of this Agreement without restriction on future use. However, any reuse of documents on a different Project, without specific written verification or adaptation by Consultant, will be at Owner's sole risk and without liability or legal exposure to Consultant.

12.4 Consultant agrees and covenants to protect any and all proprietary rights of Owner in any materials provided to Consultant. Such protection of proprietary rights by Consultant shall include, but not be limited to, the inclusion in any copy intended for publication of copyright mark reserving all rights to Owner. Additionally, any materials provided to Consultant by Owner shall not be released to any third party without the written consent of Owner and shall be returned intact to Owner upon termination or completion of this Agreement or if instructed to do so by the Director.

12.5 CONSULTANT HEREBY ASSIGNS ALL STATUTORY AND COMMON LAW COPYRIGHTS TO ANY COPYRIGHTABLE WORK THAT, IN PART OR IN WHOLE, WAS PRODUCED FROM THIS AGREEMENT TO OWNER, INCLUDING ALL EQUITABLE RIGHTS. NO REPORTS, MAPS, DOCUMENTS OR OTHER COPYRIGHTABLE WORKS PRODUCED IN WHOLE OR IN PART BY THIS AGREEMENT SHALL BE SUBJECT OF AN APPLICATION FOR COPYRIGHT BY CONSULTANT. ALL REPORTS, MAPS, PROJECT LOGOS, DRAWINGS OR OTHER COPYRIGHTABLE WORK PRODUCED UNDER THIS AGREEMENT SHALL BECOME THE PROPERTY OF OWNER (EXCLUDING ANY PRIOR-OWNED INSTRUMENT OF SERVICES, UNLESS OTHERWISE SPECIFIED HEREIN). CONSULTANT SHALL, AT ITS EXPENSE, INDEMNIFY OWNER AND DEFEND ALL SUITS OR PROCEEDINGS INSTITUTED AGAINST OWNER AND PAY ANY AWARD OF DAMAGES OR LOSS RESULTING FROM AN INJUNCTION, AGAINST OWNER, INSOFAR AS THE SAME ARE BASED ON ANY CLAIM THAT MATERIALS OR WORK PROVIDED UNDER THIS AGREEMENT CONSTITUTE AN INFRINGEMENT OF ANY PATENT, TRADE SECRET, TRADEMARK, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY RIGHTS.

12.6 Consultant may make copies of any and all documents and items for its files. Consultant shall have no liability for changes made to or use of the drawings, specifications and other documents by other Consultants and/or engineers and/or other persons, subsequent to the completion of the Project. Consultant shall note Consultant's agreement or disagreement with all changes or modifications on all drawings, specifications and other documents by other Consultants and/or engineers or other persons outside of Consultant's control, including electronic copies, prior to the completion of the Project.

12.7 Copies of documents which may be relied upon by Owner are limited to the printed copies (also known as hard copies) and PDF electronic versions that are sealed and signed (if required) by Consultant. Files in editable electronic media format of text, data, graphics, or other types, (such as .DWG and the REVIT MODEL) which are furnished by Consultant to Owner only are for convenience of Owner or a utility. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. However, any reuse without specific written verification or adaptation by Consultant, will be at Owner's sole risk and without liability or legal exposure to Consultant.

12.8 Notwithstanding anything to the contrary contained herein, all previously owned intellectual property of Consultant including, but not limited to, any computer software (object code and source code), tools, systems, equipment or other information used by Consultant or its suppliers in the course of delivering the Services hereunder, and any know-how, methodologies, or processes used by Consultant to provide the services or protect deliverables to Owner, including without limitation, all copyrights, trademarks, patents, trade secrets and any other proprietary rights inherent therein and appurtenant thereto, shall remain the sole and exclusive property of Consultant and/or its suppliers.

ARTICLE XIII. TERMINATION AND/OR SUSPENSION OF WORK

13.1 Right of Either Party to Terminate for Default

13.1.1 This Agreement may be terminated by either party for substantial failure by the other party to perform (through no fault of the terminating party) in accordance with the terms of this Agreement and a failure to cure, as provided in this **Article XIII**.

13.1.2 The party not in default must issue a written Notice of Termination, signed by the party and citing this paragraph, to the other party declaring the other party to be in default and stating the reason(s) why it is in default. Upon receipt of such written notice of default, the party in receipt shall have a period of ten (10) calendar days to cure any failure to perform under this Agreement. Upon the completion of such 10-day calendar period, commencing upon receipt of notice of termination, if such party has not cured any failure to perform, such termination shall become effective without further written notice.

13.2 Owner reserves the right to terminate this Agreement for reasons other than substantial failure by Consultant to perform by issuing a written and signed Notice of Termination, citing this **Section 13.2**, which shall take effect on the twentieth (20th) calendar day following receipt of said Notice and upon the scheduled completion date of the performance phase in which Consultant then currently is working, whichever effective termination date occurs first.

13.3 Owner reserves the right to suspend this Agreement for the convenience of Owner by issuing a written and signed Notice of Suspension, citing this **Section 13.3**, which shall outline the reasons for the suspension and the expected duration of the suspension, but such expected duration shall in no way guarantee the total number of days of suspension which may occur. Such suspension shall take effect immediately upon Consultant's receipt of said Notice of Suspension.

13.4 Consultant hereby is given the right to terminate this Agreement in the event a suspension extends for a period in excess of sixty (60) consecutive calendar days. Consultant may exercise its right to terminate by issuing a written and signed Notice of Termination, citing this **Section 13.4**, to Owner after the expiration of sixty (60) consecutive calendar days from the effective date of the suspension. Termination, as defined under this **Section 13.4**, shall become effective immediately upon Owner's receipt of said written and signed Notice of Termination from Consultant.

13.5 The procedures which Consultant will follow upon Receipt of Notice of Termination are:

13.5.1 Upon receipt of a Notice of Termination and prior to the effective date of termination, unless the notice otherwise so directs or Consultant immediately takes action to cure a failure to perform under the cure period set out herein, Consultant immediately shall begin the phase-out and the discontinuance of all services in connection with the performance of this Agreement and promptly shall proceed to cancel all existing orders and contracts, insofar as such orders and contracts are chargeable to this Agreement. Within thirty (30) days after receipt of such notice of termination, unless Consultant successfully has cured a failure to perform, Consultant shall submit a statement to Owner showing in detail the services performed under this Agreement

prior to the effective date of termination. Owner shall have the option to grant an extension to the time period allowable for the submittal of such statement.

13.5.2 Copies of all completed or partially completed specifications and all reproductions of all completed or partially completed designs, plans and exhibits, if prepared under this Agreement prior to the effective date of termination, shall be delivered to Owner in the form requested by Owner as a pre-condition to Owner's payment of Final Compensation.

13.5.3 Upon the above conditions being met, Owner promptly shall compensate Consultant that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less previously paid Compensation.

13.5.4 Owner, as a public entity, has a duty to document the expenditure of public funds and Consultant acknowledges this duty on the part of Owner. To that end, Consultant further acknowledges that the failure of Consultant to comply with the submittal of the statement and documents, as required herein, shall constitute a waiver by Consultant of any and all rights or Claims to compensation for services performed under this Agreement and for which Consultant otherwise may be entitled for services performed under this Agreement.

13.6 The procedures Consultant is to follow, upon Receipt of Notice of Suspension, are:

13.6.1 Upon receipt of written Notice of Suspension, which date also shall be the effective date of the suspension, Consultant shall, unless the Notice otherwise directs, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and promptly shall proceed to suspend all existing orders and contracts, insofar as such orders and contracts are chargeable to this Agreement.

13.6.2 Consultant shall prepare a statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

13.6.3 Copies of all completed or partially completed designs, plans and specifications and models, if prepared under this Agreement prior to the effective date of suspension, shall be prepared for possible delivery to Owner but shall be retained by Consultant until such time as Owner may exercise the right to terminate this Agreement.

13.6.4 In the event that Consultant elects to exercises its right to terminate one hundred twenty (120) calendar days after the effective suspension date, within thirty (30) days after receipt by Owner of Consultant's Notice of Termination, Consultant promptly shall cancel all existing orders and contracts, insofar as such orders and contracts are chargeable to this Agreement, and shall submit the above referenced statement showing in detail the services performed under this Agreement, prior to the effective date of suspension.

13.6.5 Any documents prepared in association with this Agreement shall be delivered to Owner as a pre-condition to Owner paying Final Compensation.

13.6.6 Upon the above conditions being met, Owner promptly shall compensate Consultant that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less previously paid Compensation.

13.6.7 Owner, as a public entity, has a duty to document the expenditure of public funds and Consultant acknowledges this duty on the part of Owner. To that end, Consultant further acknowledges that the failure of Consultant to comply with the submittal of the statement and documents, as required herein, shall constitute a waiver by Consultant of any and all rights or Claims to compensation for services performed under this Agreement and for which Consultant otherwise may be entitled for services performed under this Agreement.

ARTICLE XIV. INDEMNIFICATION

Consultant covenants and agrees to FULLY INDEMNIFY, DEFEND and HOLD HARMLESS, the City and the elected officials, employees, officers, directors, volunteers and representatives of the City, individually

and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the City directly or indirectly arising out of, resulting from or related to Consultants' activities under this Agreement, including any acts or omissions of Consultant, any agent, officer, director, representative, employee, Consultant or subcontractor of Consultant, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of City, it s officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Consultant shall advise the City in writing within 24 hours of any claim or demand against the City or Consultant known to Consultant related to or arising out of Consultants' activities under this Agreement and shall see to the investigation and defense of such claim or demand at Consultant's cost. The City shall have the right, at its option and at its own expense, to participate in such defense without relieving Consultant of any of its obligations under this paragraph.

ARTICLE XV. CLAIMS AND DISPUTES

15.1 **Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of the Agreement terms, payment of money, and/or an extension of time or other relief, with respect to the terms of this Agreement. The term "Claim" also includes other disputes and matters in question between Owner and Consultant arising out of or relating to this Agreement. Claims must be initiated by written notice to the other party. Every Claim of Consultant, whether for additional compensation, additional time or other relief, shall be signed and sworn to by an authorized corporate officer (if not a corporation, then an official of the company authorized to bind Consultant by his/her signature) of Consultant, verifying the truth and accuracy of the Claim. The responsibility to substantiate Claims shall rest with the party making the Claim.

15.2 **Time Limit on Claims**. Claims by Consultant must be initiated within twenty one (21) calendar days after occurrence of the event giving rise to such Claim. Claims by Consultant must be initiated by written notice to Owner. Claims by Owner must be initiated by written notice to Consultant.

15.3 **Continuing Contract Performance**. Pending the final resolution of a Claim, except as otherwise agreed in writing, Consultant shall proceed diligently with performance of this Agreement and Owner shall continue to make payments in accordance with this Agreement.

15.4 **Claims for Additional Time**. If Consultant wishes to make a Claim for an increase in the time for performance. written notice to Owner, as provided in this **Section XV**, shall be given. Consultant's Claim shall include an estimate of probable effect(s) of a delay on the progress of the Work. In the case of a continuing delay, only one Claim is necessary.

15.5 **Claims for Consequential Damages**. Except as otherwise provided in this Agreement, in calculating the amount of any Claim or any measure of damages for Breach of Agreement (such provision to survive any termination following such breach), the following standards will apply to Claims by either Consultant or Owner:

15.5.1 No consequential damages will be allowed.

15.5.2 Damages are limited to extra costs specifically shown to have been directly caused by a proven wrong for which the other party is claimed to be responsible.

15.5.3 No profit will be allowed on any damage Claim by Consultant.

15.6 No Waiver of Governmental Immunity. NOTHING IN THIS **SECTION XVI** SHALL BE CONSTRUED TO WAIVE OWNER'S GOVERNMENTAL IMMUNITY FROM LAWSUIT. GOVERNMENTAL IMMUNITY EXPRESSLY IS RETAINED TO THE EXTENT IT IS NOT CLEARLY AND UNAMBIGUOUSLY WAIVED BY STATE LAW.

15.7 Alternative Dispute Resolution

15.7.1 **Continuation of Services Pending Dispute Resolution**. Each party is required to continue to perform its obligations under this Agreement, pending final resolution of any dispute arising out of or relating to this Agreement, less it would be impossible or impracticable under the circumstances.

15.7.2 **Requirement for Senior Level Negotiations**. Before invoking mediation or any other alternative dispute process set forth herein, the parties hereto agree that they first shall try to resolve any dispute arising out of or related to this Agreement through discussions directly between those senior management representatives within their respective organizations who have overall managerial responsibility for this or similar Projects. This step shall be a condition precedent to use of any other alternative dispute resolution process. If the parties' senior management representatives cannot resolve the dispute within thirty (30) calendar days after a party delivers a written notice of such dispute, then the parties shall proceed with mediation alternative dispute resolution process contained herein.

15.7.3 All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for the purposes of applicable rules of evidence.

15.8 Mediation.

15.8.1 In the event that Owner or Consultant shall contend that the other has committed a material breach of this Agreement, the party alleging such breach shall, as a condition precedent to filing any lawsuit, request mediation of the dispute.

15.8.2 Request for mediation shall be in writing and shall request that the mediation commence not less than thirty (30) or more than ninety (90) calendar days following the date of the request, except upon the written agreement of both parties.

15.8.3 In the event Owner and Consultant are unable to agree to a date for the mediation or to the identity of the mediator or mediators within thirty (30) calendar days, following the date of the request for mediation, all conditions precedent in this **Article XV** shall be deemed to have occurred.

15.8.4 The parties shall share the mediator's fee and any filing fees equally. Venue for any mediation or lawsuit arising under this Agreement shall be in Bexar County, Texas. Any agreement reached in mediation shall be enforceable as a settlement agreement in any court having jurisdiction thereof. No provision of this Agreement shall waive any immunity or defense. No provision of this Agreement is a consent to suit.

ARTICLE XVI. SBEDA ORDINANCE COMPLIANCE PROVISIONS SECTION

Owner has adopted a Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531 and as amended, also referred to as "SBEDA" or "the SBEDA Program"), which is posted on Owner's Economic Development (EDD) website page and is also available in hard copy form upon request to Owner. The SBEDA Ordinance Compliance Provisions contained in this section of the Agreement are governed by the terms of this Ordinance, as well as by the terms of the SBEDA Ordinance Policy & Procedure Manual established by Owner pursuant to this Ordinance, and any subsequent amendments to this referenced SBEDA Ordinance and SBEDA Policy & Procedure Manual that are effective as of the date of the execution of this Agreement. Unless defined in a contrary manner herein, terms used in this section of the Agreement shall be subject to the same expanded definitions and meanings as given those terms in the SBEDA Ordinance and as further interpreted in the SBEDA Policy & Procedure Manual.

A. Definitions

Affirmative Procurement Initiatives (API) – Refers to various Small Business Enterprise, Minority Business Enterprise, and/or Women Business Enterprise ("S/M/WBE") Program tools and Solicitation Incentives that are used to encourage greater Prime and subcontract participation by S/M/WBE firms, including bonding assistance, evaluation preferences, subcontracting goals and joint venture incentives. (For full descriptions of these and other S/M/WBE program tools, see Section III. D. of Attachment A to the SBEDA Ordinance.)

Centralized Vendor Registration System (CVR) – a mandatory electronic system wherein the Owner requires all prospective Consultants and Sub-Consultants that are ready, willing and able to sell goods or services to Owner to register. The CVR system assigns a unique identifier to each registrant that is then required for the purpose of submitting solicitation responses and invoices, and for receiving payments from Owner. The CVR-assigned identifiers are also used by the Goal Setting Committee for measuring relative availability and tracking utilization of SBE and M/WBE firms by Industry or commodity codes, and for establishing Annual Aspirational Goals and Contract-by-Contract Subcontracting Goals.

Certification or "Certified" – the process by which the Small Business Office (SBO) staff determines a firm to be a bona-fide small, minority-, women-owned, or emerging small business enterprise. Emerging Small Business Enterprises (ESBEs) are automatically eligible for Certification as SBEs. Any firm may apply for multiple Certifications that cover each and every status category (e.g., SBE, ESBE, MBE, or WBE) for which it is able to satisfy eligibility standards. The SBO staff may contract these services to a regional Certification agency or other entity. For purposes of Certification, Owner accepts any firm that is certified by local government entities and other organizations identified herein that have adopted Certification standards and procedures similar to those followed by the SBO, provided the prospective firm satisfies the eligibility requirements set forth in this Ordinance in Section III.E.6 of Attachment A.

Commercially Useful Function – an S/M/WBE firm performs a Commercially Useful Function when it is responsible for execution of a distinct element of the work of the contract and is carrying out its responsibilities by actually performing, staffing, managing and supervising the work involved. To perform a Commercially Useful Function, the S/M/WBE firm must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quantity and quality, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether an S/M/WBE firm is performing a Commercially Useful Function, an evaluation must be performed of the amount of work subcontracted, normal industry practices, whether the amount the S/M/WBE firm is to be paid under the contract is commensurate with the work it is actually performing and the S/M/WBE credit claimed for its performance of the work, and other relevant factors. Specifically, an S/M/WBE firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of meaningful and useful S/M/WBE participation, when in similar transactions in which S/M/WBE firms do not participate, there is no such role performed. The use of S/M/WBE firms by Consultant to perform such "pass-through" or "conduit" functions that are not commercially useful shall be viewed by Owner as fraudulent if Consultant attempts to obtain credit for such S/M/WBE participation towards the satisfaction of S/M/WBE participation goals or other API participation requirements. As such, under such circumstances where a commercially useful function is not actually performed by the S/M/WBE firm, Consultant shall not be given credit for the participation of its S/M/WBE Sub-Consultant or joint venture partner towards attainment of S/M/WBE utilization goals, and Consultant and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

Evaluation Preference – an API that may be applied by the Goal Setting Committee ("GSC") to Construction, Architectural & Engineering, Professional Services, Other Services, and Goods and Supplies

contracts that are to be awarded on a basis that includes factors other than lowest price, and wherein responses that are submitted to Owner by S/M/WBE firms may be awarded additional Points in the evaluation process in the scoring and ranking of their proposals against those submitted by other prime Consultants or Consultants.

Good Faith Efforts – documentation of Consultant's or Consultant's intent to comply with S/M/WBE Program Goals and procedures including, but not limited to, the following: (1) documentation within a solicitation response reflecting the Consultant's commitment to comply with SBE or M/WBE Program Goals as established by the GSC for a particular contract; or (2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., timely advertisements in appropriate trade publications and publications of wide general circulation; timely posting of SBE or M/WBE subcontract opportunities on the City of San Antonio website; solicitations of bids/proposals/qualification statements from all qualified SBE or M/WBE firms listed in the Small Business Office's directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Consultant's posting of a bond covering the work of SBE or M/WBE Sub-Consultants; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by the Consultant; and documentation of consultations with trade associations and Consultants that represent the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Sub-Consultants.) The appropriate form and content of Consultant's Good Faith Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

HUBZone Firm – a business that has been certified by U.S. Small Business Administration for participation in the federal HUBZone Program, as established under the 1997 Small Business Reauthorization Act. To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and Controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its Principal Place of Business must be located in a HUBZone within the San Antonio Metropolitan Statistical Area. [See 13 C.F.R. 126.200 (1999).]

Independently Owned and Operated – ownership of an SBE firm must be direct, independent and by Individuals only. Ownership of an M/WBE firm may be by Individuals and/or by other businesses provided the ownership interests in the M/WBE firm can satisfy the M/WBE eligibility requirements for ownership and Control as specified herein in Section III.E.6. The M/WBE firm must also be Independently Owned and Operated in the sense that it cannot be the subsidiary of another firm that does not itself (and in combination with the certified M/WBE firm) satisfy the eligibility requirements for M/WBE Certification.

Individual – an adult person that is of legal majority age.

Industry Categories – procurement groupings for the City of San Antonio inclusive of Construction, Architectural & Engineering (A&E), Professional Services, Other Services, and Goods & Supplies (i.e., manufacturing, wholesale and retail distribution of commodities). This term may sometimes be referred to as "business categories."

Joint Venture – Joint ventures are manifested by written agreements between two or more Independently Owned and Controlled business firms to form a third business entity solely for purposes of undertaking distinct roles and responsibilities in the completion of a given contract. Under this business arrangement, each joint venture partner shares in the management of the joint venture and also shares in the profits or losses of the joint venture enterprise commensurately with its contribution to the venture.

Minority/Women Business Enterprise (M/WBE) – firm that is certified as a Small Business Enterprise and also as either a Minority Business Enterprise or as a Women Business Enterprise, and which is at least fifty-

one percent (51%) owned, managed and Controlled by one or more Minority Group Members and/or women, and that is ready, willing and able to sell goods or services that are purchased by the City of San Antonio.

M/WBE Directory – a listing of minority- and women-owned businesses that have been certified for participation in Owner's M/WBE Program APIs.

Minority Business Enterprise (MBE) – any legal entity, except a joint venture, that is organized to engage in for-profit transactions, which is certified as a Small Business Enterprise and also as being at least fifty-one percent (51%) owned, managed and controlled by one or more Minority Group Members, and that is ready, willing and able to sell goods or services that are purchased by Owner. To qualify as an MBE, the enterprise shall meet the Significant Business Presence requirement as defined herein. Unless otherwise stated, the term "MBE" as used in this Ordinance is not inclusive of women-owned business enterprises (WBEs).

Minority Group Members – African-Americans, Hispanic Americans, Asian Americans and Native Americans legally residing in, or that are citizens of, the United States or its territories, as defined below:

> African-Americans: Persons having origins in any of the black racial groups of Africa as well as those identified as Jamaican, Trinidadian, or West Indian.
>
> Hispanic-Americans: Persons of Mexican, Puerto Rican, Cuban, Spanish or Central and South American origin.
>
> Asian-Americans: Persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.
>
> Native Americans: Persons having no less than 1/16th percentage origin in any of the Native American Tribes, as recognized by the U.S. Department of the Interior, Bureau of Indian Affairs and as demonstrated by possession of personal tribal role documents.

Originating Department – Owner department or authorized representative of Owner which issues solicitations or for which a solicitation is issued.

Payment – dollars actually paid to Consultants and/or Sub-Consultants and vendors for Owner contracted goods and/or services.

Prime Consultant – the vendor or Consultant to whom a purchase order or contract is issued by the City of San Antonio for purposes of providing goods or services for Owner. For purposes of this Agreement, this term refers to Consultant.

Points – the quantitative assignment of value for specific evaluation criteria in the vendor selection process used in some Construction, Architectural & Engineering, Professional Services, and Other Services contracts (e.g., up to 10 points out of a total of 100 points assigned for S/M/WBE participation as stated in response to a Request for Proposals).

Relevant Marketplace – the geographic market area affecting the S/M/WBE Program as determined for purposes of collecting data for the MGT Studies, and for determining eligibility for participation under various programs established by the SBEDA Ordinance, is defined as the San Antonio Metropolitan Statistical Area (SAMSA), currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson.

Consultant – a vendor submitting a bid, statement of qualifications, or proposal in response to a solicitation issued by Ownery. For purposes of this Agreement, Consultant is the Consultant.

Responsible – a firm which is capable in all respects to fully perform the contract requirements and has the integrity and reliability which will assure good faith performance of contract specifications.

San Antonio Metropolitan Statistical Area (SAMSA) – also known as the Relevant Marketplace, the geographic market area from which Owner's MGT Studies analyzed contract utilization and availability data for disparity (currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson).

SBE Directory - a listing of small businesses that have been certified for participation in Owner's SBE Program APIs.

SBE Subcontracting Program – an API in which Prime Consultants or vendors are required to make Good Faith Efforts to subcontract a specified percentage of the value of prime contract dollars to certified SBE firms. Such subcontracting goals may be set and applied by the GSC on a contract-by-contract basis to those types of contracts that provide subcontract opportunities for performing Commercially Useful Functions wherein there have been ongoing disparities in the utilization of available SBE Sub-Consultants.

When specified by the GSC, the *Subcontractor/Supplier Utilization Plan* form submitted by CONSULTANT may also be required to reflect Good Faith Efforts that a Prime Consultant or vendor has taken (or commits to taking in the case of solicitations that do not include a detailed scope of work or those in which price cannot be considered a factor in evaluation), toward attainment of subcontracting goals for SBE firms.

Significant Business Presence – to qualify for this Program, a S/M/WBE must be headquartered or have a *significant business presence* for at least one year within the Relevant Marketplace, defined as: an established place of business in one or more of the eight counties that make up the San Antonio Metropolitan Statistical Area (SAMSA), from which 20% of its full-time, part-time and contract employees are regularly based, and from which a substantial role in the S/M/WBE's performance of a Commercially Useful Function is conducted. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a significant business presence.

Small Business Enterprise (SBE) – a corporation, partnership, sole proprietorship or other legal entity for the purpose of making a profit, which is Independently Owned and Operated by Individuals legally residing in, or that are citizens of, the United States or its territories, and which meets the U.S. Small Business Administration (SBA) size standard for a small business in its particular industry(ies) and meets the Significant Business Presence requirements as defined herein.

Small Business Office (SBO) – the office within the Economic Development Department (EDD) of Owner that primarily is responsible for general oversight and administration of the S/M/WBE Program.

Small Business Office Manager – the Assistant Director of the EDD of Owner that is responsible for the management of the SBO and ultimately responsible for oversight, tracking, monitoring, administration, implementation and reporting of the S/M/WBE Program. The SBO Manager is also responsible for enforcement of Consultant and vendor compliance with contract participation requirements, and ensuring that overall Program goals and objectives are met.

Small Minority Women Business Enterprise Program (S/M/WBE Program) – the combination of SBE Program and M/WBE Program features contained in the SBEDA Ordinance.

Sub-Consultant – any vendor or Consultant providing goods and/or services to a Prime Consultant or Consultant in furtherance of the Prime Consultant's performance under a contract or purchase order with Owner. A copy of each binding agreement between Consultant and its Sub-Consultants shall be submitted to

Owner prior to execution of this contract Agreement and any contract modification Agreement.

Suspension – the temporary stoppage of the SBE or M/WBE firm's beneficial participation in Owner's S/M/WBE Program for a finite period of time due to cumulative contract payments the S/M/WBE firm received during a fiscal year that exceed a certain dollar threshold as set forth in Section III.E.7 of Attachment A to the SBEDA Ordinance, or the temporary stoppage of Consultant's and/or S/M/WBE firm's performance and payment under Owner contracts due to Owner's imposition of Penalties and Sanctions set forth in Section III.E.13 of Attachment A to the SBEDA Ordinance.

Subcontractor/Supplier Utilization Plan – a binding part of this contract Agreement which states Consultant's commitment for the use of Joint Venture Partners and/or Sub-Consultants/Suppliers in the performance of this contract Agreement, and states the name, scope of work, and dollar value of work to be performed by each of Consultant's Joint Venture partners and Sub-Consultants/Suppliers in the course of the performance of this contract, specifying the S/M/WBE Certification category for each Joint Venture partner and Sub-Consultant/Supplier, as approved by the SBO Manager. Additions, deletions or modifications of the Joint Venture partner or Sub-Consultant/Supplier names, scopes of work, or dollar values of work to be performed requires an amendment to this Agreement to be approved by the EDD Director or designee.

Women Business Enterprises (WBEs) - any legal entity, except a joint venture, that is organized to engage in for-profit transactions, that is certified for purposes of the SBEDA Ordinance as being a Small Business Enterprise and that is at least fifty-one percent (51%) owned, managed and Controlled by one or more non-minority women Individuals that are lawfully residing in, or are citizens of, the United States or its territories, that is ready, willing and able to sell goods or services that are purchased by Owner and that meets the Significant Business Presence requirements as defined herein. Unless otherwise stated, the term "WBE" as used in this Agreement is not inclusive of MBEs.

B. SBEDA Program Compliance – General Provisions

As CONSULTANT acknowledges that the terms of Owner's SBEDA Ordinance, as amended, together with all requirements, guidelines, and procedures set forth in Owner's SBEDA Policy & Procedure Manual are in furtherance of Owner's efforts at economic inclusion and, moreover, that such terms are part of Consultant's scope of work as referenced in the Owner's formal solicitation that formed the basis for contract award and subsequent execution of this Agreement, these SBEDA Ordinance requirements, guidelines and procedures are hereby incorporated by reference into this Agreement, and are considered by the Parties to this Agreement to be material terms. Consultant voluntarily agrees to fully comply with these SBEDA program terms as a condition for being awarded this contract by Owner. Without limitation, Consultant further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. Consultant fully shall cooperate with the Small Business Office and other Owner departments in their data collection and monitoring efforts regarding Consultant's utilization and payment of Sub-Consultants, S/M/WBE firms, and HUBZone firms, as applicable, for their performance of Commercially Useful Functions on this contract including, but not limited to, the timely submission of completed forms and/or documentation promulgated by SBO, through the Originating Department, pursuant to the SBEDA Policy & Procedure Manual, timely entry of data into monitoring systems, and ensuring the timely compliance of its Sub-Consultants with this term;

2. Consultant fully shall cooperate with any Owner or SBO investigation (and shall also respond truthfully and promptly to any Owner or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of

Consultant, its Sub-Consultants or suppliers;

3. Consultant shall permit the SBO, upon reasonable notice, to undertake inspections as necessary including, but not limited to, contract-related correspondence, records, documents, payroll records, daily logs, invoices, bills, cancelled checks, and work product, and to interview Sub-Consultants and workers to determine whether there has been a violation of the terms of this Agreement;

4. Consultant immediately shall notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to Consultant's Subcontractor/Supplier Utilization Plan for this contract, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by Consultant to replace the Sub-Consultant/Supplier in accordance with the applicable Affirmative Procurement Initiative. All proposed changes to the Subcontractor/Supplier Utilization Plan including, but not limited to, proposed self-performance of work by Consultant of work previously designated for performance by Sub-Consultant or supplier, substitutions of new Sub-Consultants, terminations of previously designated Sub-Consultants, or reductions in the scope of work and value of work awarded to Sub-Consultants or suppliers, shall be subject to advanced written approval by the Originating Department and the SBO. Consultant shall require new Sub-Consultants or Suppliers, prior to submission of Consultant's Change to Utilization Plan form, to register in the Centralized Vendor Registration system, before seeking SBO approval.

5. Consultant immediately shall notify the Originating Department and SBO of any transfer or assignment of its contract with Owner, as well as any transfer or change in its ownership or business structure.

6. Consultant shall retain all records of its Sub-Consultant payments for this contract for a minimum of four years, or as required by state law, following the conclusion of this contract or, in the event of litigation concerning this contract, for a minimum of four years, or as required by state law, following the final determination of litigation, whichever is later.

7. In instances wherein the SBO determines that a Commercially Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in Consultant's Subcontractor /Supplier Utilization Plan, Consultant shall not be given credit for the participation of its S/M/WBE or HUBZone Sub-Consultant(s) or joint venture partner(s) toward attainment of S/M/WBE or HUBZone firm utilization goals, and Consultant and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

8. Consultant acknowledges that Owner will not execute a contract or issue a Notice to Proceed for a Task until Consultant and each of its Sub-Consultants for a Task have registered and/or maintained active status in Owner's Centralized Vendor Registration System, and Consultant has represented to Owner which primary commodity codes each registered Sub-Consultant will be performing under pursuant to this Agreement.

C. SBEDA Program Compliance – Affirmative Procurement Initiatives

Owner has applied the following contract-specific Affirmative Procurement Initiatives (APIs) to this Agreement. Consultant hereby acknowledges and agrees that the selected API requirements shall also be extended to any Change Order or subsequent Contract modification and, absent SBO's granting of a waiver, that its full compliance with the following API terms and conditions is material to its satisfactory performance under this Agreement:

M/WBE Prime Contract Program. In accordance with the SBEDA Ordinance, Section III. D. 4. (b), this contract is being awarded pursuant to the M/WBE Prime Contract Program and as such, Consultant affirms that if it is presently certified as an M/WBE (see *Minority/Women Business Enterprise* definition), Consultant agrees not to subcontract more than 49% of the contract value to a non-M/WBE firm; **and**

SBE Subcontracting Program. In accordance with SBEDA Ordinance Section III. D. 3. (a), this contract is also being awarded pursuant to the SBE Subcontracting Program. Consultant agrees to subcontract at least **twenty-five (25%)** of its prime contract value to certified SBE firms headquartered or having a Significant Business Presence within the San Antonio Metropolitan Statistical Area (SAMSA). The Subcontractor/Supplier Utilization Plan which Consultant submitted to Owner with its response for this contract (or, as appropriate, that it agrees to submit during the price proposal negotiation phase of this contract), and that contains the names of the certified SBE Sub-Consultants to be used by Consultant on this contract, the respective percentages of the total prime contract dollar value to be awarded and performed by each SBE Sub-Consultant, and documentation including a description of each SBE Sub-Consultant's scope of work and confirmation of each SBE Sub-Consultant's commitment to perform such scope of work for an agreed upon dollar amount is hereby attached and incorporated by reference into the material terms of this Agreement. In the absence of a waiver granted by the SBO, the failure of Consultant to attain this Sub-Consultant goal for SBE firm participation in the performance of a Commercially Useful Function under the terms of its contract shall be a material breach and grounds for termination of the contract with Owner, and may result in debarment from performing future Owner contracts and/or shall be subject to any other remedies available under the terms of this Agreement for violations of the SBEDA Ordinance, or under any other law.

F. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, Consultant represents and warrants that it has complied with throughout the course of this solicitation and contract award process, and will continue to comply with, Owner's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, Consultant shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation or, on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring or commercial treatment of Sub-Consultants, vendors, suppliers, or commercial customers, nor shall the company retaliate against any person for reporting instances of such discrimination. Consultant shall provide equal opportunity for Sub-Consultants, vendors and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in Owner's Relevant Marketplace. Consultant understands and agrees that a material violation of this clause shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification of the company from participating in Owner contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party. Consultant's certification of its compliance with this Commercial Nondiscrimination Policy as submitted to Owner pursuant to the solicitation for this contract is hereby incorporated into the material terms of this Agreement. Consultant

shall incorporate this clause into each of its Sub-Consultant and Supplier agreements entered into pursuant to Owner contracts.

G. Prompt Payment

Upon execution of this Agreement by Consultant, Consultant shall be required to submit to Owner accurate progress payment information with each Request for Payment regarding each of its Sub-Consultants, including HUBZone Sub-Consultants, to ensure that Consultant's reported subcontract participation is accurate. Consultant shall pay its Sub-Consultants in compliance with Chapter 2251, Texas Government Code (the "Prompt Payment Act") within ten (10) days of receipt of payment from Owner. In the event of Consultant's noncompliance with these prompt payment provisions, no final retainage on the Prime Contract shall be released to Consultant, and no new Task Orders shall be issued by Owner to Consultant until Owner's audit of previous subcontract payments is complete and payments are verified to be in accordance with the specifications of the contract.

H. Violations, Sanctions and Penalties

In addition to the above terms, Consultant acknowledges and agrees that it is a violation of the SBEDA Ordinance and a material breach of this Agreement to:

1. Fraudulently obtain, retain, or attempt to obtain, or aid another in fraudulently obtaining, retaining, or attempting to obtain or retain Certification status as an SBE, MBE, WBE, M/WBE, HUBZone firm, Emerging M/WBE, or ESBE for purposes of benefitting from the SBEDA Ordinance;

2. Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of the SBEDA Ordinance;

3. Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;

4. Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of the SBEDA Ordinance; and

5. Make false statements to any entity that any other entity is, or is not, certified as an S/M/WBE for purposes of the SBEDA Ordinance.

Any person who violates the provisions of this section shall be subject to the provisions of Section III. E. 13. of the SBEDA Ordinance and any other penalties, sanctions and remedies available under law including, but not limited to:

1. Suspension of contract;

2. Withholding of funds;

3. Rescission of contract based upon a material breach of contract pertaining to S/M/WBE Program compliance;

4. Refusal to accept a response or proposal; and

5. Disqualification of Consultant or other business firm from eligibility for providing goods or services to Owner for a period not to exceed two years (upon San Antonio City Council approval).

ARTICLE XVII. ASSIGNMENT OR TRANSFER OF INTEREST

Consultant shall not assign or transfer Consultant's interest in this Agreement without the written consent of Owner.

ARTICLE XVIII. SEVERABILITY

If for any reason, any one or more paragraphs of this Agreement are held invalid or unenforceable, such invalidity or unenforceability shall not affect, impair or invalidate the remaining paragraphs of this Agreement but shall be confined in its effect to the specific section, sentences, clauses or parts of this Agreement held invalid or unenforceable. The invalidity or unenforceability of any section, sentence, clause or parts of this Agreement in any one or more instance shall not affect or prejudice in any way the validity of this Agreement in any other instance.

ARTICLE XIX. INTEREST IN OWNER CONTRACTS PROHIBITED

19.1 Consultant acknowledges that no officer or employee of Owner shall have a financial interest, directly or indirectly, in any contract with Owner or shall be financially interested, directly or indirectly, in the sale to Owner of any land, materials, supplies or service, except on behalf of Owner as an officer or employee. This prohibition extends to Owner's Public Service Board, San Antonio Water System and other Owner boards and commissions, which are more than purely advisory. The prohibition also applies to subcontracts on Owner projects.

19.2 Consultant acknowledges that it is informed that the Charter of Owner and its Ethics Code prohibit an officer or employee of Owner, as those terms are defined in the Ethics Code, from having a financial interest in any contract with Owner or any Owner agency, such as Owner-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with Owner or in the sale to Owner of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: (1) an Owner officer or employee; his parent, child or spouse; (2) a business entity in which the officer or employee, or his parent, child or spouse owns ten percent (10%) or more of the voting stock or shares of the business entity, or ten percent (10%) or more of the fair market value of the business entity; and/or (3) a business entity in which any individual or entity above listed is a Sub-Consultant on an Owner contract, a partner or a parent or subsidiary business entity.

19.3 Consultant warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents neither are officers nor employees of Owner. Consultant further warrants and certifies that it has tendered to Owner a Discretionary Contracts Disclosure Statement in compliance with Owner's Ethics Code.

ARTICLE XX. CONFLICTS OF INTEREST DISCLOSURE

Consultant must disclose if it is associated in any manner with an Official or employee of Owner in a business venture or business dealings. Failure to do so will constitute a violation of City of San Antonio Ordinance No. 76933. To be "associated" in a business venture or business dealings includes:

(1) being in a partnership or joint venture with the official or employee;

(2) having a contract with the official or employee;

(3) being joint owners of a business; or

(4) owning at least ten percent (10%) of the stock in a corporation in which an official or employee also owns at least ten percent (10%), or having an established business relationship as client or customer.

ARTICLE XXI. RIGHT OF REVIEW AND AUDIT

21.1 Consultant grants Owner and its designee(s) the right to audit, examine or inspect, at Owner's election, all of Consultant's records relating to the performance of the Work under this Agreement during the term of this Agreement and during the retention period herein. The audit, examination or inspection may be performed by a Owner designee, which may include its internal auditors or an outside representative engaged by Owner. Consultant agrees to retain its records for a minimum of four (4) years, following the termination of this Agreement, unless there is an ongoing dispute under the contract; then, such retention period shall extend until final resolution of the dispute. "Consultant's records" include any and all information, materials and data, of every kind and character, generated as a result of the Work under this Agreement. Example of Consultant records include, but are not limited to, billings, books, general ledger, cost ledgers, invoices, production sheets, documents, correspondence, meeting notes, subscriptions, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, procedures, federal and state tax filings, for any issue in question, and any and all other agreements, sources of information and matters which may, in Owner's judgment, have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Agreement Documents.

21.2 Owner agrees that it will exercise the right to audit, examine or inspect only during regular business hours. Consultant agrees to allow Owner's designee access to all of Consultant's Records, facilities and current or former employees of Consultant deemed necessary by Owner or its designee(s) to perform such audit, inspection or examination. Consultant also agrees to provide adequate and appropriate Work space necessary to Owner or its designees to conduct such audits, inspections or examinations.

21.3 Consultant shall include this audit clause in any Sub-Consultant, Sub-Consultant, supplier or vendor contract.

ARTICLE XXII. ENTIRE AGREEMENT

This Agreement represents the entire and integrated Agreement between Owner and Consultant and supersedes all prior negotiations, representations or agreements, either oral or written. This Agreement only may be amended by written instrument signed by both Owner and Consultant.

ARTICLE XXIII. VENUE

The obligations of the parties to this Agreement shall be performable in San Antonio, Bexar County, Texas, and if legal action, such as civil litigation, is necessary in connection therewith, exclusive venue shall lie in Bexar County, Texas.

ARTICLE XXIV. NOTICES

Except as may be provided elsewhere herein, all notices, communications and reports, required or permitted under this Contract, shall personally be delivered or mailed to the respective party by depositing the same in the United States Postal Service, addressed to the applicable address shown below, unless and until either party is otherwise notified in writing by the other party of a change of such address. Mailed notices shall be deemed communicated as of five (5) days of mailing.

If intended for Owner, to:	If intended for Consultant, to:
Capital Improvements Management Services Department	**Project Control of Texas, Inc.**
Attention: Contract Services 114 West Commerce, 9th Floor San Antonio, Texas 78205	Attention: **Richard McNary** **17300 Henderson Pass, Suite 110** **San Antonio, Texas 78232**

With a copy to:

Capital Improvements Management
Services Department
Attention: City Architect's Office
114 West Commerce, 4th Floor. Room 412
San Antonio, Texas 78205

ARTICLE XXV. INDEPENDENT CONTRACTOR

In performing services under this Agreement, the relationship between Owner and Consultant is that of independent contractor. By the execution of this Agreement, Consultant and Owner do not change the independent contractor status of Consultant. Consultant shall exercise independent judgment in performing its duties and obligations under this Agreement and solely is responsible for setting working hours, scheduling or prioritizing the workflow and determining how the Services are to be performed. No term or provision of this Agreement, or act of Consultant in the performance of this Agreement, shall be construed as making Consultant the agent, servant or employee of Owner or as making Consultant or any of its agents or employees eligible for any fringe benefits, such as retirement, insurance and/or Worker's compensation, which Owner provides to or for its employees.

ARTICLE XXVI. CAPTIONS

The captions for the individual provisions of this Agreement are for informational purposes only and shall not be construed to effect or modify the substance of the terms and conditions of this Agreement to which any caption relates.

IN WITNESS WHEREOF, City of San Antonio has lawfully caused these present to execute this Agreement by the hand of City Manager or his/her designee; Consultant, acting by the hand of **Richard McNary** thereunto authorized **President and COO** does now sign, execute and deliver this document.

Executed on this _____ day of _____, _____

CITY OF SAN ANTONIO

_____
PETER ZANONI
ASSISTANT CITY MANAGER

PROJECT CONTROL OF TEXAS, INC.

_____
RICHARD McNARY
PRESIDENT AND COO

APPROVED:

_____
CITY ATTORNEY

EXHIBIT A. SCOPE OF SERVICES AND FEE SCHEDULE

The scope of services is to provide CIMS with Program Management Staff Augmentation on an as-needed basis for the Henry B. Gonzalez Convention Center Expansion Project and related projects. The main areas of expertise required include the following:

1. Program Management
2. Construction Management
3. Design Review/Management
4. Construction Inspection
5. Project Controls
   - Cost
   - Primavera Scheduling Review and Tracking
   - Master Scheduling (all projects)
   - Estimates
   - Change Orders (review and negotiation)

6. Environmental
   - Cultural Resources
   - Site Assessments
   - Hazmat

7. Office Management
   - Document Control
   - Meeting Facilitation
   - Presentation Preparation

8. Material Testing for Quality Assurance
9. Public Relations

At least one member of the Team must be a registered Architect with a minimum of five (5) years of experience in large-scale facilities (preferably over $100,000,000). At least one member of the Team must have a license to practice engineering in the State of Texas as a Professional Engineer and have at least five (5) years of commercial project management experience. At least one member of the Team must have knowledge and experience using BIM and Primavera.

Below is a more detailed description of each expertise area:

Program Management

Program Management is the application of knowledge, skills, tools and techniques across multiple interrelated projects to obtain the overall program objectives and requirements. Program Management may be responsible for, but not limited to, any of the following activities:

1) Monitoring;
2) Budgeting;
3) Coordinating;
4) Analyzing;
5) Representation;
6) Other related duties and responsibilities as presented.

Construction Management

Construction Management may be responsible for, but not limited to, any of the following activities:

1) Performing detailed engineering calculations;
2) Preparing analysis report;
3) Performing site assessments;

4) Evaluating and tracking performance of contractors;
5) Assisting with responding to citizen inquiries and complaints;
6) Providing technical assistance;
7) Reviewing plans;
8) Reviewing specifications;
9) Reviewing MEP design;
10) Coordinating with other divisions, departments or municipal agencies;
11) Reviewing Project elements for building, safety and other required codes;
12) Reviewing and advising on ADA requirements;
13) Assisting with constructability reviews;
14) Attending construction progress meetings, as requested;
15) Assisting with monthly status reports;
16) Assisting with Project close-out process, including gathering of warranties and owner's manuals;
17) Perform related duties and fulfill responsibilities, as presented.

CIMS will require construction management services to augment staff in the delivery of Convention Center Project and related projects on time and within budget. Coordination with Project team members, ensuring objectives are focused on the overall schedule and Project deliverables is a must.

Design Review & Management
Design Review & Management may be responsible for, but not limited to, any of the following activities:
1) Reviewing plans;
2) Reviewing specifications;
3) Reviewing MEP Design;
4) Reviewing and assisting with permitting requirements;
5) Reviewing Project elements for building, safety and other required codes;
6) Reviewing and advising on ADA requirements;
7) Assisting with constructability reviews;
8) Providing conceptual sketches;
9) Assisting with analysis of architectural design;
10) Reviewing FF&E requirements;
11) Attending design review meetings, as requested;
12) Assisting with monthly status reports;
13) Performing related duties and fulfilling responsibilities, as presented.

Construction Inspection Services
Construction Inspection Services may be responsible for, but not limited to, any of the following activities:
1) Monitoring and documenting job site safety;
2) Monitoring and documenting the Storm Water Pollution Prevention Plan (SWPPP) best management practices and posted notifications;
3) Attending on-site construction meetings, as requested;
4) Coordinating with Owner facilities and operations when utility outages, noise control, traffic control or security are required by the Work;
5) Conducting daily observation of construction Work for compliance with approved contract drawings, specifications, requests for information, change order proposals, approved submittals and shop drawings;
6) Reviewing contractor submittals and coordinate Owner comments (including resolving conflicts);
7) Issuing daily observation reports for site and building, noting conditions of non-compliance, with proper references to detailed drawings and specifications sections;
8) Attending early morning, evening or after-hours installations requiring Owner representation;
9) Maintaining and organizing on-site Project documentation;
10) Reviewing and approving monthly Contractor payment application, including survey construction progress to confirm percent complete by trades;
11) Coordinating and monitoring material testing, HVAC air testing and balancing and other systems testing;
12) Monitoring the Project commissioning process, including equipment testing, functional performance tests and building integration of inter-related systems;
13) Monitoring deficiency logs to assure follow up of re-testing and system performance;

14) Assisting the Project Manager in resolving construction issues;
15) Documentation of site investigation through photos and reporting;
16) Attending pre-installation meetings between the Contractor and Owner, prior to start of roofing, glazing, pre-cast panels, curtain wall, waterproofing, foundations, structural framing and other systems, as required by specifications;
17) Monitoring punch lists for above ceiling, open wall and Substantial Completion inspections and confirm completion of deficiencies;
18) Remaining current in codes and regulations applicable to design and construction;
19) Interfacing with, and providing support to Owners Representatives, Users operations, design professionals, contractors, utilities and regulatory agencies to assist with resolution of construction phase conflicts;
20) Monitoring project close-out procedures, including O&M manuals, as-builts, punch lists and warranty walk-through;
21) Assisting the Project Manager in the 1-year warranty process;
22) Performing related duties and fulfilling responsibilities, as presented.

It is requested that specific construction inspectors are available who have expertise, as evidenced by appropriate credentials, in the following specialties:
Underground utilities and site preparation
Concrete (structural and flatwork)
Structural Steel
Heating, Ventilation and Air-Conditioning (HVAC)
Electrical and Data
Architectural Finishes
Security
Audio-Visual (AV)
Information Technologies (IT)

Project Controls
Project Controls may be responsible for, but not limited to, any of the following activities:

1) Reviewing cost estimates;
2) Supporting Owner Project Manager, reviewing and providing comments on schedules submitted by Consultants, Contractors and others for conformance with scheduling requirements and policies, consistency with Project/construction plans and phasing, executability, proper resource allocation and other schedule-related requirements;
3) Validating progress on Project schedule;
4) Coordination between Project teams regarding schedules;
5) Budgetary cost estimate preparation;
6) Reviewing and negotiating change orders;
7) Assisting with Project budget analysis;
8) Assisting with BIM requirements and review;
9) Performing related duties and fulfilling responsibilities, as presented.

Environmental
Environmental may be responsible for, but not limited to, any of the following activities:
1) Compliance with the Texas Antiquities Code and Section 106 of the National Historic Preservation Act;
2) Texas Archeological Research Laboratory search/background reviews/constraints analysis;
3) Archeological survey(s);
4) Testing to determine a site's potential to the National Register of Historic Places or as State Archeological Landmarks (SALs);
5) Hazmat investigation/survey and specification writing;
6) Hazmat remediation oversight;
7) Geo-archeological investigation;
8) Photo and report documentation of site analysis;
9) Native American Grave Protection and Repatriation Act Compliance;
10) Historical standing structure surveys;
11) Cultural resources mitigation, if needed;
12) Archeological monitoring during construction, if needed;

13) Historical and archival backgrounds;
14) Artifact curation;
15) Health and safety code compliance, as it pertains to cemeteries;
16) Phase I Environmental Site Assessments (ESAs) – due diligence assessments of property and proposed projects based on historical and visual cues to identify potential environmental impairments;
17) Phase II ESAs – subsurface environmental investigations intended to confirm and/or delineate the extent of contamination using sampling and laboratory analyses;
18) Environmental remediation/clean-up and design – the preparation of waste management plans, oversight of environmental remediation projects, and analyses to determine risk associated with soil or groundwater contamination;
19) Performing related duties and fulfilling responsibilities, as presented.

Office Management
Office Management may be responsible for, but not limited to, any of the following activities:
1) Preparing meeting agendas;
2) Scheduling of meetings, presentations, phone conferences, etc.;
3) Preparing all Project correspondence;
4) Electronic and hard-copy file organization and maintenance;
5) Coordinating Team schedules;
6) Preparing Project presentations;
7) Meeting facilitation;
8) Coordinating Project teams, Owner departments and other stakeholders;
9) Maintaining and coordinating the procurement of office supplies;
10) Performing related duties and fulfilling responsibilities, as presented.

Material Testing for Quality Assurance
Material Testing may be responsible for, but not limited to, any of the following activities:
1) Maintaining the Project Log of all testing performed.
2) Geotechnical Engineering: Geotechnical Site Investigation Services;
3) Geotechnical Engineering: Geotechnical Laboratory Testing;
4) Special Inspections;
5) Construction Materials Testing: Materials Testing and Inspection as required by 2009 International Building Code and City of San Antonio Amendments;
6) Engineering or scientific interpretation, field and laboratory services and reports as required by Owner. Testing reports shall include:

Report date;

Date of service, project title, limits, who ordered test and who performed test;

Testing lab letterhead with authorized signature – professional engineer, or appropriate licensed professional required by law in charge or his delegated assistant;

Report identification number (sequential numbering), description, price, quantity performed and location;

Test results;

Contract standards controlling the test(s);

Assessment - Compliance or noncompliance with the specifications;

Any extenuating circumstances affecting the test(s) or results(s);

7) Performing related duties and fulfilling responsibilities, as presented.

Public Relations

Public Relations may be responsible for, but not limited to, any of the following activities:

1) Preparing press releases;
2) Assisting with public meetings, if needed;
3) Assisting with citizen inquires;
4) Assisting with developing marketing materials/presentations;
5) Performing related duties and fulfilling responsibilities, as presented.

HBGCC Expansion Hourly Rates
Effective 9/1/12 - 8/31/14

Staff Augmentation Team Members FINAL September 11, 2012	Loaded price per hour
Core Team	
Project Principal	$195.00
Convention Center Special Consultant	$250.00
Project Director	$145.00
Architectural Project Manager	$145.00
Senior Project Manager	$120.00
Clerical / Administrative	$65.00
Certified Building Commissioning Professional	$108.00
Construction Inspector - MEP Inspector/Subimittal Review	$100.00
Construction Inspector/Field Observation-Building & Site	$75.00
Cultural	
Registered Project Archeologist	$115.00
Project Archeologist	$75.00
Environmental	
Environmental Project Manager	$130.00
Estimating	
Estimating Manager	$160.00
Geotechnical	
Geologist	$110.00
Mechanical/Electrical/Plumbing Design Review	
Mechanical Design Review Engineer	$100.00
Plumbing Design Review Engineer	$100.00
Electrical Design Review Engineer	$100.00
Public Relations	
Public Relations Account Executive	$115.00
Other	
BIM/Revit Special Consultant	$90.00
IT/Security Project Manager, RCDD	$110.00

60 days prior to the end of the effective period, listed at the top of the page, pricing will be reviewed against the Cost of Living Index for the San Antonio region. At that time, a meeting will be scheduled to discuss pricing adjustments, if necessary, and an updated Unit Price Sheet will be formulated.

HBGCC Expansion Hourly Rates
Effective 9/1/12 - 8/31/14

	Construction Material Test - Project Control's Pricing 9-11-12 FINAL	Unit	Rate
1	**SOILS**		
	Soils Observation Technician	Hr	$46.00
	Drilled Pier Observation Technician	Hr	$52.50
	Material Sampling Technician	Hr	$46.00
	Atterberg Limits Determination	Each	$86.00
	Grain Size Analysis Mechanical	Each	$86.00
	Material Finer than #200 Sieve	Each	$60.00
	Moisture-Density Relationship	Each	$250.00
	Sulfate Test	Each	$70.00
	Soil pH	Each	$45.00
	Lime Series of Soil Determination pH Method	Each	$400.00
	Lime Series by Atterberg Limits	Each	$472.00
	Nuclear Field Density Test (minimum 4 per trip)	Each	$15.00
2	**CONCRETE**		
	Concrete Placement Observation Technician	Hr	$46.00
	Precast Concrete Observation Technician	Hr	$55.00
	Reinforcing Steel/Post Tension Observation Technician	Hr	$59.00
	Concrete Cylinder Pick-up	Hr	$46.00
	Concrete Compression Test	Each	$19.00
	Aggregate Sieve Analysis	Each	$56.00
	Specific Gravity of Aggregate	Each	$48.00
	Absorption of Aggregate	Each	$30.00
	Unit Weight of Aggregate	Each	$36.00
	Beam Flexural Strength	Each	$36.00
	Floor Flatness Testing FL/FF (Less than or Equal to 15,000 SF)	Each	$450.00
3	**MASONRY**		
	Masonry Observation Technician	Hr	$46.00
	Masonry Pick-up	Hr	$46.00
	Reinforcing Steel/Post Tension Observation Technician	Hr	$59.00
	Grout Prism Test	Each	$30.00
	Mortar Compressive Test	Each	$20.00
	CMU Compressive Strength Test (set of 6)	SET	$330.00
	Brick Absorption Test	Each	$34.00
	Masonry Specimen Laboratory Testing Preparation	Hr	$46.00
	Compressive Test of Brick (Set of 5)	SET	$120.00

HBGCC Expansion Hourly Rates
Effective 9/1/12 - 8/31/14

	Construction Material Test - Project Control's Pricing 9-11-12 FINAL	Unit	Rate
4	**STRUCTURAL STEEL**		
	Structural Steel Observation - Certified Welding Inspector (CWI)	Hr	$95.00
	Ultrasonic Testing	Hr	$95.00
	Ultrasonic Testing Equipment	Trip	$25.00
5	**ASPHALT**		
	Asphaltic Concrete Observation Technician	Hr	$52.50
	Molding/Density of Asphalt Test Specimens (set of 3)	SET	$60.00
	Marshall/Hveem Stability Test (set of 3)	SET	$75.00
	Maximum Theoretical Density Test of Asphalt	Each	$97.00
	Asphalt Extraction/Gradation	Each	$207.00
	Asphalt Field Densities (minimum 4 per trip)	Each	$15.00
	Asphalt Coring Crew	Hr	$101.00
	Asphalt Coring Equipment	Each	$100.00
	Asphalt Density of Field Core	Each	$25.00
6	**ROOFING**		
	Roofing Installation Observation Technician	Hr	$52.50
	Roof Fastener Pull Out Tests	Each	$50.00
7	**FIREPROOFING**		
	Fireproofing Observation Technician	Hr	$52.50
	Gauge Thickness Verification	Each	No Charge
	Density and Thickness Verification	Each	$25.00

60 days prior to the end of the effective period, listed at the top of the page, pricing will be reviewed against the Cost of Living Index for the San Antonio region. At that time, a meeting will be scheduled to discuss pricing adjustments, if necessary, and an updated Unit Price Sheet will be formulated.

HBGCC Expansion Material Testing Rates
Effective 9/1/12 - 8/31/14
Construction Materials Testing-Project Control Pricing 9-11-12
FINAL

	Construction Material Test	Applicable COSA Specification Item(s)	Applicable COSA Test Methods	Unit	Price
1	Moisture-Density Relationship	104, 105, 106, 107, 108, 109, 200, 201, 236, 306, 400	TEX-113-E, TEX-114-E, TEX-120-E, TEX-121-E	Each	$338.00
1A	Moisture-Density Relationship (no additional trip required to sample)			Each	$231.00
2	Atterberg Limits Determination (in conjunction with Moisture-Density Relationship)	104, 105, 106, 107, 200, 236, 306, 400	TEX-104-E, TEX-105-E, TEX-106-E, TEX-107-E	Each	$80.00
2A	Atterberg Limits Determination (with sampling and travel charges)			Each	$187.00
2B	Atterberg Limits Determination			Each	$80.00
3	Sieve Analysis (with sampling and travel charges)	200	TEX-110-E, Part I and II	Each	$187.00
3A	Sieve Analysis			Each	$80.00
4	Field Density Test (1-3 Per Set)	104, 105, 106, 107, 108, 109, 200, 201, 236, 306, 400, 412	TEX-115-E	Set	$178.00
5	Field Density Test (each additional on same call out)			Each	$39.00
6	Concrete Compressive Strength Test (4 Cylinder Set) *	106, 209, 300, 306, 400	TEX-418-A or ASTM C 39	Set	$176.00
6A	Concrete Compressive Strength Test (additional 4 Cylinder Set) *			Set	$114.00
6B	Concrete Testing (4 Cylinder Set) in excess of 1 hour per cylinder set *		ASTM C 31, Tex-416-A or Tex-414-A, Tex-415-A, Tex-422-A	Hour	$45.00
7	Concrete Compressive Strength Test (6 Cylinders Set) *		TEX-418-A or ASTM C 39	Set	$211.00
7A	Concrete Compressive Strength Test (additional 6 Cylinders Set) *			Set	$149.00
7B	Concrete Testing (6 Cylinder Set) in excess of 1.5 hour per cylinder set *		ASTM C 31, Tex-416-A or Tex-414-A, Tex-415-A, Tex-422-A	Hour	$45.00
8	Asphalt Cores of In-Place Asphalt Paving (2 Per Set with travel charges)	205, 206, 240	TEX-207-E Part I	Set	$362.00
8A	Asphalt Cores of In-Place Asphalt Paving (additional 2 Per Set on same call out)			Set	$195.00
9	L.A. Abrasion Test (with sampling and travel charges)	205, 240, 300	ASTM C 131	Each	$255.00

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HBGCC Expansion Material Testing Rates
Effective 9/1/12 - 8/31/14
Construction Materials Testing-Project Control Pricing 9-11-12
FINAL

Construction Material Test		Applicable COSA Specification Item(s)	Applicable COSA Test Methods	Unit	Price
9A	L.A. Abrasion Test			Each	$166.00
10	Stand-By Time			Hour	$45.00
11	Asphalt Concrete Sampling, Moisture Content, Gradation, Bitumen Content, Laboratory Density and Rice Gravity (with sampling and travel	205, 206	TEX-222-F, TEX-212 Part II, TEX-200-F, TEX-236-F, TEX-	Each	$528.00
11A	Asphalt Concrete Sampling, Moisture Content, Gradation, Bitumen Content, Laboratory Density and Rice Gravity		TEX-212 Part II, TEX-200-F, TEX-236-F, TEX-207-E Part I,	Each	$431.00
11B	Asphalt Mix Design Verification	205, 206	TEX-204-F, Part I	Each	$900.00
11C	Warm Mix Design Verification	240	TEX-204-F, Part IV	Each	$1,200.00
12	Asphalt, Oils and Emulsions (with sampling and travel charges)	205, 206, 207, 236, 239, 240	TEX-500-C	Each	$590.00
12A	Asphalt, Oils and Emulsions (additional on same call out)			Each	$483.00
13	Welded Wire Fabric - Gauge thickness (with sampling and travel charges)	303	ASTM A 185 or A 497	Each	$176.00
13A	Welded Wire Fabric - Gauge thickness			Each	$87.00
14	Brick Testing (with sampling and travel charges)			Each	$140.00
14A	Brick Testing			Each	$53.00
15	Slurry Seal (field measurement of slurry seal application)	207, 239	Tex-200-F, Part II (washed), TEX-236-F	Each	$147.00
16	Fence Post and Rail (weight and coating thickness with sampling and travel charges)	507, 508	ASTM F 1083	Each	$176.00
16A	Fence Post and Rail (weight and coating thickness)			Each	$87.00
17	Sample Charge			Each	$110.00
18	Flowable Fill Shrinkage	106, 306, 400	ASTM C 827	Each	$475.00
19	Flowable Fill Consistency		COSA Item 413.3.B	Each	$150.00

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HBGCC Expansion Material Testing Rates
Effective 9/1/12 - 8/31/14
Construction Materials Testing-Project Control Pricing 9-11-12
FINAL

	Construction Material Test	Applicable COSA Specification Item(s)	Applicable COSA Test Methods	Unit	Price
20	Hamb urg Wheel test	205, 240	Tex-242-F	Each	$600.00
21	Boil test		Tex-530-C	Each	$85.00
22	Segregation (density profile)		Tex-207-F, Part V	Each	$350.00
23	Longitudinal joint density		Tex-207-F, Part VII	Each	$250.00
24	Thermal profile		Tex-244-F	Each	$270.00
25	Tack Coat Adhesion		TEX-243-F	Each	$200.00
26	Flexible Base Classification or Verification (w/o RAP)	200	TEX-110-E, TEX-104-E, TEX-106-E, TEX-116-E	Each	$475.00
27	Flexible Base Classification or Verification (w/RAP)		TEX-110-E, TEX-104-E, TEX-106-E, TEX-116-E, TEX-406-	Each	$575.00
28	Verification of Performance Graded Binders	205, 206, 240	TxDOT Item 300.2.J, AASHTO T48, T313, T314, T315, ASTM	Each	$900.00
29	Verification of Emulsified Asphalt (w/o Polymer Modifiers)	202, 203, 204	TxDOT Item 300.2.D, AASHTO T72, T59, T49, T44,	Each	$870.00
30	Verification of Emulsified Asphalt (w/Polymer Modifiers)		TxDOT Item 300.2.D, AASHTO T72, T59, T49, T44,	Each	$1,100.00

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EXHIBIT B. SUBCONTRACTOR/SUPPIER UTILIZATION PLAN

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GENERAL CONDITIONS FOR
CITY OF SAN ANTONIO CONSTRUCTION CONTRACTS

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GENERAL CONDITIONS FOR
CITY OF SAN ANTONIO CONSTRUCTION CONTRACTS

ARTICLE I. GENERAL PROVISIONS

1.1 CONTRACT DEFINITIONS

Wherever used in the Contract Documents and printed with initial capital letters, the terms listed below will have the meanings indicated, which are applicable to both the singular and plural thereof.

1.1.1 **"ALTERNATE"** means a variation in the Work in which Owner requires a price separate from the Base Bid. If an Alternate is accepted by Owner, the variation will become a part of the Contract through award of the Contract and the Base Bid will be adjusted to include the amount quoted as stated in the Notice of Award to Contractor. If an Alternate is accepted by Owner, and later deleted, Owner will be entitled to a credit in the full value of the Alternate as priced in Contractor's Bid Proposal.

1.1.2 **"AMENDMENT"** is a written modification of the Contract prepared by Owner or Design Consultant and signed by Owner and Contractor, (and approved by the San Antonio City Council, if required) which authorizes an addition, deletion or revision in the Work (specifically the services) or an adjustment in the Contract Sum or the Contract Times and is issued on or after the Effective Date of the Agreement.

1.1.3 **"BASE BID"** is the price quoted for the Work before Alternates are considered.

1.1.4 **"CHANGE ORDER"** refer to **Article VII** herein for definition.

1.1.5 **"CITY COUNCIL"** means the duly elected members of the City Council of the City of San Antonio, Texas.

1.1.6 **"CONSTRUCTION OBSERVER/INSPECTOR** (hereafter referred to as "COI") is the authorized representative of the Director of Capital Improvements Management Services (hereafter referred to as "CIMS"), or its designee department, assigned by Owner to observe and inspect any or all parts of the Project and the materials to be used therein. Also referred to herein as Resident Inspector.

1.1.7 **"CONTRACT"** means the Contract Documents which represent the entire and integrated agreement between Owner and Contractor and supersede all prior negotiations, representations or agreements, either written or oral. The terms and conditions of the Contract Documents may be changed only in writing by a Field Work Directive, Change Order or Amendment. The Contract Documents shall not be construed to create a contractual relationship of any kind between:

(1) Design Consultant and Contractor;

(2) Owner and a Subcontractor or Sub-Subcontractor; or

(3) any persons or entities other than Owner and Contractor.

1.1.8 **"CONTRACT DOCUMENTS"** means the Construction Contract between Owner and Contractor, which consists of, but are not limited to, the following: the Notice of Award, an enabling City of San Antonio Ordinance, the solicitation documents and other contract-related documents, which include:

(1) General Conditions;

(2) Vertical and/or Horizontal specific General Conditions and Special Conditions included by Special Provisions or addenda;

(3) Drawings;

(4) Specifications;

(5) addenda issued prior to the close of the solicitation period; and

(6) other documents listed in the Contract, including Field Work Directives, Change Orders and/or Amendments;

(7) a written order for a minor change in the Work issued by Design Consultant and/or Owner, as described in **Article VII** herein.

The geotechnical and subsurface reports which Owner may have provided to Contractor specifically are excluded from the Contract Documents.

1.1.9 **"CONTRACT TIME"** means, unless otherwise provided, the period of time, including any authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work. When the plural ("Contract Times") is used, it refers to milestones designated in the Work Progress Schedule.

1.1.10 **"CONTRACTOR"** means the entity that has entered into a Contract with Owner to complete the Work. Contractor, as used herein, includes Construction Manager at Risk or other applicable entities performing work under a Contract with City.

1.1.11 **"DAY"** as used in the Contract Documents shall mean Calendar Day, unless otherwise specifically defined. A Calendar Day is a day of 24 hours, measured from midnight to the next midnight, unless otherwise specifically stipulated. A Working Day is a day of eleven hours, as measured from seven o'clock a.m. to six o'clock p.m. on weekdays, except legal holidays, or the hours during which Contractor has been authorized to work by Owner.

1.1.12 **"DEPARTMENT"** means the Department of Capital Improvements Management Services (hereafter referred to as "CIMS"), City of San Antonio, Texas or Director of the Department of Capital Improvements Management Services.

1.1.13 **"DESIGN CONSULTANT"** unless the context clearly indicates otherwise, means an Engineer, Architect or other Design Consultant in private practice, licensed to do work in Texas and retained for a specific project under a contractual agreement with Owner.

1.1.14 **"DRAWINGS"** (also referred to herein as **"Plans"**) are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location and dimensions of Work, generally including elevations, sections, details, schedules and diagrams.

1.1.15 **"FIELD WORK DIRECTIVES" OR "FORCE ACCOUNT"** is a written order signed by Owner directing a change in the Work prior to agreement an adjustment, if any, in the Contract Sum and/or Contract, as further defined in **Section 7.3** herein.

1.1.16 **"HAZARDOUS SUBSTANCE"** is defined to include the following:

(a) any asbestos or any material which contains any hydrated mineral silicate, including chrysolite, amosite, crocidolite, tremolite, anthophylite or actinolite, whether friable or non-friable;

(b) any polychlorinated biphenyls ("PCBs"), or PCB-containing materials, or fluids;

(c) radon;

(d) any other hazardous, radioactive, toxic or noxious substance, material, pollutant, or solid, liquid or gaseous waste; any pollutant or contaminant (including but not limited to petroleum, petroleum hydrocarbons, petroleum products, crude oil or any fractions thereof, any oil or gas exploration or production waste, any natural gas, synthetic gas or any mixture thereof, lead, or other toxic metals) which in its condition, concentration or area of release could have a significant effect on human health, the environment, or natural resources;

(e) any substance that, whether by its nature or its use, is subject to regulation or requires environmental investigation, monitoring, or remediation under any federal, state, or local environmental laws, rules, or regulations;

(f) any underground storage tanks, as defined in 42 U.S.C. Section 6991(1)(A)(I) (including those defined by Section 9001(1) of the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq.;

(g) the Texas Water Code Annotated Section 26.344; and Title 30 of the Texas Administrative Code Sections 334.3 and 334.4), whether empty, filled or partially filled with any substance; and

(h) any other hazardous material, hazardous waste, hazardous substance, solid waste, and toxic substance as those or similar terms are defined under any federal, state, or local environmental laws, rules, or regulations.

1.1.17 **"NOTICE TO PROCEED (HEREIN ALSO REFERRED TO AS "WORK PROJECT AUTHORIZATION" OR "NTP")"** is a written notice given by Owner to Contractor establishing the date on which the Contract Time will commence to run and the date on which Contractor may begin performance of its contractual obligations.

1.1.18 **"OWNER"** is defined in **Article II** herein.

1.1.19 **"OWNER DESIGNATED REPRESENTATIVE (ODR)"** means the person(s) designated by Owner to act for Owner.

1.1.20 **"PROJECT"** means the total design and construction of Work performed under the Contract Documents and may be the whole or a part of the Project and which may include construction by Owner or by separate contractors. All references in these General Conditions to or concerning the Work or the Site of the Work will use the term "Project," notwithstanding that the Work only may be a part of the Project.

1.1.21 **"PROJECT MANAGEMENT TEAM"** is composed of Owner, its representatives, Design Consultant and Program Manager (if any) for this Work.

1.1.22 **"SITE"** means the land(s) or area(s) (as indicated in the Contract Documents) furnished by Owner, upon which the Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by Owner which are designated for the use of Contractor.

1.1.23 **"SPECIAL CONDITIONS"** are terms and conditions to an Agreement that supplement and are superior to these General Conditions and grant greater authority or impose greater restrictions upon Contractor, beyond those granted or imposed in these General Conditions. City's Horizontal Special Conditions are attached hereto, made a part of these General Conditions and shall be used as applicable.

1.1.24 **"SPECIFICATIONS"** are that portion of the Contract Documents consisting of the written requirements for materials, equipment, construction systems, standards,

workmanship for the Work, performance of related services and other technical requirements.

1.1.25 **"SUBSTANTIAL COMPLETION"** is the date certified by Owner and Design Consultant, in accordance with **Section 9.8** herein, when the Work, or a designated portion thereof, is sufficiently complete in accordance with the Contract Documents so as to be operational and fit for the intended use by Owner.

1.1.26 **"TEMPORARY BENCH MARKS (TBM)"** are temporary affixed marks which establish the exact elevation of a place; TBMs are used by surveyors in measuring site elevations or as a starting point for surveys.

1.1.27 **"THE 3D MODEL"** is the Building Information Model prepared by Design Consultant in the format designated, approved and acceptable to Owner with databases of materials, products and systems that can be used by Contractor to prepare schedules for cost estimating, product and materials placement schedules and evaluations of crash incidences. The 3D Model, if available, may be used as a tool, however all information taken from the Model is the responsibility of Contractor and not Owner or Design Consultant.

1.1.28 **"WORK"** means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by Contractor, or any Subcontractors, Sub-Subcontractors, material suppliers or any other entities for which Contractor is responsible, to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

1.1.29 **OTHER DEFINITIONS.** As used in the Contract Documents, the following additional terms have the following meanings:

1.1.29.1 "provide" means to furnish, install, fabricate, deliver and erect, including all services, materials, appurtenances and all other expenses necessary to complete in place and ready for operation or use;

1.1.29.2 "shall" means the mandatory action of the party of which reference is being made;

1.1.29.3 "as required" means as prescribed in the Contract Documents; and

1.1.29.4 "as necessary" means all action essential or needed to complete the work in accordance with the Contract Documents and applicable laws, ordinances, construction codes and regulations.

1.2 PRELIMINARY MATTERS

1.2.1 Upon the San Antonio City Council's passing of an Ordinance authorizing the issuance of a contract, a Notice of Award Letter will be sent to Contractor by CIMS Contract Services, notifying Contractor of the award of a contract. In its Notice of Award Letter, Contractor will be informed of a date certain by which Contractor's bond(s) and evidence of insurance shall be delivered to CIMS Contract Services.

1.2.2 **DELIVERY OF CONTACT AND BONDS.** Not later than the Pre-Construction meeting and prior to the commencement of any Work on the Project, Contractor shall deliver a fully executed Contract to Owner, along with such bonds as Contractor may be required to furnish, including, but not limited to, a required payment bond in the form and amount specified in the Contract Documents and these General Conditions and a required performance bond in the form and amount specified in the Contract Documents and these General Conditions.

1.2.3 **DELIVERY OF EVIDENCE OF INSURANCE.** Not later than the Pre-Construction meeting, and prior to the commencement of any Work under this Contract, Contractor shall deliver evidence of insurance to Owner. Contractor shall furnish an original completed Certificate of Insurance and a copy of all insurance policies, together with all required endorsements thereto, required by the Contract Documents to the CIMS Contract Services Division, or its delegated department, clearly labeled with the name of the Project and which shall contain all information required by the Contract Documents. Contractor shall be prohibited from commencing the Work and Owner shall have no duty to pay or perform under this Contract until such evidence of insurance is delivered to Owner. No officer or employee, other than Owner's Risk Management Department, shall have authority to waive this requirement.

1.2.4 **NOTICE TO PROCEED AND COMMENCEMENT OF CONTRACT TIMES.** Unless otherwise stated on the Notice to Proceed, the Contract Time will commence to run on the date stated on the Notice to Proceed. No Work shall commence any earlier than the date stated on Notice to Proceed and no Work shall be performed by Contractor or any Subcontractor prior to issuance of the Notice to Proceed. Any work commenced prior to Contractor receiving a Notice to Proceed is performed at Contractor's risk.

1.2.5 **SUBMISSION OF PROJECT SCHEDULE(S).** Prior to comment of Work (unless otherwise specified elsewhere in the Contract Documents), Contractor shall submit to the Director of CIMS or his/her designee the Project schedule(s), as defined in **Section 3.10** herein, a minimum of fifteen (15) days prior to the Pre-Construction Conference.

1.2.6 **PRE-CONSTRUCTION CONFERENCE.** Before Contractor commences any Work on the Project, a Pre-Construction Conference attended by Contractor, Design Consultant, Owner's Designated Representative(s) and others, as appropriate, will

be held to establish a working understanding among the parties as to the Work and discuss, at minimum: the Project Schedule(s) referenced in this **Article 1**; the procedures for handling Shop Drawings and other submittals; the processing of Applications for Payment; and Contractor maintaining required records. The Notice to Proceed may be issued at the Pre-Construction Conference or issued by Owner at any time at Owner's discretion. Said issuance of the Notice to Proceed shall not be unreasonably withheld by Owner.

1.2.7 Payments for services, goods, work, equipment and materials are contingent upon and subject to the availability and appropriation of funds and the sale of future City of San Antonio Certificates of Obligation and/or General Obligation Bonds in accordance with adopted budgets. In the event funds are not available, appropriated or encumbered to fund a Project, then, at City's discretion, this Agreement may be terminated immediately with no additional liability to City.

1.3 CONTRACT DOCUMENTS

1.3.1 **EXECUTION OF CONTRACT DOCUMENTS.** Execution of the Contract by Contractor is a representation Contractor has been provided unrestricted access to the existing improvements and conditions on the Project Site, Contractor thoroughly has investigated the visible conditions at the Site and the general local conditions affecting the Work and Contractor's investigation was instrumental in preparing its bid or proposal submitted to Owner to perform the Work. Contractor shall not make or be entitled to any claim for any adjustment to the Contract Time or the Contract Sum arising from conditions which Contractor discovered or, in the exercise of reasonable care, should have discovered in Contractor's investigation.

1.3.2 **OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE.** The Drawings, Specifications and other documents, including those in electronic form, prepared by Design Consultant, its consultants or other consultants retained by Owner for the Project, which describe the Work to be executed by Contractor (collectively referred to as the "Construction Documents") are and will remain the property of Owner, whether the Project for which they are made is executed or not. Contractor shall be permitted to retain one record set. Neither Contractor nor any Subcontractor, sub-Subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by Design Consultant or Design Consultant's consultants. All copies of Construction Documents, except Contractor's record set, shall be returned or suitably accounted for to Design Consultant on request and upon completion of the Work. The Drawings, Specifications and other documents prepared by Design Consultant and Design Consultant's consultants, along with copies thereof furnished to Contractor, are for use solely with respect to this Project. The drawings, specifications or other documents are not to be used by Contractor or any Subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner. Contractor, Subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Design Consultant

and the Design Consultant's consultants appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by Design Consultant and Design Consultant's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes, in connection with this Project, is not to be construed as publication.

1.3.2.1 All of Contractor's non-proprietary, documentary Work product, including reports and correspondence to Owner, prepared pursuant to this Contract, shall be the property of Owner and, upon completion of this Contract and upon written request by Owner, promptly shall be delivered to Owner in a reasonably organized form, without restriction on its future use by Owner. For the avoidance of doubt, documentary Work product does not include privileged communications, proprietary information and documents used to prepare Contractor's Bid Proposal.

1.3.2.2 Contractor may retain for its files any copies of documents it chooses to retain and may use its Work product as it deems fit. Any materially-significant Work product lost or destroyed by Contractor shall be replaced or reproduced at Contractor's non-reimbursable sole cost. In addition, Owner shall have access during normal business hours, during the duration this Contract is in effect and for four (4) years after the final completion of the Work, unless there is an ongoing dispute under the Contract, then such access period shall extend longer until final resolution of the dispute, to all of Contractor's records and documents covering reimbursable expenses, actual base hourly rates, time cards and annual salary escalation records maintained in connection with this Contract for purposes of auditing same at the sole cost of Owner. The purpose of any such audit shall be for the verification of such costs. Contractor shall not be required to keep records of, or provide access to, the make up of any negotiated and agreed-to lump sums, unit prices or fixed overhead and profit multipliers. Nothing herein shall deny Contractor the right to retain duplicates. Refusal by Contractor to comply with the provisions hereof shall entitle Owner to withhold any payment(s) to Contractor until compliance is obtained.

1.3.2.3 All of Contractor's documentary Work product shall be maintained within Contractor's San Antonio offices, unless otherwise authorized by Owner. After expiration of this Contract, Contractor's documents may be archived in the Contractor's central record storage facility but shall remain accessible to Owner for the four (4) year period cited in **Section 1.3.22** herein.

1.3.3 **CORRELATION AND INTENT.** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by Contractor. The Contract Documents are complementary and what is required by one shall be as binding as if required by all. Performance by Contractor shall be required only to the extent consistent with the Contract Documents and which

reasonably is inferable from the Contract Documents as deemed necessary to produce the indicated results. In cases of discrepancy between any drawing and the dimension figures written thereon:

(1) the dimension figures shall govern over scaled dimensions;

(2) Detailed Drawings and accompanying notations shall govern over general Drawings;

(3) Specifications shall govern over Drawings, subject to **Section 1.3.3.6** herein;

(4) General Conditions and Supplemental Conditions;

(5) Special Conditions shall govern over Specifications, Drawings and General/Supplemental Conditions; and

(6) Negotiated Special Conditions shall govern over Special Conditions.

The most recent revision of Plans shall control over older revisions.

1.3.3.1 Organization of the Specifications into divisions, sections, articles, and the arrangement of Drawings shall not control Contractor in dividing the Work among Subcontractors or establishing the extent of Work to be performed by any trade.

1.3.3.2 Unless otherwise stated in the Contract Documents, words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings. Where the phrases "directed by", "ordered by" or "to the satisfaction of" Owner, Design Consultant or Owner's Resident Inspector or other specified designation occur, it is to be understood that the directions, orders or instructions to which they relate are those within the scope of and authorized by the Contract Documents.

1.3.3.3 Reference to manufacturer's instructions, standard specifications, manuals or codes of any technical society, organization or association, laws or regulations of any governmental authority, or to any other documents, whether such reference be specific or by implication, shall mean the latest standard specification, manual, code or laws or regulations in effect at the time of opening of Contractor's Bid Proposal, except as otherwise may be

specifically stated or where a particular issue is indicated. Municipal and utility standards shall govern except in case of conflict with the Specifications. In case of a conflict between the Specifications and the referenced standard, the more stringent shall govern.

1.3.3.4 The most recently issued Document takes precedence over previous issues of the same Document. The order of precedence is as follows, with the highest authority listed herein as "1" and in descending order:

1. Modifications to this Agreement signed by Contractor, Owner and Design Consultant;

2. Addenda, with those of later date(s) having precedence over those with earlier date(s);

3. Special Conditions;

4. General Conditions;

5. Special Provisions (Horizontal Projects);

6. Specifications;

7. Drawings;

1.3.3.5 Should the Drawings and Specifications be inconsistent, contract pricing shall be based on the better quality and greater quantity of work indicated. In the event of the above-mentioned inconsistency, Owner shall determine the resolution of the inconsistency.

1.3.3.6 In the Drawings and Specifications, where certain products, manufacturer's trade names or catalog numbers are given, such information is given for the sole and express purpose of establishing a standard of function, dimension, appearance and quality of design in harmony with the Work and is not intended for the purpose of limiting competition. Materials or equipment shall not be substituted unless such a substitution has been specifically accepted for use on this Project by Owner and Design Consultant.

1.3.3.7 When the work is governed by reference to standards, building codes, manufacturer's instructions or other documents, unless otherwise specified, the edition currently in place as of the date of the submission of the bid shall apply.

1.3.3.8 Requirements of public authorities apply as minimum requirements only and do not supersede more stringent specified requirements.

1.3.4 **INTERPRETATION.** In the interest of brevity, the Contract Documents frequently omit modifying words such as “all” and “any” and articles such as “the” and “an”,

but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

ARTICLE II. OWNER

2.1 GENERAL

2.1.1 The City of San Antonio, Texas, a home-rule, Texas Municipal Corporation located in Bexar County and identified as "Owner" or as "City" in the Contract and these General Conditions, is referred to throughout the Contract Documents as if singular in number. Owner shall designate in writing to Contractor a representative (hereafter referred to as "Owner's Designated Representative" or "ODR") who shall have express authority to bind Owner with respect to all matters concerning this Contract requiring Owner's approval or authorization. Whenever the term "City" or "Owner" is found in this Contract or the Contract Documents, such term shall include the City's agents, elected officials, employees, officers, directors, volunteers, representatives, successors and assigns.

2.1.2 Contractor acknowledges that no lien rights exist with respect to public property.

2.2 INFORMATION AND SERVICES TO BE PROVIDED BY OWNER

2.2.1 Owner will provide and maintain the Preliminary Budget and general schedule, if any, for the Project. The Preliminary Budget will include the anticipated construction cost, contingencies for changes in the Work during construction and other costs that are the responsibility of Owner. The general schedule will set forth Owner's plan for milestone dates and completion of the Project.

2.2.2 Owner shall furnish surveys, if in existence, describing physical characteristics, legal limitations and utility locations. The furnishing of these surveys and reports shall not relieve Contractor of any of its duties under the Contract Documents or these General Conditions. Information or services required of Owner by the Contract Documents shall be furnished by Owner with reasonable promptness following actual receipt of a written request from Contractor. It is incumbent upon Contractor to identify, establish and maintain a current schedule of latest dates for submittal and approval by Owner, as required in **Section 3.10** herein, including when such information or services must be delivered. If Owner delivers the information or services to Contractor as scheduled and Contractor is not prepared to accept or act on such information or services, then Contractor shall reimburse Owner for all extra costs incurred by holding, storage, retention or performance, including redeliveries by Owner in order to comply with the current schedule.

2.2.3 Unless otherwise provided in the Contract Documents, Contractor shall be furnished, free of charge, up to five (5) complete sets of the Plans and Specifications by Design Consultant. Additional complete sets of Plans and Specifications, if requested by Contractor, will be furnished at reproduction cost to Contractor.

2.2.4 Owner's personnel may, but are not required to, be present at the construction site during progress of the Work, along with Design Consultant in the performance of its duties, to verify Contractor's record of the number of workmen employed on the Work site, the workmen's occupational classification, the time each workman is engaged in the Work and the equipment used by the workmen in the performance of the Work, for purpose of verification of Contractor's Applications for Payment and payroll records.

2.2.5 Owner shall reimburse Contractor for the necessary Project-related approvals, fees and required permits with no markup paid to Contractor for these necessary Project-related approvals, fees and required permits costs unless said costs are stipulated in the Contract Documents as a part of the Work.

2.2.6 **OWNER'S RIGHT TO STOP THE WORK.** If Contractor fails to correct Work deemed by Owner to not be in accordance with the requirements of the Contract Documents, as required by **Section 12.3** herein, fails to carry out Work in accordance with the Contract Documents or fails to submit its preliminary schedule(s), bond(s), insurance certificate(s) or any other required submittals, Owner may issue a written order to Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated. The right of Owner to stop the Work shall not give rise to any duty on the part of Owner to exercise this right for the benefit of the Contractor or any other person or entity. This right shall be in addition to and not in restriction of Owner's rights pursuant to **Section 12.3** herein. Owner's issuance of an order to Contractor to stop the Work shall not give rise to any claim by Contractor for additional time, cost or general conditions costs.

2.2.7 **OWNER'S RIGHT TO CARRY OUT THE WORK.** If Contractor defaults, neglects or fails to carry out the Work in accordance with the Contract Documents and fails, within a three (3) work-day period after receipt of written notice from Owner, to commence and continue correction of such default, neglect or failure with diligence and promptness, Owner may, without prejudice to other remedies Owner may have, correct such deficiencies, neglect or failure. In such case, an appropriate Change Order may be issued deducting from payments then or thereafter due Contractor reflecting the reasonable cost of correcting such deficiencies, neglect or failure of Contractor, including all of Owner's incurred expenses and compensation for Design Consultant's additional services made necessary by such default, neglect or failure of Contractor. If payments then or thereafter due Contractor are not sufficient to cover such amounts for the Work performed, Contractor shall pay the difference to Owner.

ARTICLE III. CONTRACTOR

3.1 GENERAL

3.1.1 Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

3.1.2 Contractor shall perform the Work in a good and workmanlike manner, except to the extent the Contract Documents expressly specify a higher degree of finish or workmanship.

3.1.3 Contractor shall not be relieved of its obligations, responsibilities or duties to perform the Work in accordance with the Contract Documents, either by any activities or duties of Design Consultant in Design Consultant's administration of the Contract or by tests, inspections or approvals required or performed by Owner or any person other than the Contractor.

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, Contractor carefully shall:

(1) study and compare the various Drawings and other Contract Documents relative to that portion of the Work and the information furnished by Owner;

(2) take field measurements of any existing conditions related to that portion of the Work; and

(3) observe any conditions at the Site affecting the Work.

Any error, inconsistencies or omissions discovered by Contractor shall be reported

promptly to Owner via a Request for Information in such form as the Owner may require.

3.2.1.1 The exactness of existing grades, elevations, dimensions or locations given on any Drawings issued by Design Consultant, or the work installed by other contractors, is not guaranteed by Owner. Contractor shall, therefore, satisfy itself as to the accuracy of all grades, elevations, dimensions and locations.

3.2.1.2 In all cases of interconnection of its Work with existing conditions or with work performed by others, Contractor shall verify at the site all dimensions relating to such existing or other work. Any errors due to Contractor's failure to so verify all such grades, elevations, dimensions or locations promptly shall be rectified by Contractor without any additional cost to Owner.

3.2.2 As between Owner and Contractor, and subject to the provisions of **Section 3.2.4** below, Contractor has no responsibility for the timely delivery, completeness, accuracy and/or sufficiency of the Specifications or Drawings (or any errors, omissions, or ambiguities therein), and is not responsible for any failure of the design of the facilities or structures as reflected thereon to be suitable, sound or safe. Contractor shall be deemed to have satisfied itself as to

the design contained in and reflected by the Specifications and the Drawings. In particular, but without prejudice to the generality of the foregoing, Contractor will review the Contract Documents to establish that:

3.2.2.1 the information is sufficiently complete to perform the Work; and

3.2.2.2 there are no obvious or patent ambiguities, inaccuracies or inconsistencies within or between the documents forming the Contract; and

3.2.2.3 Contractor shall work with the aforementioned Contract Documents so as to perform the Work and of each and every part thereof such that the Work and each and every part thereof will, jointly and severally, be in accordance with the requirements of the Contract Documents and in particular, but without limiting the generality of the foregoing, such that the Work as a whole and, as appropriate, each and every part thereof, shall comply with the requirements of any performance specifications.

3.2.3 Any design errors or omissions noted by Contractor during its review promptly shall be reported to Owner, but it is recognized that the Contractor's review is made in Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents. Contractor is not required to ascertain if Contact Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to Contractor promptly shall be reported both to Owner and Design Consultant.

3.2.4 If Contractor believes additional cost or time is involved because of clarifications or instructions issued by Design Consultant, in response to the Contractor's Notices or Requests for Information, Contractor shall make Claims as provided in **Section 4.3.6** and **Section 4.3.7** herein. If Contractor fails to perform the obligations of **Section 3.2.1** and **Section 3.2.2** herein, Contractor shall pay such costs and damages to Owner as would have been avoided if Contractor had performed such obligations. Contractor shall not be liable to Owner or Design Consultant for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents, unless Contractor recognized or should have recognized such error, inconsistency, omission or differences and knowingly failed to report it to Owner and Design Consultant, as required by this **Section 3.2.4**.

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 Contractor shall supervise, inspect and direct the Work competently and efficiently, exercising the skill and attention of a reasonably prudent Contractor, devoting such attention and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. Contractor solely shall be responsible for the means, methods, techniques, sequences, procedures and

coordination of all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods and/or techniques, Contractor then shall evaluate the jobsite safety thereof and, except as stated herein below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If, upon its evaluation, Contractor determines such means, methods, techniques, sequences or procedures may not be safe, Contractor shall give timely written notice to Owner and Design Consultant and Contractor shall not proceed with that portion of the Work without further written instructions from Owner. Sequencing and procedures shall be coordinated and agreed upon by Owner, Design Consultant and Contractor.

3.3.2 Contractor shall be responsible to Owner for the acts and omissions of Contractor's agents and employees, Subcontractors and their agents and employees and other persons or entities performing portions of the Work for or on behalf of Contractor or any of its Subcontractors.

3.3.3 Contractor shall be responsible for inspection of portions of Work already performed, to determine which such portion are in proper condition to receive subsequent Work.

3.3.4 Contractor shall bear responsibility for design and execution of acceptable trenching and shoring procedures, in accordance with Texas Government Code, Section 2166.303 and Texas Health and Safety Code, Subchapter C, Sections 756.021, et seq.

3.3.5 It is understood and agreed the relationship of Contractor to Owner shall be of an independent contractor. Nothing contained or inferable in the Contract documents shall be read, deemed or construed to make Contractor the agent, servant or employee of Owner or create any partnership, joint venture or other association between Owner and Contractor. Any direction or instruction by Owner, in respect of the Work, shall relate to the results the Owner desires to obtain from the Work and shall in no way affect Contractor's independent contractor status, as described herein.

3.3.6 Contractor shall review Subcontractor(s) written safety programs, procedures and precautions in connection with performance of the Work. However, Contractor's duties shall not relieve any Subcontractor(s) or any other person or entity (e.g. a supplier), including any person or entity with whom Contractor does not have a contractual relationship, of their responsibility or liability relative to compliance with all applicable federal, state and local laws, rules, regulations and ordinances, which shall include the obligation to provide for the safety of their employees,

persons, and property and their requirements to maintain a work environment free of recognized hazards. The foregoing notwithstanding, the requirements of this **Section 3.4.6** are not intended to impose upon Contractor any additional obligations Contractor would not have under any applicable state or federal laws including, but not limited to, any rules, regulations or statutes pertaining to the Occupational Safety and Health Administration.

3.4 LABOR AND MATERIALS

3.4.1 Unless otherwise provided in the Contract Documents, Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.4.2 **PREVAILING WAGE RATE AND LABOR STANDARD PROVISIONS**. The Provisions of Chapter 2258 of the Texas Government Code, and the "Wage and Labor Standard Provisions" amended in City of San Antonio Ordinance 2008-11-20-1045, expressly are made a part of this Contract. In accordance therewith, a schedule of the general prevailing rate of per diem wages in this locality for each craft or type of worker needed to perform this contract shall be obtained by Contractor from the City of San Antonio's Labor Compliance Office and included in Contractor's Project bid package and Plans & Specifications, prior to Contractor bidding of the Project and such schedule shall become a part hereof. Contractor shall forfeit, as a penalty to Owner, sixty dollars ($60.00) for each laborer, workman or mechanic employed for each calendar day, or portion thereof, in which such laborer, workman or mechanic is paid less than the stipulated prevailing wage rates for any work done under this Contract by the Contractor or any Subcontractor employed on the project. The establishment of prevailing wage rates, pursuant to Chapter 2258 of the Texas Government Code, shall not be construed to relieve Contractor from its obligation under any federal or state law, regarding the wages to be paid to or hours worked by laborers, workmen or mechanics, insofar as applicable to the work to be performed hereunder. Contractor, in the execution of this Project, agrees it shall not discriminate in its employment practices against any person because of race, color, creed, sex, or origin. Contractor agrees it will not engage in employment practices which have the effect of discriminating against employees or prospective employees because of race, color, creed, national origin, sex, age, handicap or political belief or affiliation. This Contract provision shall be included in its entirety in all Subcontractor agreement entered into by the Contractor or any Subcontractor employed on the project.

3.4.3 **SUBSTITUTIONS**

3.4.3.1 Contractor's proposed substitutions and alternates may be rejected by Owner without explanation and shall be considered by Owner only under one or more of the following conditions:

(a) the proposal is required for compliance with interpretation of code requirements or insurance regulations then existing;

(b) specified products are unavailable through no fault of Contractor; and

(c) when in the judgment of Owner or Design Consultant, a substitution substantially would be in Owner's best interests in terms of cost, time or other considerations.

3.4.3.2 Contractor shall submit to Owner and Design Consultant:

(a) a full explanation of the proposed substitution and submittal of all supporting data, including technical information, catalog cuts, warranties, test results, installation instructions, operating procedures and other like information necessary for a complete evaluation of the substitution;

(b) a written explanation of the reasons the substitution is necessary, including the benefits to the Owner and to the Work, in the event the substitution is acceptable to Owner;

(c) the adjustment, if any, in the Contract Sum;

(d) the adjustment, if any, in the time of completion of the Contract and the construction schedule; and

(e) in the event of a substitution under **Section 3.4.2.1** herein, an affidavit stating:

(1) Contractor's proposed substitution conforms to and meets all the requirements of the pertinent Specifications and requirements shown on the Drawings; and

(2) Contractor accepts the warranty and correction obligations in connection with the proposed substitution as if originally specified by Design Consultant.

Proposals for substitutions shall be submitted to Design Consultant in sufficient time to allow Design Consultant no less than twenty-one (21) calendar days for review. No substitutions will be considered or allowed without Contractor's submittal of complete substantiating data and information as stated hereinbefore.

3.4.3.3 In the event of a substitution submittal under this **Section 3.4.3**, and whether or not any such proposed substitution is accepted by Owner or Design Consultant, Contractor shall reimburse Owner, at Owner's reasonable discretion, for any fees

incurred and charged by Design Consultant or other consultants for evaluating each proposed substitute.

3.4.3.4 Except as otherwise stipulated in the Contract Documents or required for safety or protection of persons or the Work or property at the Site or adjacent thereto, no Work will be allowed by Owner between the hours of 10:00 p.m. and 6:00 a.m. of the following calendar day, unless directed by the ODR or requested in writing by Contractor and approved by Owner.

3.4.4 Contractor shall, at all times, enforce strict discipline and good order among persons working on the Project and shall not employ or continue to employ any unfit person on the Project or any person not skilled in the assigned work. Contractor shall be liable for and responsible to Owner for all acts and omissions of its employees, all tiers of its Subcontractors, material suppliers, anyone who Contractor may allow to perform any Work on the Project and their respective officers, agents, employees, and consultants who Contractor may allow to come on the job site, with the exception of Owner or Owner's Designee. Owner, at any time, for any reason or for no reason, may direct Contractor to remove any employee, Subcontractor, material supplier or anyone else from the Project and Contractor promptly shall comply with Owner's direction. In addition, if Contractor receives written notice from Owner complaining about any Subcontractor, employee or anyone who is a hindrance to proper or timely execution of the Work, Contractor shall remedy such complaint without delay to the Project and at no additional cost to Owner. This provision shall be included in all contracts between the Contractor and all Subcontractors of all tiers.

3.4.5 Contractor recognizes and acknowledges that the Project Site is a public facility representing the City of San Antonio. As such, Contractor shall prohibit the possession or use of alcohol, controlled substances, tobacco and any prohibited weapons on the Project Site and shall require appropriate dress of Contractor's forces consistent with the nature of the Work being performed, including the wearing of shirts at all times. Harassment of any kind, including sexual harassment, of employees of Contractor or any Subcontractor, employees or consultants of Owner or any visitor to the site by employees of Contractor or a Subcontractor strictly is forbidden. Any employee of Contractor or a Subcontractor who is found to have engaged in such conduct shall be subject to appropriate disciplinary action by Contractor, including removal from the Project Site.

3.4.6 Contractor only shall employ or use labor in connection with the Work capable of working harmoniously with all trades, crafts and any other individuals associated with the Project.

3.4.7 All materials and installed equipment shall be as specified in the Contract Documents, and if not specified, shall be of good quality and shall be new, except as otherwise provided in the Contract Documents. If required by Owner or Design Consultant, Contractor shall furnish satisfactory evidence (including reports of required tests) as to the source, kind and quality of materials and equipment

installed. Contractor may make substitutions only with the consent of Owner, after Contractor's compliance with **Section 3.4.2** herein.

3.4.8 All materials shall be shipped, stored and handled in a manner which will protect and ensure their condition at the time of incorporation in the Work. After installation, all materials shall be properly protected against damage to ensure they are in the condition as required by **Section 3.5.1** herein when the Work is Substantially Completed or Owner takes over use and occupancy, whichever is earlier.

3.4.9 Contractor shall procure and furnish to Owner all guarantees, warranties, spares and maintenance manuals called for by the Specifications or which normally are provided by a manufacturer. The maintenance manual shall include a catalog for any equipment, materials, supplies or parts used in the inspection, calibration, maintenance or repair of the equipment and items in the catalog shall be readily available for purchase.

3.4.10 During construction of the Work and for four (4) years after final completion or longer if, during the duration of this Contract or during the four (4) years after the final completion of the Work, a dispute between any parties to this Project exists, Contractor shall retain and shall require all Subcontractors to retain for inspection and audit by Owner all books, accounts, reports, files, time cards, material invoices, payrolls and evidence of all other direct or indirect costs related to the bidding and performance of this Work. Upon request by Owner, a legible copy or the original of any or all such records shall be produced by Contractor at the administrative office of Owner. To the extent that it requests copies of such documents, Owner will reimburse Contractor and its Subcontractors for copying costs. Contractor shall not be required to keep records of or provide access to the make up of any negotiated and agreed-to lump sums, unit prices or fixed overhead and profit multipliers.

3.5 WARRANTY

3.5.1 Contractor warrants to Owner materials and equipment furnished and installed under the Contract will be of good quality and new, unless otherwise required or permitted by the Contract Documents, the Work will be free from defects not inherent in the quality required or permitted and the Work will conform to the requirements of the Contract Documents. Work not conforming to this warranty and these requirements, including substitutions not properly approved and authorized by Owner, may be considered defective. Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not

executed by the Contractor, improper or insufficient maintenance, improper operation, normal wear and tear and normal usage, and additional damage or defects caused by Owner's failure to promptly notify Contractor. If required by Owner, Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.5.2 A right of action by Owner for any breach of Contractor's express warranty herein shall be in addition to, and not in lieu of, any other remedies Owner may have under this Contract at law or in equity, regarding any defective Work.

3.5.3 The warranty provided in **Section 3.5.1** herein shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract Documents. Such warranty shall be interpreted to require Contractor, upon written timely demand by Owner, to replace defective materials and equipment and re-execute any defective Work disclosed to the Contractor by the Owner within a period of one (1) year after Substantial Completion of the applicable Work or, in the event of a latent defect, within one (1) year after discovery thereof by Owner.

3.5.4 All warranties shall be assignable by Owner. Submittal of all warranties and guarantees are required as a prerequisite to the final payment.

3.5.5 Except when a longer warranty time is specifically called for in the Specifications or is otherwise provided by law or by manufacturer, all warranties shall be at minimum for twelve (12) months and shall be in form and content otherwise reasonably satisfactory to Owner. Owner and Contractor acknowledge that the Project may involve construction work on more than one (1) building or section of infrastructure of Owner's. Each building, section of infrastructure or approved phase of each section of infrastructure may have its own separate and independent date of Substantial Completion or Final Completion. If separate dates for Substantial Completion and Final Completion are granted by Owner, Contractor shall maintain a complete and accurate schedule of the dates of Substantial Completion and dates upon which the one (1) year warranty on each building, phase or section of infrastructure that achieved Substantial Completion will expire. If separate dates are granted, Contractor agrees to provide notice of the warranty expiration date(s) to Owner and Design Consultant at least one (1) month prior to the expiration of the one (1) year warranty period on each building, section of infrastructure or each phase of the section of infrastructure which has achieved Substantial Completion. Prior to termination of any one (1) year warranty period, Contractor shall accompany Owner and Design Consultant on re-inspection of the building, section of infrastructure or phase of the section of infrastructure and be responsible for correcting any reasonable additional deficiencies not caused by the Owner or by the use of the building, section of infrastructure or phase of the section of infrastructure observed and/or reported during the re-inspection. For extended warranties required by the Contract Documents, Owner will notify Contractor of deficiencies and Contractor shall start remedying these defects within seven (7) calendar days of initial notification from Owner. Contractor shall prosecute the work without interruption until

accepted by Owner and Design Consultant, even though such prosecution may extend beyond the limit of the warranty period. If Contractor fails to provide notice of the expiration of the one (1) year warranty period at least one (1) month prior to the expiration date and conduct the required walk through with Owner, Contractor's warranty obligations described in this **Section 3.5.5** shall continue until such inspection is conducted and any deficiencies found in the inspection is corrected.

3.5.6 Warranties shall become effective on a date established by Owner in accordance with the Contract Documents. This date shall be the date of Substantial Completion of the entire Work, unless otherwise provided in any Certificate of Partial Substantial Completion approved by the parties, except for Work to be completed or corrected after the date of Substantial Completion and prior to final payment and those occurrences addressed in **Section 3.5.4** herein. Warranties for Work to be completed or corrected after the date of Substantial Completion and prior to Final Completion shall become effective on the later of the date the Work is completed or corrected and accepted by Owner and Design Consultant or the date of final completion of the Work.

3.5.7 Neither final payment nor compliance by Contractor with any provision in the Contract Documents shall constitute an acceptance of Work not done in accordance with the Contract Documents or relieve Contractor or its sureties of liability, with respect to any warranties or responsibility for faulty materials and workmanship. Contractor warrants that the Work will conform to the requirements of the Contract Documents.

3.5.8 Contractor agrees to assign to Owner, at the time of Final Completion of the Work, any and all manufacturer's warranties relating to materials and labor used in the Work and further agrees to perform the Work in such manner so as to preserve any and all such manufacturer's warranties, provided that such assignment shall contain a reservation of Contractor's right also to enforce the manufacturer's warranties. As a condition precedent to final payment, Contractor shall prepare a notebook with reference tabs and submit three (3) copies of the notebook to Owner that includes a complete set of warranties from Subcontractors, manufacturers or suppliers, as appropriate, and executed by and between Contractor and Owner, as required under this Agreement, with a specified warranty commencement date, as required by the Contract Documents. Copies of the complete set of warranties from Subcontractors, manufacturers and/or suppliers, as appropriate, executed by Contractor as required by the Contract Documents, with and between Owner and Contractor. A specified warranty commencement date, as required by the Contract Documents, also shall be submitted to Owner in an electronic format (PDF) on a Compact Disc (CD).

3.5.9 When Contractor is constructing a building, the building shall be watertight and leak proof at every point and in every area, except where leaks can be attributed to damage to the building by external forces beyond Contractor's control. Contractor, immediately upon notification by the Owner of water penetration, shall determine the source of water penetration and perform any work necessary

to make the building watertight. Contractor also shall repair or replace any damaged material, finishes and/or fixtures damaged as a result of any water penetration, returning the building to original condition. The costs of such determination and repair shall be borne by Contractor only to the extent that the leak(s) is/are attributable to faulty workmanship or unauthorized or defective materials.

3.6 TAXES. Contractor will not include in the Contract Sum or any modification thereto any amount for sales, use or similar taxes for which Owner is exempt. Upon request by Contractor, Owner will provide Contractor with a tax exemption certificate or other documentation necessary to establish Owner's exemption from such taxes.

3.7 PERMITS, FEES AND NOTICES

3.7.1 **PERMITS.** Unless otherwise provided in the Contract Documents or by Owner, as per **Section 2.2.2** herein, it is the responsibility of and Contractor shall secure all permits, licenses and inspections. Owner and Design Consultant may assist Contractor, when necessary, in obtaining such permits, licenses and inspections necessary for the proper execution and completion of the work. For federally funded construction projects, when applicable, Owner shall prepare and submit the necessary paperwork to satisfy Texas Pollutant Discharge Elimination System (hereafter referred to as "TPDES"), regulations of the Texas Commission on Environmental Quality.

3.7.2 Contractor shall comply with and give all notices required by law, ordinance, rule, regulations and lawful orders of public authorities applicable to performance of the Work.

3.7.3 It is not Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes and rules and regulations. However, if Contractor observes that portions of the Contract Documents are at variance therewith, Contractor promptly shall notify Owner and Design Consultant in writing of any variances and all necessary changes shall be accomplished by appropriate modification(s) before Contractor performs any Work affected by such modification(s).

3.7.4 If Contractor performs Work knowing Work is contrary to laws, statutes, ordinances, building codes and rules and regulations, without such notice to and approval from Owner and Design Consultant, Contractor shall assume sole responsibility for performing such Work and shall bear all costs attributable to correct such Work.

3.7.5 Contractor also shall assist Owner in obtaining all permits and approvals and, at Owner's request, pay all fees and expenses, if any, associated with TPDES regulations of the Texas Commission on Environmental Quality, as well as local authorities, if applicable, which require completion of documentation and/or acquisition of a "Land Disturbing Activities Permit" for a Project. Contractor's obligations under this paragraph do not require it to perform engineering services

during the pre-construction phase to prepare proper drainage for the Project Site. However, any drainage alterations made by Contractor during the construction process, which require the issuance of a permit, shall be at Contractor's sole cost. It will be Contractor's responsibility to prepare and submit the permit approval documentation provided by the regulatory agencies prior to beginning any Work.

3.8 ALLOWANCES

3.8.1 Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as Owner may direct, but Contractor shall not be required to employ persons or entities to whom Contractor has reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

3.8.2.1 Allowances shall cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

3.8.2.2 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses, contemplated for stated allowance, shall be included in the allowances;

3.8.2.3 Whenever actual costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect both the difference between actual costs and the allowances under **Section 3.8.2.1** herein and all changes in Contractor's costs under **Section 3.8.2.2** herein.

3.8.3 Materials and equipment under an allowance shall be selected by Owner within such time as is reasonably specified by Contractor as necessary to avoid any delay in the Work.

3.9 SUPERINTENDENT/KEY PERSONNEL

3.9.1 At all times during the progress of the Work, Contractor shall assign a competent resident superintendent who is able to communicate fluently in English, along with any necessary assistant(s) who is/are satisfactory to Owner. Any superintendent designee shall be identified in writing to Owner promptly after Owner issues written Notice to Proceed. The superintendent shall represent Contractor at all time and all directions given to the superintendent shall be binding on Contractor. The designated superintendent shall not be replaced without written notice to and the approval of Owner, which approval will not be unreasonably withheld, except with good reason (including any termination or disability of the superintendent) or under extraordinary circumstances. The superintendent may not be employed on any other project prior to Final

Completion of the Work without the approval of Owner, which approval will not be unreasonably withheld.

3.9.2 Contractor shall furnish a list to Design Consultant and Owner of all Architects, Engineers, consultants, Sub-Consultants, job-site superintendents, Subcontractors and suppliers involved in the Project construction. Design Consultant also shall provide said information to Owner.

3.9.2.1 Owner, upon the showing of good and reasonable cause, may reject or require removal of any Architect, Engineer, consultant, sub-consultant, job superintendent, employee of the Contractor, Subcontractor or sub-Subcontractor and/or supplier involved in the Project.

3.9.2.2 Contractor shall provide an adequate staff for the proper coordination and expedition of the Work. Owner reserves the right to require Contractor to remove from the Project any employee(s) Owner, at its sole discretion, deems incompetent, careless, insubordinate, unnecessary or in violation of any provision in these Contract Documents. This provision is applicable to Subcontractors, sub-Subcontractors and their employees.

3.9.2.3 Owner reserves the right to utilize one or more of its employees or consultants to function in the capacity of Owner's Inspector, whose primary function will be daily inspections, checking pay requests or construction timelines and the verification of the storage of supplies and materials.

3.9.2.4 Contractor shall not change any key personnel or key Subcontractors without the prior written consent of Owner, which consent shall not be unreasonably withheld. In the event key personnel leaves Contractor's employment, such key personnel's replacement shall be subject to Owner's reasonable approval.

3.10 CONTRACTOR'S PROJECT SCHEDULES

3.10.1 **PROJECT SCHEDULE METHOD.** Contractor shall create and maintain a Critical Path Method (hereafter referred to as "CPM") Project Schedule, showing the manner of execution of Work which Contractor intends to follow, in order to complete the Project within the allotted time. The Project Schedule shall employ computerized CPM for the planning, scheduling and reporting of Work, as described in this **Section 3.10**. Contractor shall create and maintain the Project Schedule using project management scheduling software compatible with Owner's project management scheduling software. The observance of the requirements herein is an essential part of the Work to be performed under the Contract.

3.10.2 **SCHEDULING PERSONNEL.** Unless otherwise indicated in writing by Owner, Contractor shall provide an individual, who shall be referred to hereafter as "Scheduler", to create and maintain the Project Schedule. Scheduler shall be proficient in CPM analysis, possess sufficient experience to be able to perform required tasks on the specified software and able to prepare and interpret reports from the software. Scheduler shall be made available for discussion or meetings when requested by Owner.

3.10.3 **PROJECT SCHEDULE SUBMISSION**

3.10.3.1 Unless indicated otherwise, Contractor shall submit Project Schedule(s) for the Work in relation to the entire Project to Owner and Design Consultant at least fifteen (15) calendar days prior to the pre-construction conference.

3.10.3.2 All Project Schedule submittals shall be in the electronic form to include PDF plots of the schedule, a PDF plot defining the Critical Path and two week look-ahead, and include the native compatible scheduling file format. Contractor shall submit the schedule to Owner and Design Consultant via electronic mail, CD-Rom or any other electronic format acceptable to Owner.

3.10.3.3 This initial schedule shall indicate the dates for starting and completing the various aspects/phases required to complete the Work, including mobilization, procurement, installation, testing, inspection and acceptance of all the Work of the Contract, including any contractually mandated milestone dates. The Project Schedule shall not exceed the time limits set forth in the Contract Documents. Contractor shall organize the Project Schedule and provide adequate detail so the Schedule is capable of measuring and forecasting the effect of delaying events on completed and uncompleted activities.

3.10.3.4 The Project Schedule shall show the order in which Contractor proposes to carry out the Work in accordance with the final approved phasing plan, if any, and the anticipated start and completion dates of each phase of the Work. The Project Schedule shall be in the form of a time scaled work progress chart, to indicate the percentage of Work scheduled for completion at various critical milestones.

3.10.3.5 Contractor shall maintain a schedule of Shop Drawings and Sample Submittals and each submitted Shop Drawing and Sample Submittal shall list each required submittal and the expected time(s) for submitting, reviewing and processing such submittal.

3.10.3.6 Owner will review the Project Schedule within fifteen (15) calendar days for compliance with the specifications and notify Contractor of its acceptability.

3.10.4 **PROJECT SCHEDULE SEQUENCING.** The Project Schedule shall show the sequence and interdependence of activities required for complete performance of the Work. Contractor shall be responsible for assuring all Work sequences are logical and show a coordinated plan of Work in accordance with the sequence of work outlined in the plans. The purpose of Owner requiring the Project Schedule shall be to:

3.10.4.1 Ensure adequate planning during the execution and progress of the Work in accordance with the allowable number of calendar days and all milestones;

3.10.4.2 Assure coordination of the efforts of Contractor, Owner, utilities and others that may be involved in the Project and those activities are included in the Schedule highlighting coordination points with others;

3.10.4.3 Assist Contractor and Owner in monitoring the progress of the Work and evaluating proposed changes to the Contract; and

3.10.4.4 Assist Owner in administering the Contract time requirements.

3.10.5 **PROJECT SCHEDULE ACTIVITIES.** Contractor shall provide Owner a legend for all abbreviations used. The activities shall be coded so that organized plots of the Project Schedule may be produced. Typical activity coding includes traffic control phase, location and work type. Contractor shall show an estimated production rate per working day for each Work activity. Activity durations shall be based on production rates shown. Each activity on the Project Schedule shall include:

3.10.5.1 An activity number utilizing an alphanumeric designation system that is agreeable to Owner;

3.10.5.2 A concise description of the Work represented by the activity; and

3.10.5.3 Activity durations in whole work days, with a maximum of twenty (20) work days. Durations greater than twenty (20) work days may be used for non-construction activities (mobilization, submittal preparation, curing, etc.), and other activities mutually agreeable between Owner and Contractor.

3.10.6 **PROJECT SCHEDULE WORK DURATION AND RESOURCES**

3.10.6.1 The Project Schedule layout shall be grouped by Project and then by Work Breakdown Structure (hereafter referred to as "WBS") for organizational purposes.

3.10.6.2 The original and remaining Work duration shall be displayed. The grouping band will, by default, report Work days planned. One additional level of effort activity shall be added to the schedule as a "time calculator" with a seven (7) day calendar without holidays reflected. The calculation of days should be reflected in the appropriate duration columns.

3.10.6.3 Work shall be scheduled based upon Contractor's standard five (5) day work week, utilizing the appropriate calendar assignments and using compatible Project Scheduling software.

3.10.6.4 Assign working calendars for the days Contractor plans to work. Contractor shall designate all twelve (12) Owner holidays as non-working days (holidays). For dates beyond the then-current calendar year, Contractor shall assume Owner holidays are the same as the current calendar year.

3.10.6.5 Seasonal weather conditions shall be considered and included in the Project Schedule for all work influenced by temperature and/or precipitation. Seasonal weather conditions shall be determined by an assessment of average historical climatic conditions. Average historical weather data is available through the National Oceanic and Atmospheric Administration (hereafter referred to as "NOAA"). These effects shall be simulated through the use of work calendars for each major work type (i.e., earthwork, concrete paving, structures, asphalt, drainage, etc.). Project and work calendars should be updated each month to show days actually able to work on the various work activities.

3.10.6.6 Only Owner-responsible delays in activities that affect milestone dates or the Contract completion date, as determined by CPM analysis, will be considered for a time extension.

3.10.7 **PROJECT SCHEDULE - OTHER REQUIREMENTS.** The Project Schedule shall:

3.10.7.1 have all Work coded and organized by WBS. An example of an acceptable WBS will be provided, upon written request, by Owner to Contractor;

3.10.7.2 reflect Duration Percent complete as the percent complete type;

3.10.7.3 reflect Fixed Units as the duration type;

3.10.7.4 include submittals with a logical tie to what each drives;

3.10.7.5 add proposed Change Order(s) and those Change Order(s) shall be reflected on the Schedule as proposed Change Order(s). This task will

be linked to the schedule with logical ties and approved by Owner. Upon approval of a Change Order, a task shall be renamed and shall identify Work performed and Change Order number and resources will be added to the task;

3.10.7.6 only have constraints in accordance with the plans;

3.10.7.7 include activity milestones for material delivery;

3.10.7.8 disallow default progress; and

3.10.7.9 include a detailed explanation in the Project narrative, if Work is performed out of sequence.

3.10.8 **PROJECT SCHEDULE JOINT REVIEW AND ACCEPTANCE**

3.10.8.1 The Project Schedule and successive updates or revisions thereof are for Contractor's use in managing the Work. The Project Schedule is for the information of Owner and to demonstrate that Contractor has complied with requirements for planning the Work. Owner's acceptance of a Schedule and Schedule updates or revisions constitutes Owner's agreement to coordinate its own activities with Contractor's activities, as shown on the schedule.

3.10.8.2 Within fifteen (15) calendar days of receipt of Contractor's proposed Project Schedule, Owner shall evaluate the Schedule for compliance with this specification and notify Contractor of its findings. If Owner requests a revision or justification, Contractor shall provide satisfaction to Owner within seven (7) calendar days. If Contractor submits a Project Schedule for acceptance, based on a sequence of work not shown in the plans, Contractor shall notify Owner in writing of said sequence of work, separate from the Schedule submittal.

3.10.8.3 Owner's review and acceptance of Contractor's Project Schedule only is for conformance to the requirements of the Contract Documents. Review and acceptance by Owner of Contractor's Project Schedule does not relieve Contractor of any of its responsibility for the Project Schedule, Contractor's ability to meet interim milestone dates (if so specified) or meeting the Contract completion date, nor does such review and acceptance expressly or by implication warrant, acknowledge or admit the reasonableness of the logic, durations, manpower or equipment loading of Contractor's Project Schedule. In the event Contractor fails to define any element of Work, activity or

logic and Owner's review does not detect this omission or error, such omission or error, whether or when discovered by Contractor or Owner, shall be corrected by Contractor at the next monthly schedule update and shall not affect the Project or Contract completion date.

3.10.8.4 Acceptance of the Project Schedule, or update and/or revision thereto, does not indicate any approval of Contractor's proposed sequences and duration.

3.10.8.5 Acceptance by Owner of the Project Schedule or updated Project Schedule which exceeds contractual time does not alleviate Contractor from meeting the contractual completion date.

3.10.8.6 Acceptance of a Project Schedule update or revision indicating early or late completion does not constitute Owner's consent to any changes, alter the terms of the Contract, waive either Contractor's responsibility for timely completion, or waive Owner's right to damages for Contractor's failure to do so.

3.10.8.7 Contractor's scheduled dates for completion of any activity or of the entire Work do not constitute a change in terms of the Contract. Change Orders are the only method of modifying the completion date(s) and Contract time.

3.10.8.8 Submittal of a schedule, schedule revision or schedule update constitutes Contractor's representation to Owner, as of the date of the submittal, of the accurate depiction of all progress to date and that Contractor will follow the schedule as submitted in performing the Work.

3.10.9 **PROJECT SCHEDULE UPDATES AND REVISIONS**

3.10.9.1 The Project Schedule shall be updated monthly, at a minimum, to reflect progress to date and current plans for completing the Work. A paper and an electronic copy of the update shall be submitted to Owner and Design Consultant as directed. Owner has no duty to make progress payments to Contractor unless Contractor's payment application accompanied by the updated Project Schedule. The anticipated date of Substantial Completion shall show all extensions of time granted through Change Order(s) as of the date of the update.

3.10.9.2 The Project Schedule update shall be submitted no later than the date the pay application is submitted.

3.10.9.3 Contractor shall meet with Owner each month, at a scheduled Project Schedule update meeting, to review actual progress made through the data date of the schedule update, as determined by Owner. The review of progress will include dates of activities actually started and/or completed, the percentage of Work completed, the remaining duration of

each activity started and/or completed and the amount of Work still to complete, with an analysis of the relationship between the remaining duration of the activity and the quantity of material to install over that given period of time with a citation of past productivity.

3.10.9.4 The monthly Schedule Update shall include a progress narrative, explaining the Project's progress, identifying all progress made out of sequence, defining the Critical Path, identification of any potential delays, and other relevant data. A Project Schedule Narrative template will be required for the narrative. Upon request, Owner shall supply said template to Contractor.

3.10.9.5 Each Schedule shall segregate the Work into a sufficient number of activities to facilitate the efficient use of critical path method scheduling by Contractor, Owner and Design Consultant. The Project Schedule layout shall be grouped first by Project then by WBS. The layout shall include the following columns:

(1) Activity ID

(2) Activity Description

(3) Original Durations

(4) Remaining Durations

(5) Early Start and Early Finish Dates

(6) Late Start and Late Finish Dates

(7) Total Float

(8) Performance Percent Complete

(9) Display logic and target bars in the Gantt bar chart view

3.10.9.6 Each schedule shall include activities representing manufacturing, fabrication or ordering lead time for materials, equipment or other items for which Design Consultant is required to review submittals, shop drawings, product data or samples.

3.10.9.7 Each schedule, other than the initial schedule, shall:

(1) indicate the activities, or portions thereof, which have been completed;

(2) reflect the actual time for completion of such activities; and

(3) reflect any changes to the sequence or planned duration of all activities.

3.10.9.8 If any updated schedule exceeds the time limits set forth in the Contract Documents for Substantial Completion of the Work, Contractor shall include, along with its updated schedule, a statement of the reasons for the anticipated delay in achieving Substantial Completion of the Work and Contractor's planned course of action for completing the Work within the time limits set forth in the Contract Documents. If Contractor asserts that the failure of Owner or Design Consultant to provide requested and required information to Contractor as the reason for anticipated delay in completion, Contractor also shall specify what information has been requested and is required from Owner or Design Consultant.

3.10.9.9 Neither Owner nor Contractor shall have exclusive ownership of float time in the schedule and all float time shall inure to the benefit of the Project.

3.10.9.10 Submission of any schedule under this Contract constitutes a representation by Contractor that, as of the date of the submittal:

(1) the schedule represents the sequence in which Contractor intends to prosecute the remaining Work;

(2) the schedule represents the actual sequence and duration used to prosecute the completed Work;

(3) to the best of its knowledge and belief, Contractor is able to complete the remaining Work in the sequence and time indicated; and

(4) that Contractor intends to complete the remaining work in the sequence and time indicated.

3.10.9.11 If Contractor desires to make major changes in the Project Schedule, Contractor shall notify Owner in writing and submit the proposed schedule revision. The written notification shall include the reason for the proposed revision, what the revision is composed of and how the revision was incorporated into the schedule. Major changes are hereby defined as those that may affect compliance with the contract requirements or those that change the critical path. All other changes may be accomplished through the monthly updating process without written notification.

3.10.10 COMPLETION OF WORK

3.10.10.1 Contractor is accountable for substantially completing the Work in the Contract Time or as otherwise amended by Change Order.

3.10.10.2 If, in the sole judgment of Owner, the Schedule update reflects Work is behind schedule and the rate of performance of Work is inadequate to regain scheduled progress to insure Contractor achieving any Project Milestones (including, but not limited to, Substantial Completion) in accordance with the Project Schedule, Owner may, at its sole option, give written notice to Contractor and direct Contractor, at Contractor's sole expense, to propose and adopt a plan to accelerate the Work so that the Work conforms to the Project Schedule and Project Milestones previously agreed upon. Contractor may, but is not limited to, propose:

(1) increasing Project work forces;

(2) increasing Project equipment or tools;

(3) increasing the hours of work or number of shifts per day;

(4) expediting the delivery of Project materials;

(5) changing, with the approval of Owner, the schedule logic and Work sequences; or

(6) taking some other action as Contractor may proposes, if acceptable to Owner.

3.10.10.3 Within ten (10) calendar days after such notice from Owner, Contractor shall notify Owner in writing of the specific measures taken and/or planned to be taken to increase the rate of progress of Work on the Project. Contractor shall include an estimate as to the date of scheduled full progress recovery and an updated Project Schedule, illustrating Contractor's plan for achieving timely completion of the Project Milestone's and the Project's Substantial Completion.

3.10.10.4 Should Owner deem Contractor's plan of action inadequate to achieve the desired acceleration to bring the Work back on the Project Schedule and achieve Substantial Completion on time, Owner shall have the right to order Contractor, at Contractor's sole expense, to take any corrective measures Owner deems necessary to expedite the progress of Work including, without limitations:

(1) increasing work forces and hours, to include Contractor working additional shifts of overtime;

(2) supplying additional manpower, equipment and facilities;

(3) re-sequencing the Work;

(4) expediting the fabrication and supply of materials; and/or

(5) other similar measures Owner may direct (hereafter **(1) – (5)** herein collectively referred to as "Extraordinary Measures").

Such Extraordinary Measures Owner directs shall continue until the progress of the Work complies with the Milestone required by the Contract Documents.

3.10.10.5 Owner's right to require Extraordinary Measures solely is for the purpose of ensuring Project Milestones and Substantial Completion of the Work is achieved within the Contract Time. Contractor shall not be entitled to an adjustment in the Contract Sum in connection with Extraordinary Measures required by Owner under or pursuant to this **Section 3.10**, except as may be provided under the provisions of **Section 4.3.11** herein.

3.10.10.6 Owner may exercise the rights furnished pursuant to this **Section 3.10.5** as frequently as Owner deems necessary to ensure Contractor's performance of the Work is in compliance with any milestone date or completion date(s) set forth in the Contract Documents.

3.10.10.7 If reasonably required by Owner, Contractor also shall prepare and furnish Project cash flow projections, manning data for critical activities and schedules for the purchase and delivery of all critical equipment and material, together with periodic updating thereof.

3.10.10.8 Contractor shall recommend to Owner and Design Consultant a schedule for procurement of long-lead time items, which will constitute part of the Work as required to meet the Project Schedule.

3.10.11 **PROJECT SCHEDULE TIME IMPACT ANALYSIS**

3.10.10.1 Contractor shall notify Owner when an impact may justify an extension of Contract time or adjustment of milestone dates. Said notice shall be made by Contractor in writing as soon as possible, but no later than the end of the next estimate period after the commencement of an impact or the notice for a change is given to Contractor. Not providing notice to Owner within twenty (20) calendar days after receipt will indicate Contractor's approval of the

time charges as shown on that time statement. Future consideration of that statement will not be permitted and Contractor forfeits its right to subsequently request a time extension or time suspension unless the circumstances are such that Contractor could not reasonably have knowledge of the impact by the end of the next estimate period.

3.10.11.1 When changes are initiated or impacts are experienced, Contractor shall submit to Owner a written Time Impact Analysis describing the influence of each change or impact. A "Time Impact Analysis" is an evaluation of the effects of changes in the construction sequence, contract, plans or site conditions on Contractor's plan for constructing the Project, as represented by the schedule. The purpose of the Time Impact Analysis is to determine if the overall Project has been delayed and, if necessary, to provide Contractor and Owner a basis for making adjustments to the Contract.

3.10.11.2 A Time Impact Analysis shall consist of one or all of the steps listed below:

(1) Establish the status of the Project before the impact using the most recent Project Schedule Update prior to the impact occurrence.

(2) Predict the effect of the impact on the most recent Project Schedule Update prior to the impact occurrence. This requires estimating the duration of the impact and inserting the impact into the schedule update. Any other changes made to the schedule including modifications to the calendars or constraints shall be noted.

(3) Track the effects of the impact on the schedule during its occurrence. Note any changes in sequencing and mitigation efforts.

(4) Compare the status of the work prior to the impact **(#1 above)** to the prediction of the effect of the impact **(#2 above)**, and to the status of the work during and after the effects of the impact are over **(#3 above)**. Note that if an impact causes a lack of access to a portion of the Project, the effects of the impact may extend to include a reasonable period for remobilization.

3.10.11.3 The Time Impact Analysis shall be electronically submitted to Owner. If the Project Schedule is revised after the submittal of a Time Impact Analysis but prior to its approval, Contractor promptly shall indicate in writing to Owner the need for any modification to its Time Impact Analysis. One (1) copy of each Time Impact Analysis shall be submitted within fourteen (14) calendar days after the completion of an impact. Owner may require **Step 1** and **Step 2** in **Section 3.10.11.2** herein of the Time Impact Analysis be submitted at the commencement of the impact, if needed to make a decision regarding the suspension of Contract time. Approval or rejection of each Time Impact Analysis

by Owner shall be made within fourteen (14) calendar days after receipt, unless subsequent meetings and negotiations are necessary.

3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 Contractor shall maintain, on Site and for Owner's use, one record copy of the Drawings, Specifications, Addenda, Change Orders and other Amendments, in good order and currently marked, to record field changes and selections made during construction, along with one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These record copies also shall be available to Design Consultant and shall be delivered to Design Consultant for submittal to Owner upon completion of the Work.

3.11.2 Contractor shall at all times maintain job records including, but not limited to, invoices, payment records, payroll records, daily reports, logs, diaries and job meeting minutes applicable to the Project. Contractor shall make such reports and records available for inspection by Owner, Design Consultant and/or their respective agents, during normal business hours if requested by Owner.

3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, illustrations, schedules, performance charts, brochures and other data prepared and furnished by Contractor or its agents, manufacturers, suppliers or distributors and which illustrate and detail some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical samples of materials, equipment or workmanship that are representative of some portion of the Work, furnished by the Contractor to Owner to assist Owner and Design Consultant in the establishment of workmanship and quality standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittals is to demonstrate, for those portions of the Work for which submittals are required by the Contract Documents, the way by which Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by Design Consultant is subject to the limitations of **Section 4.2.8** herein. Informational submittals, upon which Design Consultant is not expected to take responsive action, may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Design Consultant without action.

3.12.5 Contractor shall review for compliance with the Contract Documents, approve and submit to Design Consultant Shop Drawings, Product Data, Samples and

similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by Contractor may be returned by Design Consultant without action.

3.12.6 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, Contractor represents that it has determined and verified materials, field measurements and filed construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.7 Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal and review has been approved by Design Consultant. Design Consultant shall review and return such submittals within ten (10) calendar days or within a reasonable period so as to not delay the project.

3.12.8 The Work shall be in accordance with approved submittals, except that Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by Design Consultant's approval of Shop Drawings, Product Data, Samples or similar submittals unless Contractor specifically has informed Design Consultant in writing of such deviation at the time of submittal and:

(1) Design Consultant has given written approval in the specific deviation as a minor change in the Work; or

(2) a Change Order or Field Work Directive has been issued authorizing the deviation. Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by Design Consultant's approval thereof.

3.12.9 Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by Design Consultant on previous submittals. In the absence of such written notice, Design Consultant's approval of a resubmission shall not apply to such revisions.

3.12.10 Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services specifically are required by the Contract Documents for a portion of the Work or unless Contractor needs to provide such services in order to carry out Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment specifically are

required of Contractor by the Contract Documents, Owner and Design Consultant will specify all performance and design criteria that such services must satisfy. Contractor shall cause such services or certifications to be provided by a properly Texas-licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to Design Consultant. Owner and Design Consultant shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided Owner and Design Consultant have specified to Contractor all performance and design criteria that such services must satisfy. Pursuant to this **Section 3.12.10**, Design Consultant will review, approve or take other appropriate action on submittals only for the limited purpose of checking of conformance with information given and the design concept expressed in the Contract Documents. Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

3.13 USE OF SITE

3.13.1 Contractor shall confine construction equipment, the storage of materials and equipment and the operations of workers to areas permitted by law, ordinances, permits or the requirements of the Contract Documents and shall not unreasonably encumber the premises with construction equipment or other materials or equipment.

3.13.2 Contractor shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall Contractor subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

3.13.3 Contractor will abide by all applicable rules and regulations of Owner with respect to conduct, including smoking, parking of vehicles, security regulations and entry into adjacent facilities owned by Owner.

3.13.4 Contractor shall provide access to residents and businesses affected by the construction of this Project to the greatest extent possible, including providing temporary base and asphalt as needed.

3.13.5 Contractor shall erect and maintain on Site a Project Bulletin Board, accessible to all Contractor and Subcontractor employees, upon which Contractor shall post and maintain, throughout the Project's duration, all employment and safety information required by law and Contractor shall include information listing

Contractor's bonding and insurance agencies/providers, to include agency contact names, address and telephone numbers.

3.13.6 As applicable, Owner will have appropriate Temporary Bench Marks (hereafter referred to as "TBM") and a baseline (for both horizontal and vertical projects, as applicable) established. As of the date of the Notice To Proceed, it will be Contractor's responsibility to protect, preserve and reestablish (if required) the TBM and/or baseline. Construction staking and tolerances shall be in accordance with the "Manual of Practice for Land Surveying in the State of Texas Category 5".

3.13.7 As applicable, Contractor shall layout its work from an established baseline and TBM indicated on the drawings and shall be responsible for all measurements in connection with the layout. Contractor shall furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials and labor required to layout any part of the work. Contractor shall provide cut sheets to Owner's inspector at minimum seven (7) calendar days prior to construction of street and drainage work. Contractor shall establish the necessary offsets, hubs and guards marked showing control designation and offsets for SAWS Work, if present. Contractor shall provide cut sheets for improvements where Sewer profiles are provided for various phases of the project and cut sheets for Water profiles, if applicable. Contractor shall provide staking and preparation of cut sheets after receiving notice to proceed from Owner. If present, Contractor shall provide SAWS with cut sheets at minimum (7) calendar days prior to commence of SAWS work. Contractor shall be responsible for maintaining and preserving a baseline and TBM indicated on the drawings for duration of construction. If such marks are destroyed, Contractor shall replace them at its own expense. At the end of construction of the Project, Contractor shall provide Owner a grade certificate prepared by a Registered Professional Land Surveyor. This certificate shall state that the infrastructure is constructed in accordance to the construction documents or as approved by Owner and the Engineer of Record, which is noted on the record plan set.

3.14 CUTTING AND PATCHING

3.14.1 Contractor shall be responsible for all cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 Contractor shall not damage or endanger a portion of the Work or a fully or partially completed construction by either Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. Contractor shall not cut or otherwise alter such construction by Owner or a separate contractor except with written consent of Owner and, if Owner so designates, of such separate contractor and said consent shall not be unreasonably withheld. Contractor unreasonably shall not withhold from Owner or a Owner's separate contractor Contractor's consent to cutting or otherwise altering the Work.

3.14.3 Any part of the Work damaged by Contractor, either during installation or prior to Substantial Completion of the Work (or such earlier date established in **Section 9.9** herein), shall be repaired by Contractor so as to be equal in quality, appearance, serviceability and other respects to an undamaged item or part of the Work. Where this repair cannot fully be accomplished, a damaged item or part shall be replaced by Contactor.

3.15 CLEANING UP

3.15.1 During the progress of the Work, Contractor shall keep the Project Site and surrounding area including, but not limited to, creeks, drainage channels, easements and private property free from accumulations of waste materials, rubbish and other debris resulting from the Work. As applicable, Contractor shall clean, sweep, mop, brush and polish, as appropriate, the interior of the improvements and/or renovated areas including, but not limited to, any floors, carpeting, ducts, fixtures and ventilation units operated during construction, and shall clean exterior gutters, drainage, walkways, driveways and roofs of debris. If Contractor fails to clean up as provided in the Contract Documents, Owner may elect to do so and all costs incurred by Owner shall be paid by Contractor.

3.15.2 Prior to Substantial Completion of the Work, Contractor shall remove all waste materials, rubbish and debris from and about the premises, as well as all tools, appliances, construction equipment and machinery and surplus materials, and shall leave the Project Site clean and ready for occupancy by Owner. As applicable, Contractor shall clean, sweep, mop, brush and polish, to Owner's satisfaction, the interior of the improvements and/or renovated areas including, but not limited to, any floors, carpeting, ducts, fixtures and ventilation units operated during construction, and shall clean exterior gutters, drainage, walkways, driveways and roofs of debris. Contractor shall restore to their original condition those portions of the Site not designated for alteration by the Contract Documents. If Contractor fails to clean up the premises as provided in the Contract Documents, Owner may elect to do so and all costs incurred by Owner shall be paid by Contractor.

3.16 ACCESS TO WORK. Contractor shall provide Owner and Design Consultant access to Work in preparation and in progress, wherever located.

3.17 PATENT FEES AND ROYALTIES. Contractor shall pay all license fees and royalties and assume all costs incident to the use of the performance of the Work or the incorporation in the Work of any invention, design, process, product or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, product or device is specified in the Contract Documents for use in the performance of the Work and if to the actual knowledge of Owner its use is subject to patent rights or copyrights calling

for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by Owner in the Contract Documents.

3.18 INDEMNITY PROVISIONS

3.18.1 Contractor covenants and agrees to **HOLD HARMLESS AND UNCONDITIONALLY INDEMNIFY, PROTECT AND DEFEND** Owner, its elected officials, employees, officers, directors, volunteers and representatives of Owner, individually or collectively, from and against any and all third party claims, demands, actions, liabilities, liens, losses, damages, costs and expenses, of every kind and character whatsoever, including without limitation by enumeration the amount of any judgment, penalty, interest, court costs and reasonable legal fees incurred in connection with the same, or the defense thereof, for or in connection with loss of life or personal injury (including employees of Contractor and of Owner) damage to property (other than the Work itself and including property of Contractor and of Owner), but only to the extent caused by the negligent acts or omissions of, or incident to or in connection with or resulting from the negligent acts or omissions of, Contractor, its agents, servants, employees or its Subcontractors and their agents, servants and employees, in connection with the Work to be performed, services to be rendered or materials to be furnished under this Contract. Notwithstanding anything to the contrary included herein, in no event shall Contractor be liable for claims arising out of accidents resulting from the sole negligence of Owner, all without however, waiving any governmental immunity available to Owner under Texas Law and without waiving any defenses of the parties under Texas Law.

3.18.2 In addition to the above, Contractor also covenants and agrees to **HOLD HARMLESS AND UNCONDITIONALLY INDEMNIFY, PROTECT AND DEFEND** Owner, its elected officials, employees, officers, directors, volunteers and representatives of Owner, individually or collectively, from and against any and all third party claims, demands, actions, liabilities, liens, losses, damages, costs and expenses of every kind and character whatsoever, including, without limitation by enumeration, the amount of any judgment, penalty, interest, court costs and reasonable legal fees incurred in connection with the same, or the defense thereof, for or in connection with loss of life or personal injury (including employees of Contractor and of Owner) damage to property (other than the Work itself and including property of Contractor and of Owner), but only to the extent caused by the intentional or deliberate misconduct, grossly negligent, willful acts or omissions of Contractor, its agents, servants, employees, or its Subcontractors and their agents, servants and employees, or in connection with the Work to be performed, services to be rendered or materials to be furnished under this Contract, including but not limited to violations of any statute, regulation, ordinance or provision of this Contract. Notwithstanding anything to the contrary included herein, in no event shall Contractor be liable for claims arising out of accidents resulting from the sole negligence of Owner, all without however, waiving any governmental immunity available to Owner under Texas Law and without waiving any defenses of the parties under Texas Law.

3.18.3 **INTELLECTUAL PROPERTY INDEMNIFICATION.** Contractor shall protect, indemnify, and defend and/or handle at its own cost and expense any claim or action against Owner, its elected officials, employees, officers, directors, volunteers and representatives of Owner, individually or collectively, for infringement of any United States Patent, copyright or similar property right including, but not limited to, misappropriation of trade secrets and any infringement by Contractor and its employee or its Subcontractors and their agents, servants and employees, based on any deliverable or any other materials furnished hereunder by Contractor and used by either Owner or Contractor within the scope of this Agreement (unless said infringement results directly from Contractor's compliance with City's written standards or specifications). Contractor does not warrant against infringement by reason of Owner's or Design Consultant's design of articles or their use in combination with other materials or in the operation of any process. Contractor shall have the sole right to conduct the defense of any such claim or action and all negotiations for its settlement or compromise, unless otherwise mutually agreed upon, expressed in writing and signed by the parties hereto. Contractor agrees to consult with Owner's City Attorney during such defense or negotiations and make good faith efforts to avoid any position adverse to the interest of Owner. Owner will make available to Contractor any deliverables and/or works made for hire by Contractor necessary to the defense of Contractor against any claim of infringement for the duration of Contractor's legal defense.

3.18.4 If such infringement claim or action has occurred or, in Contractor's judgment, is likely to occur, Owner shall allow Contractor, at Contractor's option and expense, (unless such infringement results directly from Contractor's compliance with Owners written standards or specifications or by reason of Owner's or Design Consultants' design of articles or their use in combination with other materials or in the operation of any process for which the City shall be liable) to elect to:

(1) procure for Owner the right to continue using said deliverable and/or materials;

(2) modify such deliverable and/or materials to become non-infringing (provided that such modification does not adversely affect Owner's intended use of the deliverable and/or materials as contemplated hereunder);

(3) replace said deliverable and/or materials with an equally suitable, compatible and functionally equivalent non-infringing deliverable and/or materials at no additional charge to Owner; or

(4) if none of the foregoing alternatives is reasonably available to Contractor, upon written request, Owner shall return the deliverable and/or materials in question to Contractor and Contractor shall refund all monies paid by Owner, with respect to such deliverable and/or materials, and accept return of same. If any such cure provided for in this **Section 3.18** shall fail to satisfy the third-party claimant, these actions shall not relieve

Contractor from its defense and indemnity obligations set forth in this **Section 3.18**.

3.18.5 The indemnification obligations under this **Section 3.18** shall not be limited in any way by the limits of any insurance coverage or any limitation on the amount or type of damages, compensation or benefits payable by, for or to Contractor or any Subcontractor, supplier or any other individual or entity under any insurance policy, workers' compensation acts, disability benefit acts or other employee benefits acts.

3.18.6 **WORKMEN SAFETY.** The Indemnification hereunder shall include, without limiting the generality of the foregoing, liability which could arise to Owner, its agents, consultants and/or representatives or Design Consultant pursuant to State statutes for the safety of workmen and, in addition, all Federal statutes and rules existing there under for protection, occupational safety and health to workmen. It is agreed that the primary obligation of Contractor is to comply with these statutes in the performance by Contractor of the Work and that the obligations of Owner, its agents, consultants and representatives under said statutes are secondary to that of Contractor.

3.18.7 **OTHER PROVISIONS REGARDING INDEMNITY**

3.18.7.1 The provisions of this Indemnification solely are for the benefit of the Parties hereto and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

3.18.7.2 The indemnities contained herein shall survive the termination of this Contract for any reason whatsoever.

3.18.7.3 Contractor shall, within twenty-one (21) calendar days, advise Owner in writing of any potential or actual claim or demand against Owner or Contractor, as the case may be, known to Contractor and related to or arising out of Contractor's activities under this Contract and Contractor shall see to the investigation and defense of such claim or demand at Contractor's sole cost. Owner shall have the right, at its option and at its own expense, to participate in such defense without relieving Contractor of any of its obligations under this **Section 3.18**.

3.18.8 **DEFENSE COUNSEL.** Owner shall have the right to approve defense counsel, of which approval shall not be unreasonably withheld, to be retained by Contractor in fulfilling its obligation hereunder to defend and indemnify Owner, unless such right is expressly waived by Owner in writing. Contractor shall retain Owner-approved defense counsel within ten (10) calendar days of Owner's written notice that Owner is invoking its right to Indemnification under this Contract. If Contractor fails to retain counsel within such time period, Owner shall have the right to retain defense counsel on its own behalf and Contractor shall be liable for

all costs incurred by Owner. Owner also shall have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

3.19 REPRESENTATIONS AND WARRANTIES. Contractor represents and warrants the following to Owner (in addition to the other representations and warranties contained in the Contract Documents), as an inducement to Owner to execute this Contract, which representations and warranties shall survive the execution and delivery of the Contract and the Final Completion of the Work, that Contractor:

3.19.1 is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under the Contract Documents;

3.19.2 is able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so;

3.19.3 is authorized to do business in the State of Texas and properly is licensed by all necessary governmental, public and quasi-public authorities having jurisdiction over it, the Work and the site of the Project;

3.19.4 is acting within its duly authorized powers to execute this Contract and execute the performance and obligations thereof; and

3.19.5 had directed its duly authorized representative(s) to visit the Site of the Work, familiarize itself with the local conditions under which the Work is to be performed and correlated its observations with the requirements of the Contract Documents.

3.20 **BUSINESS STANDARDS.** Contractor, in performing it's obligations under this Contract, shall establish and maintain appropriate business standards, procedures and controls, including those necessary to avoid any real or apparent impropriety or adverse impact on the interest of Owner or affiliates. Contractor shall review with Owner, at a reasonable frequency during the performance of the Work hereunder, such business standards and procedures including, without limitation, those related to the activities of Contractor's employees, Subcontractors and agents in their relations with Owner's employees, consultants, agents, representatives, vendors, Subcontractors, other third parties and those relating to the placement and administration of purchase orders and subcontracts.

ARTICLE IV. ADMINISTRATION OF THE CONTRACT

4.1 DESIGN CONSULTANT. A Design Consultant is a person registered as an Architect pursuant to Tex. Occupations Code Ann., Chapter 1051, as a Landscape Architect pursuant to Texas Occupations Code, Chapter 1052, and/or a person licensed as a professional Engineer pursuant to Texas Occupations Code, Chapter 1001, or a firm employed by Owner to provide professional architectural or engineering services and exercising overall

responsibility for the design of a Project or a significant portion thereof, and performing certain contract administration responsibilities as set forth in its Contract and these General Conditions. If the employment of a Design Consultant is terminated, Owner shall employ a new Design Consultant whose status under the Contract Documents shall be that of the former Design Consultant.

4.2 ROLES IN ADMINISTRATION OF THE CONTRACT

4.2.1 Owner and Design Consultant will provide administration of the Contract, as described in the Contract Documents, and Design Consultant will be Owner's representative:

(1) during construction;

(2) until final payment is due; and

(3) with Owner's concurrence, from time to time during the one-year period for correction of Work described in **Article XII** herein.

Design Consultant only will have authority to act on behalf of Owner to the extent provided in the Contract Documents, unless otherwise modified in writing by Owner in accordance with other provisions of the Contract Documents.

4.2.2 Owner's instruction to Contractor may be issued through Design Consultant and Owner reserves the right to issue instructions directly to Contractor or through other designated Owner representatives. Contractor understands that Owner may modify the authority of such Design Consultant as provided in the terms of its contractual relationship with Design Consultant, and Owner shall, in such event, be vested with powers formerly exercised by such Design Consultant, provided written notice of such modification immediately shall be served on Contractor. Nothing herein shall authorize independent agreements between Contractor and Design Consultant, nor shall Design Consultant be deemed to have a legal relationship with Contractor.

4.2.3 Neither Design Consultant nor Owner will have control over, charge of nor be responsible for the construction means, methods or techniques, or for the safety precautions, quality control program and other programs in connection with the Work, since these solely are Contractor's rights and responsibilities under the Contract Documents. Sequencing and procedures will be coordinated and agreed upon by Owner, Design Consultant and Contractor.

4.2.4 Design Consultant will not be responsible for Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. Design Consultant will not have control over, charge of and will not be responsible for acts or omissions of Contractor, Subcontractor, their respective agents, employees or any other persons or entities performing portions of the Work.

4.2.5 Owner and Contractor shall endeavor to communicate with each other directly, through Design Consultant and/or through the ODR about matters arising out of or relating to the Contract. Communications by and with Design Consultant's consultants shall be through Design Consultant. Communications by Owner and Design Consultant with Contractor's employees Subcontractors and material suppliers shall be through Contractor. All communications by and with Owner's separate contractors shall be through Owner.

4.2.6 Design Consultant will review and approve or take other appropriate action upon Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. Design Consultant will perform these reviews in a timely fashion so as to not delay the Work. Design Consultant promptly will respond to submittals such as Shop Drawings, Product Data and Samples pursuant to the procedures set forth in the Project Specifications. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of equipment or systems, all of which remain the responsibility of Contractor as required by the Contract Documents. Design Consultant's review of Contractor's submittals shall not relieve the Contractor of the obligations under **Sections 3.3, 3.5** and **3.12** herein. Design Consultant's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by Design Consultant, any construction means, methods, techniques, sequences or procedures. Design Consultant's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.7 Upon written request of Owner or Contractor, Design Consultant will issue its interpretation of the requirements of the plans and specifications. Design Consultant's response to such requests will be made in writing within a time limit agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of Design Consultant shall be furnished in compliance with this **Section 4.2**, then no delay will be recognized on account of any failure by Design Consultant to furnish such interpretations except for actual substantiated delays, for which Contractor is not responsible, occurring more than fifteen (15) calendar days after written request is made for the interpretations.

4.2.8 Interpretations and decisions of Design Consultant will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings.

4.2.9 Design Consultant's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents and not expressly overruled in writing by Owner.

4.3 CLAIMS AND DISPUTES

4.3.1 **DEFINITION.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, an adjustment or interpretation of Contract terms, payment of money, extension of time or other relief, with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. Except as contemplated by **Section 8.2** herein, every Claim of Contractor, whether for additional compensation, additional time or other relief including, but not limited to, claims arising from concealed conditions, shall be signed and sworn to by an authorized corporate officer (if not a corporation, then an official of the company authorized to bind Contractor by his/her signature) of Contractor, verifying the truth and accuracy of the Claim. The responsibility to substantiate a Claim shall rest with the party making the Claim.

4.3.2 **TIME LIMIT ON CLAIMS.** Except for those Claims resulting from unusually severe weather, as addressed in **Section 4.3.6** herein, Contractor Claims must be initiated within fifteen (15) calendar days after occurrence of the event giving rise to such Claim. Claims by Contractor must be submitted by written notice to both Owner and Design Consultant. Claims by Owner must be submitted by written notice to Contractor. Failure by Contractor to submit written notice of the claim within fifteen (15) calendar days shall constitute a waiver of such claim.

4.3.3 **CONTINUING CONTRACT PERFORMANCE.** Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in **Sections 4.5.1, Section 9.7.1** and **Article 14** herein, Contractor shall proceed diligently with performance of the Contract and Owner shall continue to make payments in accordance with the Contract Documents.

4.3.4 **CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS.** If conditions are encountered at the Site which either are subsurface or are otherwise concealed physical conditions which were not known to Contractor and which differ materially from those indicated in the Contract Documents or in the reports of investigations and tests of subsurface and latent physical conditions provided by Owner to Contractor prior to the preparation by Contractor of its Bid, as referred to above, or are unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents in the general vicinity of the Project site, then Contractor promptly shall notify Owner and Design Consultant of such conditions before conditions are disturbed, and in no event more than three (3) workdays after first observation of the conditions. Upon notification by Contractor, Design Consultant promptly will investigate such conditions and report its findings to Owner. If Owner and Contractor cannot agree on an adjustment to the Contract Sum or Contract Time, the adjustment shall be subject to dispute resolution pursuant to **Section 4.5** herein.

4.3.5 **CLAIMS FOR ADDITIONAL COST.** If Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided in this **Section 4.3** shall

be given and accepted by Owner before proceeding to execute the Work, provided that prior notice is not required for Claims relating to an emergency endangering life or property. Contractor shall file a Claim in accordance with this **Section 4.3** if Contractor believes additional cost is involved for reasons including, but not limited to:

(1) a written interpretation from Design Consultant;

(2) an order by Owner to stop the Work where Contractor was not at fault;

(3) a written order for a minor change in the Work issued by Design Consultant;

(4) failure of payment by Owner;

(5) termination of the Contract by Owner for convenience;

(6) Owner's suspension; or

(7) other reasonable grounds.

4.3.6 **CLAIMS FOR ADDITIONAL TIME**

4.3.6.1 If Contractor wishes to make Claim for an increase in the Contract Time, written notice, as required in this **Section 4.3**, shall be given. Contractor's Claim shall include an estimate of probable impact of delay on progress of the Work in accordance with **Section 3.10.11** herein. In the case of a continuing delay, only one Claim is necessary.

4.3.6.2 Contractor shall be entitled to an extension of the Contract Time for delays or disruptions due to unusually severe weather in excess of that normally experienced at the job site, as determined from climatological data set forth by National Weather Service and which affects the Project's critical path. Contractor shall bear the entire economic risk of all weather delays and disruptions. Contractor shall not be entitled to any increase in the Contract Sum by reason of such delays or disruptions. With regard to Vertical projects with Owner, requests for an extension of time, pursuant to this **Section 4.3.6**, shall be submitted to Owner and Design Consultant not later than the fifteenth (15th) calendar day of the month following the month during which the delays or disruptions occurred and shall include documentation and all details reasonably available, demonstrating the nature and duration of the delays or disruptions and their effect on the critical path of the Schedule. With regard to Horizontal projects with Owner, upon Contractor reaching Substantial Completion, Owner and Contractor will look back at the entire duration of the calendar day Project and review the totality of what Contractor claims were unusually severe weather disruptions. If the Project was delayed or disrupted due to unusually severe weather in excess of that normally experienced over the

entire duration of the Project, Contractor may make a Claim for an extension of the Contract Time for delays or disruptions due to unusually severe weather in excess of that normally experienced at the job site, as determined from climatological data set forth by National Weather Service and which affects the Project's critical path. Any time extension granted to Contractor for either Vertical or Horizontal projects under **Section 4.3.6** shall be non-compensatory.

4.3.7 **INJURY OR DAMAGE TO PERSON OR PROPERTY.** If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party or an act or omission of others for whose acts such other party legally is responsible (including, with respect to Owner, the acts or omissions of Owner's separate contractors), written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding three (3) calendar days after the discovery of the injury or damage. The written notice shall provide sufficient detail to enable the other party to investigate the injury or damage.

4.3.8 **CHANGE IN UNIT PRICES.** As applicable, if unit prices are stated in the Contract Documents or subsequently agreed upon by Owner and Contractor and if quantities originally contemplated are materially changed in a proposed Change Order or Field Work Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to Owner or Contractor, the applicable unit prices shall be equitably adjusted.

4.3.9 **CLAIMS FOR CONSEQUENTIAL DAMAGES.** Except as otherwise provided in this Contract, in calculating the amount of any Claim or any measure of damages for breach of contract (such provision to survive any termination following such breach), the following standards will apply both to Claims by Contractor and to Claims by Owner:

4.3.9.1 No consequential, indirect, incidental, punitive or exemplary damages will be allowed, whether or not foreseeable, regardless of whether based on breach of contract, tort (including negligence), indemnity, strict liability or other bases of liability.

4.3.9.2 No recovery shall be based on a comparison of planned expenditures to total actual expenditures, on estimated losses of labor efficiency, on a comparison of planned manloading to actual manloading or on any other similar analysis that is used to show total cost or other damages.

4.3.9.3 Damages are limited to extra costs specifically shown to directly have been caused by a proven wrong for which the other party is claimed to be responsible.

4.3.9.4 The maximum amount of any recovery for delay, to the extent damages for delay are not otherwise disallowed by the terms of the Contract Documents, shall be as is provided in **Article VIII** herein.

4.3.9.5 No damages will be allowed for home office overhead or other home office charges or any Eichleay formula calculation, except or unless as expressly authorized by the Contract Documents.

4.3.9.6 No profit will be allowed on any damage Claim, except or unless as expressly authorized by the Contract Documents.

4.3.10 **SUBCONTRACTOR PASS-THROUGH CLAIMS.** In the event that any Subcontractor of Contractor asserts a Claim to Contractor that Contractor seeks to pass through to Owner under the Contract Documents, any entitlement to submit and assert the Claim as to Owner shall be subject to:

4.3.10.1 the requirements of **Section 4.3** herein of these General Conditions; and

4.3.10.2 the following additional three (3) requirements listed below, all three of said additional requirements shall be conditions precedent to the entitlement of Contractor to seek and assert such Claim against Owner:

(1) Contractor shall:

(a) have direct legal liability as a matter of contract, common law, or statutory law to Subcontractor for the claim that Subcontractor is asserting; or

(b) have entered into a written liquidating agreement with Subcontractor, prior to the Claim's occurrence, under which Contractor has agreed to be legally responsible to the Subcontractor for pursing the assertion of such Claim against Owner under said Contract and for paying to Subcontractor any amount that may be recovered, less Contractor's included markup (subject to the limits in the Contract Documents for any markup). The relationship, liability or responsibilities shall be identified in writing by Contractor to Owner at the time such Claim is submitted to Owner and a copy of any liquidating agreement shall be included by Contractor in the Claim submittal materials.

(2) Contractor shall have reviewed the Claim of the Subcontractor prior to its submittal to Owner and independently shall have evaluated such Claim in good faith to determine the extent to

which the Claim is believed in good faith to be valid. Contractor shall inform Owner that Contractor has made a review, evaluation, and determination that the Claim is made in good faith and is believed to be valid.

(3) Subcontractor making the Claim to Contractor shall certify to both Contractor and Owner that it has compiled, reviewed and evaluated the merits of such Claim and that the Claim is believed in good faith by Subcontractor to be valid. A copy of the certification by Subcontractor shall be included by Contractor in the Claim submittal materials.

4.3.10.3 Any failure of Contractor to comply with any of the foregoing requirements and conditions precedent with regard to any such Claim shall constitute a waiver of any entitlement to submit or pursue such Claim.

4.3.10.4 Receipt and review of a Claim by Owner under this **Section 4.3** shall not be construed as a waiver of any defenses to the Claim available to Owner under the Contract Documents or at law.

4.3.11 **OWNER'S RIGHT TO ORDER ACCELERATION AND TO DENY CLAIMED AND APPROPRIATE TIME EXTENSIONS, IN WHOLE OR IN PART.** Contractor acknowledges and agrees that Substantial Completion of the Work by or before the Scheduled Completion Date is of substantial importance to Owner. The following provisions, therefore, will apply:

4.3.11.1 If Contractor falls behind the approved construction schedule for whatever reason, Owner shall have the right, in Owner's sole discretion, to order Contractor to develop a schedule recovery plan to alter its work sequences or to otherwise accelerate its progress in such a manner as to achieve Substantial Completion on or before the Contract Time completion date or such other date as Owner reasonably may direct. Upon receipt, Contractor shall take any and all action necessary to comply with Owner's order. In such event, any possible right, if any, of Contractor to additional compensation for any acceleration shall be subject to the terms of this **Section 4.3.11**.

4.3.11.2 In the event Owner agrees that Contractor is entitled to an extension of Contract Time and Contractor properly has initiated a Claim for a time extension in accordance with **Section 4.3(a)** herein, Owner shall have the right, in Owner's sole discretion, to deny any portion of Contractor's Claim for an extension of Contract Time and order Contractor to exercise its commercially reasonable efforts to achieve Substantial Completion on or before the date that would have been required, but for the existence of the event giving rise to the Claim, by giving written notice to Contractor provided within fourteen (14) calendar days after receipt of Contractor's

Claim. If Owner denies Contractor's claim for an extension of Contract Time under this **Section 4.3.11**, either in whole or in part, Contractor shall proceed to prosecute the Work in such a manner as to achieve Substantial Completion on or before the then-existing Scheduled Completion Date. If, after initiating good faith acceleration efforts and is it shown that, through no fault of Contractor, Contractor fell behind on the approved construction schedule and Contractor still is unable to achieve Substantial Completion within the originally scheduled Contract Time, Owner will not be entitled to liquidated damages. Nothing in this **Section 4.3.11.2** shall prohibit Contractor from filing a Claim for an extension of time Contractor feels it may be owed.

4.3.11.3 If Owner orders Contractor to accelerate the Work under **Section 4.3.11.2** herein, and Contractor would have been entitled to a time extension for a reason specifically allowed under the Contract Documents for an amount of time that would have justified approval by Owner if not for the need and right to complete the Project within the stipulated period, Contractor may initiate a Claim for schedule recovery or acceleration costs, pursuant to **Section 4.3.1** herein. Any resulting Claim for these costs properly initiated by Contractor under **Section 4.3.1** herein shall be limited to those reasonable and documented direct costs of labor, materials, equipment and supervision solely and directly attributable to the actual recovery or acceleration activity necessary for Contractor to bring the Work back within the then existing approved construction schedule. These direct costs of Contractor include, but are not limited to, the premium portion of overtime pay for additional crew, shift, or equipment costs, if requested in advance by Contractor and approved in writing by Owner. A percentage markup for the prorated cost of premium on the existing performance and payment bonds and required insurance, profit and field overhead, not to exceed the markups permitted by this Contract, will be allowed on the claimed costs. **NO OTHER MARKUP FOR PROFIT, OVERHEAD (INCLUDING, BUT NOT LIMITED TO, HOME OFFICE OVERHEAD) OR ANY OTHER COSTS WILL BE ALLOWED ON ANY ACCELERATION CLAIM**. Owner shall not be liable for any costs related to an acceleration claim other than those described in this **Section 4.3.11**.

4.3.12 **NO WAIVER OF GOVERNMENTAL IMMUNITY.** Nothing in this contract shall be construed to waive Owner's Governmental Immunity from a lawsuit, which Immunity is expressly retained to the extent it is not clearly and unambiguously waived by State law.

4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 Claims by Contractor against Owner and Claims by Owner against Contractor, including those alleging an error or omission by Design Consultant but excluding those arising under **Section 10.3** and **Section 10.5** herein, shall be referred initially to Design Consultant for consideration and recommendation to Owner.

4.4.2 An initial recommendation by Design Consultant shall be required as a condition precedent to mediation or litigation of all Claims by the parties arising prior to the date final payment is due, unless thirty (30) calendar days have passed after the Claim has been referred to Design Consultant with no recommendation having been rendered by Design Consultant.

4.4.3 Design Consultant will review Claims and, within ten (10) work days of receipt of a Claim, take one or more of the following actions:

(1) request additional supporting data from the party making the Claim;

(2) issue an initial recommendation;

(3) suggest a compromise; or

(4) advise the parties that Design Consultant is unable to issue an initial Recommendation, due to a lack of sufficient information or conflict of interest.

4.4.4 Following receipt of Design Consultant's initial recommendation regarding a Claim, Owner and Contractor shall attempt to reach agreement as to any adjustment to the Contract Sum and/or Contract Time. If no agreement is reached, either party may request mediation of the dispute, pursuant to **Section 4.5** herein.

4.4.5 If Design Consultant requests either or any party to provide a response to a Claim or to furnish additional supporting data, such requested party shall provide a response or the requested supporting data to Design Consultant, advise Design Consultant when the response or supporting data will be furnished or advise Design Consultant that no response of supporting data will be furnished.

4.4.6 With receipt of all information requested by Design Consultant, Design Consultant shall review the Claim and all received information within ten (10) calendar days of receipt of the information and shall take one of the following actions:

(1) issue a recommendation;

(2) suggest a compromise; or

(3) advise the parties Design Consultant is unable to issue a recommendation due to lack information or conflict of interest.

4.4.7 Upon Design Consultant's action or inaction, the two parties may agree to accept recommendations made by either party or may request mediation of the dispute pursuant to **Section 4.5** herein.

4.4.8 **WAIVER OF LIEN.** It is understood that, by virtue of this Contract, no mechanic, contractor, material man, artisan or laborer, whether skilled or unskilled, ever shall, in any manner, have a claim or acquire any lien upon the building or any of the improvements of whatever nature or kind so erected or to be erected by virtue of this Contract, nor upon any of the land upon which said building or any of the improvements are so erected, built or situated.

4.5 ALTERNATIVE DISPUTE RESOLUTION

4.5.1 **CONTINUATION OF WORK PENDING DISPUTE RESOLUTION.** Each party is required to continue to perform its obligations under this Contract pending the final resolution of any dispute arising out of or relating to this Contract, unless it would be impossible or impracticable under the circumstances then present.

4.5.2 **REQUIREMENT FOR SENIOR LEVEL NEGOTIATIONS.** Before invoking mediation or any other alternative dispute process set forth herein, the parties to this Contract agree that they first shall try to resolve any dispute arising out of or related to this Contract through discussions directly between those senior management representatives within their respective organizations who have overall managerial responsibility for similar projects. Both Owner and Contractor agree that this step shall be a condition precedent to use of any other alternative dispute resolution process. If the parties' senior management representatives cannot resolve the dispute within thirty (30) calendar days after a party delivers a written notice of such dispute to the other, then the parties shall proceed with the alternative dispute resolution process contained in **Section 4.5** herein, including mediation and/or litigation. All negotiations pursuant to this **Section 4.5** are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

4.5.3 **MEDIATION.** In the event that Owner and/or Contractor contend that the other has committed a material breach of this Contract, or the two parties can not reach a resolution of a claim or dispute pursuant to **Section 4.4** herein, as a condition preceding to filing a lawsuit, either party shall request mediation of the dispute with the following requirements:

4.5.3.1 Request for mediation shall be in writing, and shall request that the mediation commence not less than thirty (30) or more than ninety (90) calendar days following the date of the request, except upon agreement of both parties.

4.5.3.2 In the event Owner and Contractor are unable to agree to a date for the mediation or to the identity of the mediator(s) within thirty (30) calendar days following the date of the request for mediation, all conditions precedent in this **Section 4.5** shall be deemed to have occurred.

4.5.3.3 The parties shall share the mediator's fee and any mediation filing fees equally. Venue for any mediation or lawsuit arising under this Contract

shall be in Bexar County, Texas. Any agreement reached in mediation shall be enforceable as a settlement agreement in any court having jurisdiction thereof. No provision of this Contract shall waive any immunity or defense. No provision of this Contract is consent to a suit.

4.6 INTERNET-BASED PROJECT MANAGEMENT SYSTEMS. At its option, Owner may administer its design and construction management through an Internet-based Project Management system. In such cases, Contractor shall conduct communication through this medium and perform all Project-related functions utilizing this management system, to include all correspondences, submittals, Requests for Information, vouchers, payment requests and processing, Amendments, Change Orders and other administrative activities. When such a management system is employed, Owner shall administer the software, provide training to Project Team Members and shall make the software accessible via the Internet to all Project Team Members.

ARTICLE V. SUBCONTRACTORS

5.1 DEFINITION

A Subcontractor is a person or entity that has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of Subcontractor. The term "Subcontractor" does not include a separate contractor or Subcontractor of a separate contractor.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Contractor shall, prior to entering into an agreement with such Subcontractor, notify Owner in writing of the names of all proposed first-tier Subcontractors for the Work.

5.2.2 Contractor shall not employ any Subcontractor or other person or organization (including those who are to furnish the principal items of materials or equipment), whether initially or as a substitute, against whom Owner may have reasonable objection. A Subcontractor or other person or organization identified in writing to Owner, prior to the Notice of Award and not objected to in writing by Owner prior to the Notice of Award, will be deemed acceptable to Owner. Acceptance of any Subcontractor, other person or organization by Owner shall not constitute a waiver of any right of Owner to reject defective Work. If Owner, after due investigation, has reasonable objection to any Subcontractor, other person or organization proposed by Contractor after the Notice of Award, Contractor will be required to submit an acceptable substitute. Contractor shall not be required to employ any Subcontractor, other person or organization against whom Contractor has reasonable objection.

5.2.3 Contractor fully shall be responsible to Owner for all acts and omissions of its Subcontractors, persons and organizations directly or indirectly employed by them

and persons and organizations for whose acts any of them may be liable to the same extent that Contractor is responsible for the acts and omissions of persons directly employed by Contractor. Nothing in the Contract Documents shall create any contractual relationship between Owner and any Subcontractor or other person or organization having a direct contract with Contractor, nor shall it create any obligation on the part of Owner to pay or to see to the payment of any moneys due any Subcontractor or other person or organization, except as may otherwise be required by law. Owner may furnish to any Subcontractor or other person or organization, to the extent practicable, evidence of amounts paid to Contractor on account of specific Work done.

5.2.4 The divisions and sections of the Specifications, as well as the identifications of any Drawings, shall not control Contractor in dividing the Work among Subcontractors or delineating the Work to be performed by any specific trade.

5.2.5 All Work performed for Contractor by a Subcontractor will be performed pursuant to an appropriate agreement between Contractor and Subcontractor which specifically binds Subcontractor to the applicable terms and conditions of the Contract Documents for the benefit of Owner.

5.2.6 **SBEDA/DBE REPORTING AND AUDITING.** During the term of the contract, Contractor must report the actual payments to all SBEDA or DBE (as applicable) Subcontractors and Suppliers in the time intervals and format prescribed by Owner. Owner reserves the right, at any time during the term of this Contract, to request additional information, documentation or verification of payments made to such Subcontractors and suppliers in connection with this Contract. Verification of amounts being reported may take the form of requesting copies of canceled checks paid to SBEDA or DBE Subcontractors and suppliers and/or confirmation inquiries directly to the SBEDA or DBE participants. Proof of payments, such as copies of canceled checks, properly must identify the Project name or Project number to substantiate a SBEDA or DBE payment for the Project.

5.2.7 **SMALL BUSINESS SUBCONTRACTOR SUBSTITUTIONS.** Reference SBEDA or DBE Requirements in Supplementary Conditions for Substitution of Subcontractors. Failure to follow such procedures is an event of default under this Contract and may be grounds for termination.

5.3 SUB-CONTRACTUAL RELATIONS

5.3.1 By appropriate agreement, written where legally required for validity, Contractor shall require each Subcontractor, to the extent of the Work to be performed by Subcontractor, to be bound to the Contractor by terms of the Contract Documents and to assume toward Contractor all the obligations and responsibilities, including the responsibility for safety of Subcontractor's Work and workers, which Contractor, by these Documents, assumes toward Owner and Design Consultant.

Each Subcontractor agreement shall preserve and protect the rights of Owner and Design Consultant under the Contract Documents, with respect to the Work to be performed by Subcontractor, so that subcontracting thereof will not prejudice such rights. Where appropriate, Contractor shall require each Subcontractor to enter into similar agreements with Sub-Subcontractors. Contractor shall make available to each proposed Subcontractor, prior to the execution of all Subcontractor agreement(s), copies of the Contract Documents to which Subcontractor(s) will be bound. Subcontractors similarly will make copies of applicable portions of such documents available to their respective proposed Sub-Subcontractors.

5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

Each Subcontractor agreement for a portion of the Work assigned by Contractor to Owner shall provided that:

5.4.1 assignment is effective only after termination of the Contract by Owner and only for those Subcontractor agreements which Owner accepts by notifying Subcontractor and Contractor in writing; and

5.4.2 assignment is subject to the prior rights of the Surety, if any, obligated under bond relating to the Contract.

5.4.3 upon any such assignment, if the Work has been suspended for more than thirty (30) calendar days, Subcontractor's compensation equally shall be adjusted for increase in cost resulting from the suspension.

ARTICLE VI. CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTS

6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 Owner reserves the right to perform construction or operations related to the Project with Owner's own forces and to award separate contracts in connection with other portions of the Project or other construction or operations on the Site under General Conditions of the Contract identical or substantially similar to these. If Contractor claims that a delay or additional cost is involved, due to such action by Owner, Contractor shall make a Claim as provided in **Section 4.3** herein.

6.1.2 When separate contracts are awarded for different portions of the Project or for other construction or operations on the Project Site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor that executes each separate Owner-Contractor Agreement.

6.1.3 Owner shall provide for coordination of the activities of Owner's own forces and of each separate contractor with the Work of Contractor and Contractor fully shall cooperate with said coordination. Contractor shall participate with other separate contractors and Owner in reviewing all construction schedules when directed by Owner to do so. Contractor shall make any revisions to its construction schedule

deemed necessary after said joint review and mutual agreement. The revised construction schedules then shall constitute the schedules to be used by Contractor, separate contractors and Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when Owner and Owner's own forces perform construction or operation related to the Project, Owner shall be subject to the same obligations and to have the same rights that apply to Contractor under these General Conditions and the Contract Documents.

6.2 MUTUAL RESPONSIBILITY

6.2.1 Contractor shall afford Owner and Owner's separate contractor(s) reasonable opportunity for the introduction and storage of materials and equipment, the performance of their activities and the coordination of Contractor's construction and operations with theirs, as required by the Contract Documents.

6.2.2 If part of Contractor's Work depends, for proper execution or results, upon the construction or operations by Owner or a separate contractor, Contractor shall, prior to proceeding with that portion of the Work, promptly report to Owner apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of Contractor to so report shall constitute an acknowledgment that Owner's separate contractor's completed or partially completed construction is fit and proper to receive Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 Owner shall be reimbursed by Contractor for costs incurred by Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of Contractor. Owner shall be responsible to Contractor for costs incurred by Contractor because of delays, improperly timed activities and damage to the Work or defective construction of Owner's separate contractor(s).

6.2.4 Contractor promptly shall remedy any damage wrongfully caused by Contractor or its Subcontractor(s) to any completed or partially completed construction or to property of Owner or Owner's separate contractor(s), as provided in **Section 10.2.5** herein.

6.2.5 Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for Contractor in **Section 3.14** herein.

6.3 OWNER'S RIGHT TO CLEAN UP. If a dispute arises among or between Contractor, Owner's separate contractor(s) and Owner, as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and

rubbish, Owner may clean up and those costs will be allocated amongst those parties responsible.

ARTICLE VII. CHANGES IN THE WORK

7.1 GENERAL

7.1.1 Changes in the Work may be accomplished, after the execution of the Contract and without invalidating the Contract, by Change Order, Field Work Directive/Force Account or order for a minor change in the Work that does not affect the Contract Time or the Contract Sum, subject to the limitations stated in this **Article VII** and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner and Contractor; a Field Work Directive requires a directive by Owner and, if necessary, Design Consultant and may or may not be agreed to by Contractor; and an order for a minor change in the Work that does not affect the Contract Time or the Contract Sum may be issued by Owner.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents and Contractor promptly shall proceed with the changed Work, unless otherwise provided in a Change Order, Field Work Directive or order for a minor change in the Work or in this **Article VII**.

7.1.4 Changes resulting from Change Orders, Field Work Directives or orders for minor changes shall be recorded by Contractor on the As-Built record documents.

7.2 CHANGE ORDERS

7.2.1 A Change Order is a written modification of the Contract signed by both Owner and Contractor (and approved by City Council, if required) that authorizes an addition, deletion or revision in the Work or an adjustment in the Contract Sum or the Contract Times and is issued on or after the Effective Date of the Agreement.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in **Section 7.3.4** herein.

7.2.3 Acceptance of a Change Order by Contractor shall constitute a full accord and satisfaction for any and all claims and costs of any kind, whether direct or indirect, including, but not limited to impact, delay or acceleration damages arising from the subject matter of the Change Order. Each Change Order shall be specific and final as to prices and any extensions of time, with no reservations or other provisions allowing for future additional money or time as a result of the particular changes identified and fully compensated in the Change Order. The execution of a Change Order by Contractor shall constitute conclusive evidence of Contractor's agreement to the ordered changes in the Work, cost and additional time, if any.

This Contract, as amended, forever releases any Claim against Owner for additional time or compensation for matters relating to or arising out of or resulting from the Work included within or affected by the executed Change Order. This release of any Claim applies to Claims related to the cumulative impact of all Change Orders and to any Claim related to the effect of a change on unchanged Work.

7.2.4 Owner or Design Consultant will prepare Change Orders and Field Work Directives and will have authority to order minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time. Such changes shall be effected by written order, which Contractor promptly shall carry out and record on the As-Built record documents.

7.2.5 Contractor and Subcontractors shall be entitled to include overhead and profit in any Change Order only as provided by Project Specifications.

7.3 FIELD WORK DIRECTIVES

7.3.1 A Field Work Directive is a written directive signed by Owner and, if necessary, Design Consultant directing a change in the Work prior to agreement on an adjustment, if any, in the Contract Sum or Contract time, or both. Owner may, by Field Work Directive and without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, with any changes to the Contract Sum and/or the Contract Time to be adjusted according to the terms of this **Section 7.3**.

7.3.2 A Field Work Directive shall be used in the absence of total agreement on the terms of a Change Order. Owner will issue a Field Work Directive to Contractor with a defined Not-To-Exceed dollar amount for the scope of Work defined.

7.3.3 Upon receipt of a Field Work Directive, Contractor promptly shall proceed with the change in the Work involved and, in writing, advise Owner of the Contractor's agreement or disagreement with the method, if any, provided in the Field Work Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.4 If the Field Work Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods, as applicable:

7.3.4.1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

7.3.4.2 prices, including unit prices, stated in the Contract Documents or

subsequently agreed upon;

7.3.4.3 cost to be determined in a manner agreed upon by Owner and Contractor and a mutually acceptable fixed or percentage fee; or

7.3.4.4 as provided in **Section 7.3.6** herein.

7.3.5 If Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall initially be determined by Design Consultant on the basis of reasonable costs and savings attributable to the change including, in case of an increase in the Contract Sum, as applicable, a reasonable allowance for overhead and profit. In such case, and also under **Section 7.3.4.**3 herein, Contractor shall keep and present, in such form as Owner may prescribe, an itemized and detailed accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this **Section 7.3.5** shall be limited to the following:

7.3.5.1 costs of all labor, including social security, old age and unemployment insurance, fringe benefits required by Law, agreement or custom, and workers' compensation insurance;

7.3.5.2 costs of all materials, supplies and equipment, including cost of transportation, storage installation, maintenance, dismantling and removal, whether incorporated or consumed;

7.3.5.3 rental costs of all machinery and equipment, exclusive of hand tools, whether rented from Contractor or others, including costs of transportation, installation, minor repairs and replacements, dismantling and removal;

7.3.5.4 expenses incurred in accordance with Contractor's standard personnel policy for travel approved in writing by Owner in advance;

7.3.5.5 costs of premiums for all bonds and insurance, permit fees and allowable sales, use or similar taxes related to the Work;

7.3.5.6 all additional costs of supervision and field office personnel directly attributable to the change; and

7.3.5.7 all payments made by the Contractor to Subcontractors.

7.3.6 The amount of credit to be allowed by Contractor to Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost of the deleted or change Work, plus Contractor's allocated percent for profit and overhead, as confirmed by Design Consultant, subject to any equitable adjustment recommended by Design Consultant and approved by Owner. When both additions and credits covering related Work or substitutions are involved in a

change, the allowance for overhead and profit shall be figured on the basis of net increase or decrease, if any, with respect to that change.

7.3.7 If Owner and Contractor agree with the determination made by Design Consultant concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

7.3.8 If Owner and Contractor can not reach an agreement on either an adjustment on the Contract Sum and Contract Time, pursuant to an issued Field Work Directive, Owner and Contractor shall execute a Change Order for the adjustment on the Contract Sum or Contract Time, if any, the parties do agree upon for the Work performed and Contractor reserves the right to file a Claim for any disagreements in Contract Sum or Contract Time not addressed in the Change Order, pursuant to **Section 4.4** herein. If Owner and Contractor can not agree on both the adjustment in the Contract Sum and the Contract Time associated with an issued Field Work Directive, Owner unilaterally shall file a Change Order listing Owner's adjustments in the Contract Sum and/or Contract Time and Contractor reserves the right to file a Claim for payment and/or time, pursuant to **Section 4.4** herein.

7.4 MINOR CHANGES TO THE WORK. Owner or Design Consultant shall have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on Owner and Contractor. Contractor promptly shall carry out such written orders and record such changes in the As-Built drawings.

7.5 TIME REQUIRED TO PROCESS CHANGE ORDERS

7.5.1 All responses by Contractor to proposal requests from Owner or Design Consultant shall be accompanied by a complete itemized breakdown of costs. Responses to proposal requests shall be submitted sufficiently in advance of the required work to allow Owner and Design Consultant a minimum of thirty (30) calendar days after receipt by Owner to review the itemized breakdown and to prepare or distribute additional documents as may be necessary. Each of Contractor's responses to proposal requests shall include a statement that the cost and additional time described and requested in Contractor's response represents the complete, total and final cost and additional Contract Time associated with the extra work, change, addition to, omission, deviation, substitution or other grounds for seeking extra compensation or additional time under the Contract Documents, without reservation or further recourse.

7.5.2 All Change Orders require written approval by either Owner or City Council or, where authorized by the state law and Owner ordinance, by Owner's City Manager or designee, pursuant to Administrative Action. The approval process requires a minimum of forty-five (45) calendar days after submission to Owner in final form with all supporting data. Receipt of a submission by Owner does not constitute

acceptance or approval of a proposal, nor does it constitute a warranty that the proposal will be authorized by Owner or City Council Resolution or Administrative Action. **THE TIME REQUIRED FOR THE APPROVAL PROCESS SHALL NOT BE CONSIDERED A DELAY AND NO EXTENSIONS TO THE CONTRACT TIME OR INCREASE IN THE CONTRACT SUM WILL BE CONSIDERED OR GRANTED AS A RESULT OF THIS PROCESS.** Pending the approval of a Change Order as described above, Contractor will proceed with the work under a pending Change Order only if directed in writing to do so by Owner.

ARTICLE VIII. TIME

8.1 PROGRESS AND COMPLETION

8.1.1 **TIME LIMITS STATED IN THE CONTRACT DOCUMENTS ARE OF THE ESSENCE OF THE CONTRACT.** By executing the Contract, Contractor confirms that the Contract Time is a reasonable period for performing the Work.

8.1.2 Contractor shall proceed with the Work expeditiously using adequate forces and shall achieve Substantial Completion within the Contract Time.

8.1.3 Nothing in this **Article VIII** shall be construed as prohibiting Contractor from working on Saturdays if it so desires and giving Owner at least the prerequisite forty-eight (48) hours written notice of intent to perform Work on Saturday, Sunday and holidays so that Owner's representative may be scheduled to observe/inspect said Work and only if Contractor has performed work on the Project during the same week of the requested Saturday, Sunday or holiday.

8.2 DELAYS AND EXTENSIONS OF TIME

8.2.1 Neither Owner nor Contractor, except as provided for in this **Section 8.2**, shall be liable to the other for any delay to Contractor's Work by reason of fire, act of God, riot, strike or any other cause beyond Owner's control. Should any of these listed factors delay the Work's critical path, as evidenced by a Time Impact Analysis developed by Contractor and verified by Design Consultant, Program Manager and Owner, Contractor shall receive an extension of the Contract Times equal to the delay if a written claim is made within five (5) calendar days of the delaying event and granted by Owner. Under no circumstances shall Owner be liable to pay Contractor any compensation for such delays. Note that any request for an extension of time due to delays or disruption caused by unusually severe weather are addressed in **Section 4.3.6.2** herein.

8.2.2 Should Contractor be delayed solely by the act, negligence or default of Owner or Design Consultant, and should any of these factors delay the Project's critical path, as evidenced by a Time Impact Analysis developed by Contractor and verified by Design Consultant, Program Manager and Owner, Contractor shall receive an extension of the Contract Time equal to the verified delay or portion thereof if a written claim is made within five (5) calendar days of the act, negligence or default of Owner or Design Consultant and granted by Owner. In addition, Contractor, upon timely notice to Owner, with substantiation by Owner and Design Consultant and upon approval of Owner, shall be compensated for its Project facilities and field management expenses on a per diem basis (said per diem includes the costs incurred by Contractor to administer its Work and does not include costs associated for any tier of Subcontractor or supplier to administer their Work. Compensation for Subcontractor's and supplier's compensable delay affecting the Project critical path shall be separate and apart from the per diem cost due and payable to the Contractor) for the particular Project delayed and for the period of the critical path delay attributable to the Owner-caused event. In no event will Contractor be entitled to home office or other off-site expenses or damages.

8.2.3 Claims relating to time shall be made in accordance with applicable provisions of **Section 4.3** herein.

8.2.4 This Contract does not permit the recovery of damages by Contractor for delay, disruption or acceleration, other than those described in **Section 8.2.2** herein, as provided under Section **4.3.11(3)** herein and those justified by a Time Impact Analysis. Contractor agrees that it fully shall be compensated for all delays solely by an extension of non-compensatory time or as contemplated in **Section 8.2.2** herein.

ARTICLE IX. PAYMENTS AND COMPLETION

9.1 CONTRACT SUM. The Contract Sum is stated in the Contract and, including authorized adjustments, is the total maximum not-to-exceed amount payable by Owner to Contractor for performance of the Work under the Contract Documents

9.2 SCHEDULE OF VALUES

9.2.1 A Schedule of Values for all of the Work shall be submitted by Contractor and shall include quantities and prices of items which, when added together, equal a contract Price and subdivides the Work into component parts in sufficient detail to serve as the basis for progress payments during performance of the Work. Where applicable, overhead and profit shall be included as a separate line item.

9.2.2 Before the first Application for Payment, Contractor shall submit to Owner and Design Consultant a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as Owner and Design Consultant may require. This schedule, unless objected to by Design Consultant or Owner, shall be used as a basis for reviewing Contractor's Applications for Payment.

9.3 APPLICATIONS FOR PAYMENT

9.3.1 Contractor shall submit Applications for Payment to Owner electronically. Contractor shall electronically attach to its Application for Payment all data substantiating Contractor's right to payment as Owner or Design Consultant may require, such as copies of requisitions from Subcontractors and material suppliers reflecting retainage, if provided for in the Contract Documents, and reflecting a deduction for Liquidated Damages, if applicable. Applications for Payment shall not include requests for payment for portions of the Work which Contractor does not intend to pay to a Subcontractor or material supplier, unless such Work has been performed by others whom Contractor intends to pay.

9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the Site for subsequent incorporation in the Work and verified by Owner. If approved in advance in writing by Owner, payment similarly may be made for materials and equipment suitably stored off the Site at a location agreed upon in writing and verified by Owner. Payment for materials and equipment stored on or off the Site shall be conditioned upon compliance by Contractor with procedures reasonably satisfactory to Owner to establish Owner's title to such materials and equipment or otherwise protect Owner's interest. Contractor solely shall be responsible for payment of all costs of applicable insurance, storage and transportation to the site for materials and equipment stored off the site.

9.3.3 Contractor warrants that, upon submittal of an Application for Payment, all Work for which payment previously has been received from Owner shall, to the best of Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of Contractor, Subcontractors, material suppliers or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work. **CONTRACTOR SHALL INDEMNIFY AND HOLD OWNER HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY CONTRACTOR, SUBCONTRACTORS OR ANYONE CLAIMING BY, THROUGH OR UNDER CONTRACTOR OR SUBCONTRACTOR(S) FOR ITEMS COVERED BY PAYMENTS MADE BY OWNER TO CONTRACTOR.**

9.3.4 By submission of an Application for Payment, Contractor certifies that there are no known liens or bond claims outstanding as of the date of said Application for Payment, that all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application and, except for such bills not paid but so included, there is no known basis for the filing of any liens or bond claims relating to the Work and that releases from all Subcontractors and Contractor's materialmen have been obtained in such form as to constitute an effective release of lien or claim under the laws of the State of Texas covering all Work theretofore performed and for which payment has been made by Owner to Contractor; provided if any of the foregoing is not true and

cannot be certified, Contractor will revise the certificate as appropriate and identify all exceptions to the requested certifications.

9.4 PAY APPLICATION APPROVAL

9.4.1 Design Consultant shall, within two (2) business days after receipt of Contractor's Application for Payment, either approve the Application for Payment or reject the Application for Payment and state on the electronic notification to Contractor and Owner the Design Consultant's reasons for withholding approval, as provided in **Section 9.5.1** herein.

9.4.2 The certification of an Application for Payment will constitute a representation by Design Consultant to Owner, based on Design Consultant's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of Design Consultant's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to any specific qualifications expressed by Design Consultant. The issuance of a Certificate for Payment further will constitute a representation that Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that Design Consultant has:

(1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work;

(2) reviewed construction means, methods, techniques, sequences or procedures;

(3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by Owner to substantiate Contractor's right to payment; or

(4) made any examination to ascertain how or for what purpose Contractor has used money previously paid on account of the Contract Sum.

9.5 DECISIONS TO REJECT APPLICATION FOR PAYMENT

9.5.1 The Application for Payment may be rejected to protect Owner for any of the following reasons:

9.5.1.1 Work not performed or defective ;

9.5.1.2 third party claims filed or reasonable evidence indicating a probable filing of such claims for which Contractor is responsible hereunder unless security acceptable to Owner is provided by Contractor;

9.5.1.3 failure of Contractor to make payments properly to Subcontractors or for labor, materials or equipment;

9.5.1.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum and Contractor has failed to provide Owner adequate assurance of its continued performance within a reasonable time after demand;

9.5.1.5 damage to Owner or another contractor;

9.5.1.6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;

9.5.1.7 persistent failure by Contractor to carry out the Work in accordance with the Contract Documents;

9.5.1.8 the applicable liquidated damages were not included in the Application for Payment;

9.5.1.9 billing for unapproved/unverified materials stored off Site; or

9.5.1.10 a current schedule update has not been submitted by Contractor.

9.5.2 Owner shall not be deemed in default by reason of rejecting Application for Payment as provided for in **Section 9.5.1** herein.

9.6 PROGRESS PAYMENTS

9.6.1 After the final approval of the Application for Payment, Owner may make payment in the manner and within the time provided in the Contract Documents.

9.6.2 During the latter part of each month, as the Work progresses on all Owner Contracts regardless of Contract Sum, Owner and Contractor shall determine the cost of the labor and materials incorporated into the Work during that month and actual invoiced cost of Contractor-acquired materials stored on the Project Site, and/or within off-site storage facilities either owned or leased by Contractor. Upon receipt of a complete and mathematically accurate Application for Payment from Contractor, Owner shall make payments, in accordance with **Article IX** herein, to Contractor within thirty (30) calendar days on Contracts totaling four hundred thousand dollars ($400,000.00) or less, based upon such cost determination and at the Contract prices in a sum equivalent to ninety percent (90%) of each such invoice. The remaining ten percent (10%) retainage shall be held by Owner until the Final Completion. However, where the Contract amount exceeds four hundred

thousand dollars ($400,000.00), installments shall be paid to Contractor at the rate of ninety-five percent (95%) of each monthly invoice within thirty (30) calendar days of Owner receipt of a complete and mathematically accurate Application for Payment from the Contractor, and the retainage held until Final Completion shall be five percent (5%).

9.6.3 Owner's payment of installments shall not, in any way, be deemed to be a final acceptance by Owner of any part of the Work, shall not prejudice Owner in the final settlement of the Contract account or shall not relieve Contractor from completion of the Work herein provided.

9.6.4 Contractor shall, within ten (10) calendar days following receipt of payment from Owner, pay all bills for labor and materials performed and furnished by others in connection with the construction, furnishing and equipping of the improvements and the performance of the work, and shall, if requested, provide Owner with written evidence of such payment. Contractor's failure to make payments or provide written evidence of such payments within such time shall constitute a material breach of this contract, unless Contractor is able to demonstrate to Owner bona fide disputes associated with the unpaid Subcontractor(s) or supplier(s) and its/their work. Contractor shall include a provision in each of its subcontracts imposing the same written documentation of payment obligations on its Subcontractors as are applicable to Contractor hereunder, and if Owner so requests, shall provide copies of such Subcontractor payments to Owner. If Contractor has failed to make payment promptly to Contractor's Subcontractors or for materials or labor used in the Work for which Owner has made payment to the Contractor, Owner shall be entitled to withhold payment to Contractor to the extent necessary to protect Owner.

9.6.5 Owner and/or Design Consultant shall, if practicable and upon request, furnish to Subcontractor information regarding percentages of completion or amounts applied for by Contractor and action taken thereon by Owner and Design Consultant on account of portions of the Work done by such Subcontractor.

9.6.6 Neither Owner nor Design Consultant shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law, if any.

9.6.7 Payments to material suppliers shall be treated in a manner similar to that provided in **Section 9.6.2, Section 9.6.3** and **Section 9.6.4** herein regarding Subcontractors.

9.6.8 A Certificate for Payment, a progress payment or a partial or entire use or occupancy of the Project by Owner shall not constitute acceptance of Work that was not performed or furnished in accordance with the Contract Documents.

9.6.9 Contractor shall, as a condition precedent to any obligation of Owner under this Contract, provide to Owner payment and performance bonds in the full penal amount of the Contract in accordance with Texas Government Code Chapter 2253.

9.7 SUBSTANTIAL COMPLETION

9.7.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof sufficiently is complete in accordance with the Contract Documents so that Owner may occupy or utilize the Work for its intended use. In the event Substantial Completion is not achieved by the designated date, or as that date may be extended by Change Order(s), Owner may withhold payment of sums necessary to pay the estimated Liquidated Damages due Owner until Final Completion is achieved. Owner also shall be entitled, at any time, to deduct out of any sums due to Contractor any or all Liquidated Damages due Owner in accordance with the Contract between Owner and Contractor.

9.7.2 When Contractor considers that the Work, or a portion thereof which Owner agrees to accept separately, is Substantially Complete, Contractor shall prepare and submit to Owner and Design Consultant a preliminary comprehensive list of items to be completed or corrected prior to Final Completion and final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

9.7.3 Upon receipt of Contractor's list of items to be completed or corrected, Owner and Design Consultant will make a Site inspection to determine whether the Work or designated portion thereof is Substantially Complete. If Owner's or Design Consultant's inspection discloses any item, whether or not it was included on Contractor's list of items to be completed or corrected, which is not sufficiently complete or correct in accordance with the Contract Documents so that Owner may occupy or utilize the Work or designated portion thereof for its intended use, Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon written notification by Owner or Design Consultant. In such case, Contractor then shall submit a request for another inspection by Owner and Design Consultant to determine Substantial Completion and Contractor shall be responsible for all costs incurred and associated with re-inspection.

9.7.4 When the Work or designated portion thereof is Substantially Complete, Design Consultant or Owner shall prepare a Certificate of Substantial Completion

(Vertical Projects) or a Letter of Conditional Approval (Horizontal Projects) which shall:

(1) establish the date of Substantial Completion (which will be the date on which the Work met the requirements under the Contract Documents for Substantial Completion);

(2) establish responsibilities of Owner and Contractor, as agreed to by Owner and Contractor, for security, maintenance, heat, utilities, damage to the Work and insurance; and

(3) fix the time limit by which Contractor shall complete all items on the list accompanying the Certificate.

Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work, or the designated portion thereof, unless otherwise provided in the Certificate of Substantial Completion.

9.8 PARTIAL OCCUPANCY OR USE

9.8.1 Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with Contractor, provided such occupancy or use is consented to by the insurer as required under **Section 11.4.1.5** herein and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is Substantially Complete, provided Owner and Contractor have accepted in writing the responsibilities assigned to each of them for security, maintenance, heat, utilities, damage to the Work and insurance and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When Contractor considers a portion of the Work to be Substantially Complete, Contractor shall prepare and submit a list of items to be completed or corrected prior to Final Completion and final payment and submit such list to Owner and Design Consultant, as provided under **Section 9.8.2** herein. Consent of Contractor to partial occupancy or use shall not be unreasonably withheld. The state of the progress of the Work shall be determined by written agreement between Owner and Contractor or, if no agreement is reached, by the decision of Design Consultant.

9.8.2 Immediately prior to such partial occupancy or use, Owner, Contractor and Design Consultant collectively shall inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

9.8.3 Unless expressly agreed upon in writing, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

9.8.4 Upon such partial occupancy or use, and upon Substantial Completion, Owner may assume responsibility for maintenance, security and insuring that portion of the Work that it has put into use.

9.8.5 Partial occupancy or use by Owner does not constitute substantial completion and does not start any warranty period(s).

9.9 FINAL COMPLETION AND FINAL PAYMENT

9.9.1 When all of the Work finally is completed and ready for final inspection, Contractor shall notify Owner and Design Consultant thereof in writing. Thereupon, Owner and Design Consultant will make final inspection of the Work and, if the Work is complete in full accordance with this Contract and this Contract has been fully performed, the final Application for Payment may be submitted. If Owner and Design Consultant are unable to approve the final Application for Payment for reasons for which Contractor is responsible and Owner and Design Consultant are required to repeat a final inspection of the Work, Contractor shall be responsible for all costs incurred and associated with such repeat final inspection(s) and said costs may be deducted by Owner from the Contractor's retainage.

9.9.2 Contractor shall not be entitled to payment of retainage unless and until it submits to Owner its affidavit that the payrolls, invoices for materials and equipment, and other liabilities, to include Liquidated Damages, connected with the Work for which Owner or the Owner's property might be responsible fully have been paid or otherwise satisfied or will be paid from final payment; releases and waivers of liens from all Subcontractors of Contractor and of any and all other parties required by Design Consultant or Owner that either are unconditional or conditional on receipt of final payment; Certificates of insurance showing continuation of required insurance coverage; such other documents as Owner may request; and consent of Surety to final payment. A Retainage Checklist shall be provided by Owner to Contractor upon request.

9.9.3 If, after Substantial Completion of the Work, Final Completion thereof materially is delayed through no fault of Contractor or by Issuance of Change Orders affecting Final Completion, and Design Consultant so confirms, Owner shall, upon application by Contractor and certification by Design Consultant and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the

Contract Documents, and if bonds have been furnished, the written consent of Surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by Contractor to Design Consultant prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

9.9.4 Request for final payment by Contractor shall constitute a waiver of all claims against Owner except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

9.10 ADDITIONAL INSPECTIONS. In addition to any Liquidated Damages payable to Owner by Contractor, Owner shall be entitled to deduct from the Contract Sum amounts paid to Design Consultant for any additional inspections or services, provided that Design Consultant undertook these services due to the fault or neglect of Contractor if:

(1) Design Consultant is required to make more than one inspection for Substantial Completion;

(2) Design Consultant is required to make more than one inspection for final Completion; or

(3) the Work is not substantially complete within thirty (30) calendar days after the date established for Substantial Completion in the Contract Documents.

ARTICLE X. PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. Contractor shall develop a safety program applicable to each job site and to the Work to be done, review such program with Owner in advance of beginning the Work, and enforce such program at all times. Further, Contractor shall comply with all applicable laws and regulations including, but not limited to, the standards and regulations promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHA) and any other legislation enacted for the safety and health of Contractor employees. Owner shall have the right, but not the obligation, to inspect and verify Contractor's compliance with Contractor's responsibility for protecting the safety and health of its employees and Subcontractor.

10.1.2 Contractor shall notify Owner immediately, by telephone with prompt confirmation in writing, of all injuries and fatalities including, but not limited to, copies of all reports and other documents filed or provided to Contractor's insurers and the State of Texas in connection with such injuries or fatalities.

10.1.3 Contractor has adopted or shall adopt its own policy to assure a drug and alcohol free work place while performing the Work. Contractor's employees, agents, and Subcontractors shall not perform any service for Owner while under the influence of alcohol or any controlled substance. Contractor, its employees, agents and Subcontractors shall not use, possess, distribute or sell illegal, illicit and/or prescribed controlled drugs or drug paraphernalia or misuse legitimate prescription drugs while on Site or performing the Work. Contractor, its employees, agents and Subcontractors shall not use, possess, distribute or sell alcoholic beverages while performing the Work or while on Site or performing the Work. Contractor will remove any of its employees or Subcontractor employees from performing the Work or from the Site any time there is suspicion of alcohol and/or drug use, possession or impairment involving such employee and at any time an incident occurs where drug or alcohol use could have been a contributing factor. Owner has the right to require Contractor to remove employees or Subcontractor employees from performing the Work or from the Site any time cause exists to suspect alcohol or drug use. In such cases, Contractor's or Subcontractor's employees only may be considered for return to work after Contractor certifies, as a result of a for-cause test conducted immediately following a removal, said employee was in compliance with this Contract. Contractor will not employ any individual, or will not accept any Subcontractor employees, to perform the Work who either refuses to take or tests positive in any alcohol or drug test.

10.1.4 Contractor shall comply with all applicable federal, state and local drug and alcohol related laws and regulations (e.g., Department of Transportation regulations, Department of Defense Drug-free Work-free Workforce Policy, Drug-Free Workplace Act of 1988). The presence of any firearms or other lethal weapons by any person is prohibited on the Project site, regardless of whether the owner thereof has a permit for a concealed weapon.

10.1.5 Both Owner and Contractor agree that these safety and health terms are of the highest importance and that a breach or violation of any of the terms of this **Section X** by Contractor or a Subcontractor will be a material and substantial breach of this Contract. In the event that Owner shall determine that Contractor has breached or violated the terms of this Section, then Owner shall determine, immediately upon written notice to Contractor, whether the Work shall be suspended as a result thereof. If the Work is suspended, the Work shall not recommence until Owner is satisfied that the safety provisions hereof shall not be breached or violated thereafter. If Owner terminates the Contract as a result of such breach or violation, Owner and Contractor shall complete their obligations hereunder to one another in accordance with **Section 14.2** herein.

10.1.6 Nothing contained in this **Article X** shall be interpreted as creating or altering the legal duty of Owner to Contractor or to Contractor's agents, employees, Subcontractors or third parties, or altering the status of Contractor as an independent contractor.

10.1.7 Notwithstanding either of the above provisions, or whether Owner exercises its rights set forth herein, Owner neither warrants nor represents to Contractor, Contractor's employees or agents, any Subcontractors or any other third party that Contractor's safety policy meets the requirements of any applicable law, code, rule or regulation, nor does Owner warrant that the proper enforcement of Contractor's policy will insure that no accidents or injuries will occur. In addition, any action by Owner under these provisions in no way diminishes any of Contractor's obligations under applicable law or the contract documents.

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 Contractor shall take reasonable precautions for the safety of and shall provide reasonable protection to prevent damage, injury or loss to:

10.2.1.1 employees performing the Work and other persons who may be affected thereby;

10.2.1.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under the care, custody or control of Contractor or Contractor's Subcontractors or Sub-Subcontractors; and

10.2.1.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of Construction.

10.2.2 Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying all owners and users of adjacent sites and utilities.

10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for the execution of the Work, Contractor shall exercise extraordinary care and shall carry on such activities under the direct supervision of properly qualified personnel. Prior to the use of any explosives, Contractor shall submit a written blasting plan, shall obtain Owner's approval and shall comply with Owner's requirements for such use.

10.2.5 Contractor promptly shall remedy any and all damage and loss (other than damage or loss insured under property insurance required by the Contract Documents). Contractor shall also HOLD HARMLESS and UNCONDITIONALLY INDEMNIFY, PROTECT and DEFEND Owner, its elected officials, employees, officers, directors, volunteers and representatives of Owner, individually or collectively, from and against any and all damage or loss

to property (other than the Work itself and including property of Contractor and of Owner) referred to in **Section 10.2.1.2** and **Section 10.2.1.3** herein, but only to the extent caused in whole or in part by the acts or omissions of Contractor, its agents, servants, and employees, or its Subcontractor(s) and its/their agents, servants, and employees, or anyone directly or indirectly employed by Contractor or Subcontractor, or by any other person or entity for which Contractor or Subcontractor may be responsible under the Contract Documents in connection with the Work to be performed, services to be rendered or materials to be furnished under this Contract, including, but not limited to, violations of any statute, regulation, ordinance or provision of this Contract. Notwithstanding anything to the contrary included herein, in no event shall Contractor be liable for claims arising out of accidents resulting from the sole negligence of Owner, all without, however, waiving any governmental immunity available to Owner under Texas Law and without waiving any defenses of the parties under Texas Law. The foregoing obligations of Contractor are in addition to Contractor's obligations under **Section 3.18** herein.

10.2.6 Contractor shall designate a responsible member of Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be Contractor's superintendent unless otherwise designated by Contractor in writing to Owner and Design Consultant.

10.2.7 Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

10.2.8 Notwithstanding the delivery of a survey or other documents by Owner, Contractor shall use reasonable efforts to perform all Work in such a manner so as to avoid damaging any utility lines, cables, pipes or pipelines on the property. Contractor acknowledges and accepts that the location of underground utilities (both public and private) reflected on any City-provided plans are not guaranteed and may not be completely accurate. Contractor shall locate and verify any and all utilities and associated service lines prior to beginning any Work. Contractor shall be responsible for and shall repair, at Contractor's own expense, any damage done to lines, cables, pipes and pipelines identified or not identified to Contractor.

10.3 EMERGENCIES.

10.3.1 In an emergency affecting safety of persons or property, Contractor shall exercise its best efforts to act to prevent or minimize threatened damage, injury or loss. Additional compensation or extension of time claimed by Contractor on account of an emergency shall be determined, as provided in **Section 4.3** and **Article VII** herein.

10.3.2 If Contractor causes damage resulting in an issue of safety and/or security to a property owner, Contractor immediately shall repair any damage caused. If Contractor does not or will not act immediately to repair the damage caused by Contractor to eliminate the resulting safety and/or security issue(s), Owner shall act to repair the damage caused and deduct all costs associated with the repair from any money due Contractor.

10.4 PUBLIC CONVENIENCE AND SAFETY

10.4.1 Contractor shall place materials stored at the Project site and shall conduct the Work at all times in a manner that causes no greater obstruction to the public than is considered necessary by Owner. Sidewalks or streets shall not be obstructed, except by special permission of Owner. Materials excavated and construction materials or plants used in the performance of the Work shall be placed in a manner that does not endanger the Work or prevent free access to all fire hydrants, water mains and appurtenances, water valves, gas valves, manholes for the telephone, telegraph signal or electric conduits, wastewater mains and appurtenances and fire alarm or police call boxes in the vicinity.

10.4.2 Owner reserves the right to remedy any neglect on the part of Contractor, in regard to public convenience and safety, which may come to Owner's attention after twenty-four (24) hours notice in writing to Contractor. In case of an emergency, Owner shall have the right immediately to remedy any neglect without notice. In either case, the cost of any work done by or for Owner to remedy Contractor's neglect shall be deducted by Owner from Contractor's Contract Sum. Contractor shall notify Owner, Owner's Traffic Control Department and Design Consultant when any street is to be closed or obstructed. The notice shall, in the case of major thoroughfares or street upon which transit lines operate, be given at least forty-eight (48) hours in advance. Owner reserves the right to postpone and/or prohibit any closure or obstruction of any streets or thoroughfares, to the extent necessary for the safety and benefit of the traveling public. Contractor shall, when directed by Owner or Design Consultant, keep any street or streets in condition for unobstructed use by Owner departments. When Contractor is required to construct temporary bridges or make other arrangements for crossing over ditches or around structures, Contractor's responsibility for accidents shall include the roadway approaches as well as the crossing structures.

10.4.3 Contractor shall limit airborne dust and debris throughout the Project site and its duration. Contractor shall apply the necessary amounts of water or other appropriate substance required to maintain sufficient moisture content for dust control. For City horizontal projects, Contractor shall apply appropriate amounts of water or other appropriate substance to the base on streets under construction and on detours required to maintain sufficient moisture control in the surface layer for dust control.

10.5 BARRICADES, LIGHTS AND WATCHMEN. If the Work is carried on, in or adjacent to any street, alley or public place, Contractor shall, at Contractor's own cost and expense, furnish, erect and maintain sufficient barricades, fences, lights and danger signals, provide sufficient watchmen and take such other precautionary measures as are necessary for the protection of persons or property and of the Work. All barricades shall be painted in a color that will be visible at night, and shall be illuminated by lights as required under City's Barricades specifications. The term "lights," as used in this **Section 10.5**, shall mean

flares, flashers or other illuminated devices. A sufficient number of barricades with adequate markings and directional devices also shall be erected to keep vehicles from being driven on or into any Work under construction. Contractor will be held responsible for all damage to the Work due to failure of barricades, signs, lights and/or watchmen necessary to protect the Work. Whenever evidence is found of such damage, Owner or Design Consultant may order the damaged portion immediately removed and replaced by Contractor at Contractor's sole cost and expense. Contractor's responsibility for maintenance of barricades, signs, lights, and for providing watchmen, as required under this **Section 10.5**, shall not cease until the Project has been finally accepted by Owner.

10.6 PUBLIC UTILITIES AND OTHER PROPERTIES TO BE CHANGED. In case it is necessary for Contractor to change or move the property of Owner or of any telecommunications or public utility, such property shall not be touched, removed or interfered with until ordered to do so by Owner. Owner reserves the right to grant any public or private utility personnel the authority to enter upon the Project site for the purpose of making such changes or repairs to their property that may become necessary during the performance of the Work. Owner reserves the right of entry upon the Project site at any time and for any purpose, including repairing or relaying sewer and water lines and appurtenances, repairing structures and for making other repairs, changes, or extensions to any of Owner's property. Owner's actions shall conform to Contractor's current and approved schedule for the performance of the Work, provided that proper notification of schedule requirements has been given to Owner by Contractor.

10.7 TEMPORARY STORM SEWER AND DRAIN CONNECTIONS. When existing storm sewers or drains have to be taken up or removed, Contractor shall, at its expense, provide and maintain temporary outlets and connections for all public and private storm sewers and drains. Contractor also shall provide for all storm sewage and drainage which will be received from these storm drains and sewers. For this purpose, Contractor shall provide and maintain, at Contractor's own expense, adequate pumping facilities and temporary outlets or diversions. Contractor shall, at Contractor's own expense, construct such troughs, pipes or other structures that may be necessary and shall be prepared at all times to dispose of storm drainage and sewage received from these temporary connections until such time as the permanent connections are built and are in service. The existing storm sewers and connections shall be kept in service and maintained under the Contract, except where specified or ordered to be abandoned by Design Consultant. All storm water and sewage shall be disposed of in a satisfactory and lawful manner so that no nuisance is created and that the Work under construction will be adequately protected.

10.8 ARRANGEMENT AND CHARGE FOR WATER FURNISHED BY THE OWNER/ELECTRICITY FOR THE PROJECT/WIRELESS ACCESS

10.8.1 When Contractor desires to use Owner's water in connection with the Work, Contractor shall make complete and satisfactory arrangements with the San Antonio Water Service and shall be responsible for the cost of the water Contractor uses. Where meters are required and used, the charge will be at the regular established rate; where no meters are required and used, the charge will be as prescribed by Owner ordinance, or where no ordinance applies, payment shall

be based on estimates made by the representatives of the San Antonio Water Service.

10.8.2 Contractor shall make complete and satisfactory arrangements for electricity and metered electrical connections with Owner or with any retail electric provider, in the event that separately metered electrical connections are required for the Project. Contractor shall pay for all electricity used in the performance of the Work through separate metered electrical connections obtained by Contractor through a retail electric provider.

10.8.3 If Contractor elects or is required by City to place and operate out of a construction trailer or office on the Project site, for which all related costs shall be borne by Contractor, Contractor shall provide for an electronic device to exchange data wirelessly via a local area computer network, to include high-speed internet connections (commonly known as "Wi Fi access"), for City personnel's use while on the Project site for the duration of the Project.

10.9 USE OF FIRE HYDRANTS. Contractor, Subcontractors and any other person working on the Project shall not open, turn off, interfere with, attach any pipe or hose to or connect anything with any fire hydrant, stop valve or stop cock, or tap any water main belonging to Owner, unless duly authorized in writing to do so by Owner.

10.10 ENVIRONMENTAL COMPLIANCE

10.10.1 Contractor and its Subcontractors are deemed to have made themselves familiar with and at all times shall comply with any and all applicable federal, state or local laws, rules, regulations, ordinances and rules of common law now in effect (including any amendments now in effect), relating to the environment, Hazardous Substances or exposure to Hazardous Substances including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. §§ 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C.A. §§ 1801, et seq.; the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§ 6901, et seq.; the Federal Water Pollution Control Act, 33 U.S.C.A §§ 1201, et seq.; the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601, et seq.; the Clean Air Act, 42 U.S.C.A. §§ 7401, et seq.; the Safe Drinking Water Act, 42 U.S.C.A. §§ 3808, et seq., and any current judicial or administrative interpretation of these laws, rules, regulations, ordinances or rules of common law including, but not limited to, any judicial or administrative order, consent decree or judgment affecting the Project.

10.10.2 In the event Contractor encounters on the Project Site materials reasonably believed to be a Hazardous Substance that have not been rendered harmless, and the removal of such materials is not a part of the scope of Work required under the Contract Documents, Contractor immediately shall stop Work in the affected area and report in writing the facts of such encounter to Owner and Design Consultant. Work in the affected area shall not thereafter be resumed except by written order of Owner and written consent of Contractor, unless and until the material is determined not to be a Hazardous Substance or the Hazardous Substance is remediated. Unless removal of such materials is a part of the scope of Work

required under the Contract Documents, Owner shall remediate the Hazardous Substance with a separate contractor or through a Change Order with Contractor. If the Hazardous Substance exists in the affected area due to the fault or negligence of Contractor or any of its Subcontractors, Contractor shall be responsible for remediating the condition at the sole expense of Contractor. If applicable, such remediation shall be in accordance with Contractor's Spill Remediation Plan. An extension of the Contract Time for any delay in the progress schedule caused as a result of the discovery and remediation of a Hazardous Substance may be granted by Owner only if the Project critical path is affected and Contractor is not the source of the Hazardous Substance. Any request for an extension of the Contract Time related to the discovery and remediation of a Hazardous Substance is subject to the provisions of **Section 4.3** and **Article VIII** herein.

10.10.3 Contractor shall be responsible for identification, abatement, cleanup, control, removal, remediation and disposal of any Hazardous Substance brought into or onto the site by Contractor or any Subcontractor or Contractor's Supplier. Contractor shall obtain any and all permits necessary for the legal and proper handling, transportation and disposal of the Hazardous Substance and shall, prior to undertaking any abatement, cleanup, control, removal, remediation and/or disposal, notify Owner and Design Consultant so that they may observe the activities; provided, however, that it shall be Contractor's sole responsibility to comply with all applicable laws, rules, regulations or ordinances governing said activities.

ARTICLE XI. INSURANCE AND BONDS

11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 Without limiting any of the other obligations or liabilities of Contractor under the Contract Documents, Contractor shall purchase and maintain, during the term of the Contract and at Contractor's own expense, the minimum liability insurance coverage described below with insurance companies duly authorized or approved to do business in the State of Texas and otherwise satisfactory to Owner. Contractor also shall require each Subcontractor performing work under the Contract, at Subcontractor's own expense, to maintain levels of insurance necessary and appropriate for the Work performed during the term of the Contract, said levels of insurance comply with all applicable laws. Subcontractor's liability insurance shall name Contractor and Owner as additional insureds by using endorsement CG 20 26 or broader. Certificates of insurance complying with the requirements prescribed in **Section 11.1.2** herein shall show the existence of each policy, together with copies of all policy endorsements showing Owner as an additional insured, and shall be delivered to Owner before any Work is started. Contractor promptly shall furnish, upon the request of and without expense to Owner, a copy of each policy required, including all endorsements, which shall indicate:

11.1.1.1 Workers' Compensation, with statutory limits, with the policy endorsed to provide a waiver of subrogation as to Owner; Employer's Liability

Insurance of not less than $500,000 for each accident, $500,000 disease for each employee and $500,000 disease policy limit;

11.1.1.2 Commercial General Liability Insurance, Personal Injury Liability, Independent Contractor's Liability and Products and Completed Operations and Contractual Liability covering, but not limited to, the liability assumed under the indemnification provisions of this Contract, fully insuring Contractor's (and/or Subcontractor's) liability for injury to or death of Owner's employees and all third parties, and for damage to property of third parties, with a combined bodily injury (including death) and property damage minimum limit of $1,000,000 per occurrence, $2,000,000 annual aggregate. If coverage is written on a claims-made basis, coverage shall be continuous (by renewal or extended reporting period) for no less than sixty (60) months following completion of the contract and acceptance of work by Owner. Coverage, including any renewals, shall have the same retroactive date as the original policy applicable to the Project. Owner shall be named as additional insured by using endorsement CG 20 26 or broader. The general liability policy shall include coverage extended to apply to completed operations and XCU hazards. The Completed Operations coverage must be maintained for a minimum of one (1) year after final completion and acceptance of the Work, with evidence of same filed with Owner. The policy shall include an endorsement CG2503 amendment of limits (designated project or premises) in order to extend the policy's limits specifically to the Project in question.

11.1.1.3 Business Automobile Liability Insurance, covering owned, hired and non- owned vehicles, with a combined bodily injury (including death) and property damage minimum limit of $1,000,000 per occurrence. Such insurance shall include coverage for loading and unloading hazards.

11.1.1.4 Five (5) calendar days prior to a suspension, cancellation or non-renewal of any required line of insurance coverage, Contractor shall provide Owner a replacement certificate of insurance with all applicable endorsements included. Owner shall have the option to suspend Contractor.

11.1.2 If any insurance company providing insurance coverage(s) required under the Contract Documents for Contractor becomes insolvent or becomes the subject of any rehabilitation, conservatorship, liquidation or similar proceeding, Contractor immediately shall procure, upon first notice to Contractor or Owner of such occurrence and without cost to Owner, replacement insurance coverage before continuing the performance of the Work at the Project. Any failure to provide such replacement insurance coverage shall constitute a material breach of the Contract.

11.2 PROPERTY INSURANCE

11.2.1 In addition to the insurance described in **Section 11.1** and **Section 11.4** herein, Contractor shall obtain at its expense and maintain throughout the duration of the Project, All-Risk Builder's Risk Insurance, if the Project involves complete construction of a new building, or an All-Risk Installation Floater policy, if the Project involves materials and supplies needed for additions to, renovations or remodeling of an existing building. Coverage on either policy shall be All-Risk, including, but not limited to, Fire, Extended Coverage, Vandalism and Malicious Mischief, Flood (if located in a flood zone) and Theft, in an amount equal to one hundred percent (100%) of the insurable value of the Project for the Installation Floater policy, and one hundred percent (100%) of the replacement cost of the Project for the Builder's Risk policy. If an Installation Floater policy is provided, Owner shall be shown as a Joint Named Insured with respect to the Project. If a Builder's Risk policy is provided, the policy shall be written on a Completed Value Form, including materials delivered and labor performed for the Project. This policy shall be in the name of Contractor and naming Owner and Subcontractors, as well as any Sub-Subcontractors, as additional insureds as their interests may appear. The policy shall have endorsements as follows:

11.2.1.1 This insurance shall be specific as to coverage and not contributing insurance with any permanent insurance maintained on the property.

11.2.1.2 Loss, if any, shall be adjusted with and made payable to Contractor or Owner and Contractor as trustee for the insureds as their interests may appear.

11.2.2 **BOILER AND MACHINERY INSURANCE.** If applicable, Owner shall purchase and maintain Boiler and Machinery Insurance required by the Contract Documents or by law, which specifically shall cover such insured objects during installation and until final acceptance by Owner. This insurance shall include the interests of Owner, Contractor, Subcontractors and Sub-Subcontractors in the Work, and Owner and Contractor shall be named insureds.

11.2.3 **LOSS OF USE INSURANCE.** Owner, at Owner's option, may purchase and maintain such insurance as will insure Owner against loss of use of Owner's property due to fire or other hazards, however caused. Owner waives all rights of action against Contractor that it may now have or have in the future for loss or damage to Owner's property howsoever arising, including consequential losses due to fire or other hazards however caused.

11.2.4 Contractor shall provide to Design Consultant for delivery to Owner a Certificate of Insurance evidencing all property insurance policies procured under **Section 11.2** herein and all endorsements thereto, before any exposure to loss may occur.

11.2.5 Partial occupancy or use in accordance with **Section 9.9** herein shall not commence until the insurance company/companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. Owner and Contractor shall take reasonable steps to obtain consent of the insurance company/companies and shall take no action without mutual written consent with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

11.3 PERFORMANCE BOND AND PAYMENT BONDS

11.3.1 Subject to the provisions of **Section 11.3.2** herein, Contractor shall, with the execution and delivery of the Contract, furnish and file with Owner, in the amounts required in this **Article XI**, the surety bonds described in **Section 11.3.1.1** and **Section 11.3.1.2** herein, with said surety bonds in accordance with the provisions of Chapter 2253, Texas Government Code, as amended. Each surety bond shall be signed by Contractor, as the Principal, as well as by an established corporate surety bonding company as surety, meeting the requirements of **Section 11.3.3** herein and approved by Owner. The surety bonds shall be accompanied by an appropriate Power-of-Attorney clearly establishing the extent and limitations of the authority of each signer to so sign and shall include:

11.3.1.1 **PERFORMANCE BOND.** A good and sufficient bond in an amount equal to one hundred percent (100%) of the total Contract Sum, guaranteeing the full and faithful execution of the Work and performance of the Contract in accordance with Plans, Specifications and all other Contract Documents, including any extensions thereof, for the protection of Owner. This bond shall also provide for the repair and maintenance of all defects due to faulty materials and workmanship that appear within a period of one (1) year from the date of final Completion or acceptance of the Work by the Owner or lesser or longer periods as may be otherwise designated in the Contract Documents.

11.3.1.2 **PAYMENT BOND.** A good and sufficient bond in an amount equal to 100% of the total Contract Sum, guaranteeing the full and prompt payment of all claimants supplying labor or materials in the prosecution of the Work provided for in the Contract, and for the use and protection of each claimant.

11.3.2 If the Contract Sum, including Owner-accepted Alternates and allowances, if any, is greater than $100,000, Performance and Payment Bonds equaling one hundred percent (100%) of the Contract Sum are mandatory and shall be provided by Contractor. If the Contract Sum is greater than $25,000 but less than or equal to $100,000, only a Payment Bond equaling One hundred percent (100%) of the Contract amount is mandatory; provided, however, that Contractor also may elect to furnish a Performance Bond in the same amount if Contractor so chooses. If the Contract Sum is less than or equal to $25,000, Contractor may elect not to provide Performance and Payment Bonds; provided that in such event, no money

will be paid by Owner to Contractor until Final Completion of all Work. If Contractor elects to provide Performance and Payment Bonds, the Contract Sum shall be payable to Contractor through progress payments in accordance with these General Conditions.

11.3.3 No surety will be accepted by Owner that is in default, delinquent on any bonds or that is a party to any litigation against Owner. All bonds shall be made and executed on Owner's standard forms, shall be approved by Owner and shall be executed by not less than one (1) corporate surety that is authorized and admitted to do business in the State of Texas, is licensed by the State of Texas to issue surety bonds, is listed in the most current United States Department of the Treasury List of Acceptable Sureties and is otherwise acceptable to Owner. Each bond shall be executed by Contractor and the surety and shall specify that legal venue for enforcement of each bond exclusively shall lie in Bexar County, Texas. Each surety shall designate an agent resident in Bexar County, Texas to which any requisite statutory notices may be delivered and on which service of process may be had in matters arising out of the suretyship.

11.3.4 The person or persons, partnership, company, firm, limited liability company, association, corporation or other business entity to whom the Contract is awarded shall, within ten (10) days after such award, sign the required Contract with Owner and provide the necessary surety bonds and evidence of insurance as required under the Contract Documents. No Contract shall be binding on Owner until:

(1) it has been approved as to form by Owner's City Attorney;

(2) it has been executed by Owner's City Manager;

(3) the performance and payment bonds and evidence of insurance have been furnished to Owner by Contractor, as required by the Contract Documents; and

(4) a fully executed Contract has been delivered to Contractor.

11.3.5 The failure of Contractor to execute the Contract and deliver the required bonds and evidence of insurance within ten (10) days after the Contract is awarded or as soon thereafter as Owner can assemble and deliver the Contract and by the time the Owner-scheduled Pre-Construction meeting is held shall, at Owner's option, constitute a material breach of Contractor's bid proposal and Owner may rescind the Contract award and collect or retain the proceeds of the bid security. By reason of the uncertainty of the market prices for materials and labor, and it being impracticable and difficult to determine accurately the amount of damages occurring to Owner by reason of Contractor's failure to execute the Contract within ten (10) days and deliver bonds and insurance by the Owner-scheduled Pre-Construction meeting, the filing of a bid proposal shall constitute an

acceptance of this **Section 11.3.5**. In the event Owner should re-advertise for bids, the defaulting Contractor shall not be eligible to bid, and the lowest responsible bid obtained in the re-advertisement shall be the bid referred to in this **Section 11.3**.

11.4 'UMBRELLA' LIABILITY INSURANCE. Contractor shall obtain, pay for and maintain Umbrella Liability Insurance during the Contract term, insuring Contractor for an amount of not less than $5,000,000 per occurrence combined limit Bodily Injury (including death) and Property Damage, that follows form and applies in excess of the primary coverage required hereinabove. Owner and Design Consultant shall be named as additional insureds using endorsement CG 20 26 or broader. No aggregate shall be permitted for this type of coverage. The Umbrella Liability Insurance policy shall provide "drop down" coverage, where the underlying primary insurance coverage limits are insufficient or exhausted.

11.5 POLICY ENDORSEMENTS AND SPECIAL CONDITIONS

11.5.1 Each insurance policy to be furnished by Contractor shall address the following required provisions within the certificate of insurance, which shall be reflected in the body of the insurance contract and/or by endorsement to the policy:

11.5.1.1 Owner and Design Consultant shall be named as additional insureds on all liability coverages, using endorsement CG 20 26 or broader. When Owner employs a Construction Manager on the Project, Contractor and Subcontractor(s) shall include the Construction Manager on all liability insurance policies to the same extent as Owner and Design Consultant are required to be named as additional insureds.

11.5.1.2 Within five (5) calendar days of a suspension, cancellation or non-renewal of any required line of insurance coverage, Contractor shall provide Owner a replacement certificate of insurance with all applicable endorsements included. Owner shall have the option to suspend Contractor's performance should there be a lapse in coverage at any time during the Contract.

11.5.1.3 The terms "Owner," "City" or "City of San Antonio" shall include all authorities, boards, bureaus, commissions, divisions, departments and offices of Owner and the individual members, employees and agents thereof in their official capacities, while acting on behalf of Owner.

11.5.1.4 The policy phrase or clause "Other Insurance" shall not apply to Owner where Owner is an additional insured on the policy. The required insurance coverage furnished by Contractor shall be the primary insurance for all purposes for the Project, as well as the primary insurance for the additional insureds named in the required policies.

11.5.1.5 All provisions of the Contract Documents concerning liability, duty and standard of care, together with the indemnification provision, shall, to the maximum extent allowable in the insurance market, be underwritten with contractual liability coverage(s) sufficient to include such obligations with the applicable liability policies.

11.5.2 Concerning the insurance to be furnished by the Contractor, it is a condition precedent to acceptability which:

11.5.2.1 All policies must comply with the applicable requirements and special provisions of this **Article 11**.

11.5.2.2 Any policy evidenced by a Certificate of Insurance shall not be subject to limitations, conditions or restrictions deemed inconsistent with the intent of the insurance requirements set forth herein, and Owner's decision regarding whether any policy contains such provisions and contrary to this requirement shall be final.

11.5.2.3 All policies required are to be written through companies duly authorized and approved to transact that class of insurance in the State of Texas and that otherwise are acceptable to Owner.

11.5.3 Contractor agrees to the following special provisions:

11.5.3.1 Contractor hereby waives subrogation rights for loss or damage to the extent same are covered by insurance. Insurers shall have no right of recovery or subrogation against Owner, it being the intention that the insurance policies shall protect all parties to the Contract and be primary coverage for all losses covered by the policies. This waiver of subrogation shall be included, by endorsement or otherwise, as a provision of all policies required under this **Article XI**.

11.5.3.2 Insurance companies issuing the insurance policies and Contractor shall have no recourse whatsoever against Owner for payment of any premiums or assessments for any deductibles, as all such premiums and assessments solely are the responsibility and risk of Contractor.

11.5.3.3 Approval, disapproval or failure to act by Owner, regarding any insurance supplied by Contractor or any SUBCONTRACTOR(s), shall not relieve Contractor of any responsibility or liability for damage or accidents as set forth in the Contract Documents. The bankruptcy, insolvency or denial of liability of or by Contractor's insurance company shall likewise not exonerate or relieve Contractor from liability.

11.5.3.4 Owner reserves the right to review the insurance requirements of this **Article XI** during the effective period of this Contract and to adjust insurance coverage and insurance limits when deemed necessary and prudent by Owner's Risk Management Division, based upon changes in statutory law, court decisions or the claims history of Contractor and

Subcontractors. Contractor agrees to make any reasonable request for deletion, revision or modification of particular policy terms, conditions, limitations or exclusions, except where policy provisions are established by law or regulation binding upon either party to this Contract or upon the underwriter of any such policy provisions. Upon request by Owner, Contractor shall exercise reasonable efforts to accomplish such changes in policy coverage.

11.5.3.5 No special payments shall be made for any insurance policies that Contractor and Subcontractors are required to carry. Except as provided in **Section 11.5.3.4** herein, all amounts payable regarding the insurance policies required under the Contract Documents are included in the Contract Sum.

11.5.3.6 Any insurance policies required under this **Article XI** may be written in combination with any of the other policies, where legally permitted, but none of the specified limits neither may be lowered or otherwise negatively impacted by doing so, nor may any of the requirements or special provisions of this **Article XI** be limited or circumvented by doing so.

ARTICLE XII. INSPECTING, UNCOVERING AND CORRECTING OF WORK

12.1 Inspecting Work. Owner and Design Consultant will have authority to reject Work that does not conform to the Contract Documents. Whenever Owner or Design Consultant considers it necessary or advisable, Owner and/or Design Consultant will have authority to require inspection or testing of the Work in accordance with this **Article XII**, whether or not such Work is fabricated, installed or completed.

12.2 UNCOVERING WORK

12.2.1 If a portion of the Work is covered, concealed and/or obstructed, contrary to Owner's or Design Consultant's requirements specifically expressed in the Contract Documents, it must be uncovered for Owner's or Design Consultant's inspection and properly be replaced at Contractor's expense without any change in the Contract Time or Sum.

12.2.2 If a portion of the Work has been covered, concealed and/or obstructed and Design Consultant or Owner has not inspected the Work prior to its being covered, concealed and/or obstructed, Owner and Design Consultant retain the right to inspect such Work and, when directed by Owner, Contractor shall uncover it. If said Work is found to be in accordance with the Contract Documents, the costs for uncovering and replacement shall, by appropriate Change Order, be paid by Owner. If such Work uncovered is found to not be in accordance with the Contract Documents, Contractor shall pay all costs associated with the uncovering, correction and replacement of the Work, unless the condition found was caused by Owner or Owner's separate contractor, in which event Owner shall be responsible for payment of actual costs incurred by Contractor.

12.3 CORRECTING WORK

12.3.1 Contractor promptly shall correct any Work rejected by Owner or Design Consultant as failing to conform to the requirements of the Contract Documents, whether inspected before or after Substantial Completion and whether or not fabricated, installed or completed. Contractor shall bear costs of correcting such rejected Work, along with all costs for additional testing, inspections and compensation for Design Consultant's services and expenses made necessary thereby.

12.3.2 In addition to Contractor's warranty obligations, if any of the Work is found to be defective or nonconforming with the requirements of the Contract Documents, including, but not limited to these General Conditions, Contractor shall correct it promptly after receipt of written notice from Owner or Design Consultant to correct unless Owner previously has given Contractor a written acceptance or waiver of the defect or nonconformity. Contractor's obligation to correct defective or nonconforming Work remains in effect for:

12.3.2.1 one (1) year after the date of Substantial Completion of the Work or designated portion of the Work;

12.3.2.2 one (1) year after the date for commencement of warranties established by agreement in connection with partial occupancy under **Section 9.9.1** hereto; or

12.3.2.3 the stipulated duration of any applicable special warranty required by the Contract Documents.

12.3.3 The one (1) year period, described in **Section 12.3.2.1**, **Section 12.3.2.2** and **Section 12.3.2.3** herein, shall be extended, with respect to portions of the Work first performed after Substantial Completion, by the period of time between Substantial Completion and the actual completion of the Work.

12.3.4 The obligations of Contractor under **Section 3.5** herein and this **Section 12.3** shall survive final acceptance of the Work and termination of this Contract. Owner shall give notice to Contractor promptly after discovery of a defective or nonconforming condition in the Work. The one (1) year period stated in this **Section 12.3** does not limit the ability of Owner to require Contractor to correct latent defects or nonconformities in the Work, which defects or nonconformities could not have been discovered through reasonable diligence by Owner or Design Consultant at the time the Work was performed or at the time of inspection for certification of Substantial Completion or Final Completion. The one (1) year period also does not relieve Contractor from liability for any defects or deficiencies in the Work that may be discovered after the expiration of the one (1) year correction period.

12.3.5 Contractor shall remove from the Project Site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by Contractor nor accepted by Owner.

12.3.6 If Contractor fails to correct any defective or nonconforming Work within what Owner deems a reasonable time after Owner or Design Consultant gives written notice of rejection to Contractor, Owner may correct the defective or nonconforming Work in accordance with this **Section 12.3**. If Contractor promptly does not proceed with correction of any defective or nonconforming Work within a reasonable time fixed by written notice from Owner or Design Consultant, Owner may remove or replace the defective or nonconforming Work and store the salvageable materials or equipment at Contractor's expense. If Contractor does not pay the costs of removal and storage within ten (10) calendar days after written notice by Owner or Design Consultant, Owner may, upon ten (10) additional calendar days written notice, sell the materials and equipment at auction or at private sale and shall account to Contractor for the proceeds, after deducting all costs and damages that should have been borne by Contractor to correct the defective work, including all compensation for Design Consultant's services and expenses made necessary as a result of the sale, removal and storage. If the proceeds of sale do not cover the costs that Contractor should have borne, the Contract Sum shall be reduced by the deficiency. If payments due to Contractor then or thereafter are not sufficient to cover the deficiency, Contractor shall pay the difference to Owner.

12.3.7 Contractor shall bear the cost of correcting destroyed or damaged construction of Owner or Owner's separate contractors, whether the construction is completed or partially completed, caused by Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.3.8 Nothing contained in this **Section 12.3** shall be construed to establish a period of limitation with respect to other obligations which Contractor might have under the Contract Documents. The establishment of the one (1) year time period, as described in **Section 12.3.2** relates only to the specific obligation of Contractor to correct the Work and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced or to the time within which proceedings may be commenced to establish Contractor's liability with respect to Contractor's obligations other than specifically to correct the Work.

12.3.9 Any Work repaired or replaced, pursuant to this **Article XII,** shall be subject to the provisions of **Article XII** to the same extent as Work originally performed or installed.

12.4 Acceptance of Nonconforming Work. Owner may, in Owner's sole discretion, accept Work that is not in accordance with the requirements of the Contract Documents instead of requiring its removal and correction. Upon that occurrence, the Contract Sum will be reduced as appropriate and equitable, as solely determined by Owner. Any adjustment will be accomplished whether or not final payment has been made.

ARTICLE XIII. COMPLETION OF THE CONTRACT; TERMINATION; TEMPORARY SUSPENSION

13.1 Final Completion Of Contract. The Contract will be considered completed, except as provided in any warranty or maintenance stipulations, bond or by law, when all the Work has been finally completed, a final inspection is made by Owner and Design Consultant and final acceptance and final payment is made by Owner.

13.2 Warranty Fulfillment. Prior to the expiration of the specified warranty period provided for in the Contract Documents, Owner or Design Consultant will make a detailed inspection of the Work and will advise Contractor and Contractor's Surety of the items that require correction. Owner or Design Consultant will make a subsequent inspection and, if the corrections have been properly performed, Owner will issue a letter of release on the maintenance obligations to Contractor. If, for any reason, Contractor has not made the required corrections before the expiration of the warranty period, the warranty provisions as provided for in the Contract Documents shall remain in effect until the corrections have properly been performed and a letter of release from Owner to Contractor is issued.

13.3 TERMINATION BY THE OWNER FOR CAUSE

13.3.1 Notwithstanding any other provision of these General Conditions, the Work or any portion of the Work may be terminated immediately by Owner for any good cause after giving seven (7) calendar days advance written notice and an opportunity to cure to Contractor, including but not limited to the following causes:

13.3.1.1 Failure or refusal of Contractor to start the Work within ten (10) calendar days after the date of the written Notice to Proceed is issued by Owner to Contractor commence Work.

13.3.1.2 A reasonable belief of Owner or Design Consultant that the progress of the Work being made by Contractor is insufficient to complete the Work within the specified Contract time.

13.3.1.3 Failure or refusal of Contractor to provide sufficient and proper equipment or construction forces properly to execute the Work in a timely manner.

13.3.1.4 A reasonable belief that Contractor has abandoned the Work.

13.3.1.5 A reasonable belief that Contractor has become insolvent, bankrupt, or otherwise is financially unable to carry on the Work.

13.3.1.6 Failure or refusal on the part of Contractor to observe any material requirements of the Contract Documents or to comply with any written orders given by Owner or Design Consultant, as provided for in the Contract Documents.

13.3.1.7 Failure or refusal of Contractor promptly to correct any defects in materials or workmanship, or defects of any nature, the correction of which has been directed to Contractor in writing by Owner or Design Consultant.

13.3.1.8 A reasonable belief by Owner that collusion exists or has occurred for the purpose of illegally procuring the contract or a Subcontractor, or that a fraud is being perpetrated on Owner in connection with the construction of Work under the Contract.

13.3.1.9 Repeated and flagrant violation of safe working procedures.

13.3.2 When the Work or any portion of the Work is terminated for any of the causes itemized in **Section 13.3.1** herein, or for any other cause except termination for convenience pursuant to **Section 13.3.5** herein, Contractor shall, as of the date specified by Owner, immediately discontinue the Work or portion of the Work as Owner shall designate, whereupon the Surety shall, within fifteen (15) calendar days after the written Notice of Termination by Owner For Cause has been served upon Contractor and the Surety or its authorized agents, assume the obligations of Contractor for the Work or that portion of the Work which Owner has ordered Contractor to discontinue and Surety may:

13.3.2.1 perform the Work with forces employed by the surety;

13.3.2.2 with the written consent of Owner, tender a replacement Contractor to take over and perform the Work, in which event the Surety shall be responsible for and pay the amount of any costs required to be incurred for the completion of the Work that are in excess of the amount of funds remaining under the Contract as of the time of the termination; or

13.3.2.3 with the written consent of Owner, tender and pay to Owner in settlement the amount of money necessary to finish the balance of uncompleted Work under the Contract, correct existing defective or nonconforming work and compensate Owner for any other loss sustained as a result of Contractor's default.

In the event of Termination by Owner For Cause involving **Article 13.3.2.1** and/or **Article 13.3.2.2**, the Surety shall assume Contractor's place in all respects and the amount of funds remaining and unpaid under the Contract shall be paid by

Owner for all Work performed by the Surety or the replacement contractor in accordance with the terms of the Contract Documents, subject to any rights of Owner to deduct any and all costs, damages or liquidated or actual damages that Owner incurred, including, but not limited to, any and all additional fees and expenses of Design Consultant and any attorneys fees Owner incurs as a result of Contractor's default and subsequent termination.

13.3.3 The balance of the Contract Sum remaining at the time of Contractor's default and subsequent termination shall become due and payable to the Surety as the Work progresses, subject to all of the terms, covenants and conditions of the Contract Documents. If the Surety does not, within the time specified in **Section 13.3.2** herein, exercise its obligation to assume the obligations of the Contract, or that portion of the Work which Owner has ordered Contractor to discontinue, then Owner shall have the power to complete the Work by contract or otherwise, as Owner may deem necessary and elect. Contractor agrees that Owner shall have the right to:

(1) take possession of or use any or all of the materials, plant, tools, equipment, supplies and property of every kind, to be provided by Contractor for the purpose of the Work; and

(2) procure other tools, equipment, labor and materials for the completion of the Work at Contractor's expense; and

(3) charge to the account of Contractor the expenses of completion and labor, materials, tools, equipment, and incidental expenses.

13.3.4 All expenses incurred by Owner to complete the Work shall be deducted by Owner out of the balance of the Contract Sum remaining unpaid to or unearned by Contractor. Contractor and the Surety shall be liable to Owner for any costs incurred in excess of the balance of the Contract Sum for the completion and correction of the Work, and for any other costs, damages, expenses (including, but not limited to, additional fees of Design Consultant and attorney's fees) and liquidated or actual damages incurred as a result of the termination.

13.3.5 Owner shall not be required to obtain the lowest bid for the Work of completing the Contract, as described in **Section 13.3.3** herein, but the expenses to be deducted from the Contract Sum shall be the actual cost of such Work and the other damages, as provided in **Section 13.3.3** herein. In case Owner's costs and damages are less than the sum which would have been payable under the Contract if the Work had been completed by Contractor pursuant to the Contract, then Owner may pay Contractor (or the Surety, in the event of a complete Termination

by Owner For Cause) the difference, provided that Contractor (or the Surety) shall not be entitled to any claim for damages or for loss of anticipated profits. In case such costs for completion and damages shall exceed the amount which would have been payable under the Contract if the Work had been completed by Contractor pursuant to the Contract, then Contractor and its Surety shall pay the amount of the excess to Owner immediately upon written notice from Owner to Contractor and/or the Surety for the excess amount owed. When only a particular part of the Work is being carried on by Owner, by contract or otherwise under the provisions of this Section, Contractor shall continue the remainder of the Work in conformity with the terms of the Contract and in such manner as not to hinder or interfere with the performance of workmen employed and provided by Owner.

13.3.6 The right to terminate this Contract for the convenience of Owner (including, but not limited to, non-appropriation of funding) expressly is retained by Owner. In the event of a termination for convenience by Owner, Owner shall, at least ten (10) calendar days in advance, deliver written notice of the termination for convenience to Contractor. Upon Contractor's receipt of such written notice, Contractor immediately shall cease the performance of the Work and shall take reasonable and appropriate action to secure and protect the Work then in place. Contractor shall then be paid by Owner, in accordance with the terms and provisions of the Contract Documents, an amount not to exceed the actual labor costs incurred, the actual cost of all materials installed and the actual cost of all materials stored at the Project site or away from the Project site, as approved in writing by Owner but not yet paid for and which can not be returned, plus applicable overhead, profit, and actual, reasonable and documented termination costs, if any, paid by Contractor in connection with the Work in place which is completed and in conformance with the Contract Documents up to the date of termination for convenience, less all amounts previously paid for the Work. No amount ever shall be paid to Contractor for lost or anticipated profits on any part of the Work not performed.

13.4 TEMPORARY SUSPENSION OF THE WORK

13.4.1 The Work or any portion of the Work may temporarily be suspended by Owner, for a time period not to exceed ninety (90) calendar days, immediately upon written notice to Contractor for any reason, including, but not limited to:

13.4.1.1 the causes described in **Section 13.3.1.1** through **Section 13.3.1.9** herein;

13.4.1.2 under other provisions in the Contract Documents that require or permit temporary suspension of the Work;

13.4.1.3 situations where the Work is threatened by, contributes to or causes an immediate threat to public health, safety, or security; or

13.4.1.4 other unforeseen conditions or circumstances.

13.4.2 Contractor immediately shall resume the temporarily suspended Work when ordered in writing to do so by Owner. Owner shall not, under any circumstances, be liable for any claim of Contractor arising from a temporary suspension due to a cause described in **Section 13.4.1** herein; provided, however, that in the case of a temporary suspension for any of the reasons described under **Section 13.4.1.2** through **Section 13.4.1.4** herein, where Contractor is not a contributing cause of the suspension or where the provision of the Contract Documents in question does not specifically provide that the suspension is at no cost to Owner, Owner will make an equitable adjustment for the following items, provided that a claim properly is made by Contractor under **Section 4.3** herein:

13.4.2.1 an equitable extension of the Contract Time, not to exceed the actual delay caused by the temporary suspension, as determined by Owner and Design Consultant;

13.4.2.2 an equitable adjustment to the Contract Sum for the actual, necessary and reasonable costs of properly protecting any Work finished or partially finished during the period of the temporary suspension; provided, however, that no payment of profit and/or overhead shall be allowed on top of these costs; and

13.4.2.3 if it becomes necessary to move equipment from the Project Site and then return it to the Project Site when the Work is ordered to be resumed, an equitable adjustment to the Contract Sum for the actual, necessary and reasonable cost of these moves; provided, however, that no adjustment to the Contract Sum shall be due if said equipment is moved to another Project site of Owner.

ARTICLE XIV. MISCELLANEOUS PROVISIONS

14.1 Small Business Economic Development Advocacy. Contractor shall comply with the requirements of City's Small Business Economic Development Advocacy Office as posted in the Project's solicitation documents and the Contract Documents.

14.2 GOVERNING LAW; COMPLIANCE WITH LAWS AND REGULATIONS

14.2.1 This Contract shall be governed by the laws and case decisions of the State of Texas, without regard to conflict of law or choice of law principles of Texas or of any other state.

14.2.2 This Contract is entered into subject to and controlled by the Charter and ordinances of the City of San Antonio and all applicable laws, rules and regulations of the State of Texas and the Government of the United States of America. Contractor shall, during the performance of the Work, comply with all

applicable City of San Antonio codes and ordinances, as amended, and all applicable State of Texas and Federal laws, rules and regulations, as amended.

14.3 SUCCESSORS AND ASSIGNS. Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the promises, covenants, terms, conditions and obligations contained in the Contract Documents. Contractor shall not assign, transfer or convey its interest or rights in the Contract, in part or as a whole, without the written consent of Owner. If Contractor attempts to make an assignment, transfer or conveyance without Owner's written consent, Contractor nevertheless shall remain legally responsible for all obligations under the Contract Documents. Owner shall not assign any portion of the Contract Sum due or to become due under this Contract without the written consent of Contractor, except where assignment is compelled by court order, other operation of law or the terms of these General Conditions.

14.4 WRITTEN NOTICE. Any notice, payment, statement or demand required or permitted to be given under this Contract by either party to the other may be effected by personal delivery in writing or by facsimile transmission, email or by mail, postage prepaid, or by overnight delivery to an officer, management level employee or other designated representative of either party. Mailed or email notices shall be addressed to the parties at an address designated by each party, but each party may change its address by written notice in accordance with this section. Mailed notices shall be deemed received as of three (3) calendar days after mailing.

14.5 RIGHTS AND REMEDIES; NO WAIVER OF RIGHTS BY OWNER

14.5.1 The duties and obligations imposed on Contractor by the Contract Documents and the rights and remedies available to Owner under the Contract Documents shall be in addition to, and not a limitation of, any duties, obligations, rights and remedies otherwise imposed or made available by law.

14.5.2 No action or failure to act by Owner shall constitute a waiver of a right afforded Owner under the Contract Documents, nor shall any action or failure to act by Owner constitute approval of or acquiescence in a breach of the Contract by Contractor, except as may be specifically agreed in writing by Change Order, Amendment or Supplemental Agreement.

14.6 Interest. Owner shall not be liable for interest on any progress or final payment to be made under the Contract Documents, except as may be provided by the applicable provisions of the Prompt Payment Act, Chapter 2251, Texas Government Code, as amended, subject to **Article IX** of these General Conditions.

14.7 INDEPENDENT MATERIALS TESTING AND INSPECTION

14.7.1 In some circumstances, Owner shall retain, independent of Contractor, the inspection services, the testing of construction materials engineering and the verification testing services necessary for acceptance of the Project by Owner. Such consultants will be selected in accordance with Section 2254.004 of the Government Code. The professional services, duties and responsibilities of any

independent consultants will be described in the agreements between Owner and those consultants. The provision of inspection services by Owner will be for Quality Assurance and shall not reduce or lessen Contractor's responsibility for the Work or its duty to establish and implement a thorough Quality Control Program to monitor the quality of construction and guard the Owner against defects and deficiencies in the Work, as required herein. Contractor fully and solely is responsible for constructing the Project in strict accordance with the Construction Documents.

14.8 OFFICERS OR EMPLOYEES OF THE OWNER NOT TO HAVE FINANCIAL INTEREST IN ANY CONTRACT OF THE OWNER. Contractor acknowledges the Charter of the City of San Antonio and its Ethics Code prohibits a City officer or employee, as those terms are defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the City or any City agency, such as City-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

(1) a City officer or employee; his parent, child or spouse;

(2) a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market value of the business entity;

(3) a business entity in which any individual or entity above listed is a Subcontractor on a City contract, or

(4) a partner or a parent or subsidiary business entity.

Pursuant to this **Article XIV**, Contractor warrants and certifies, and this Contract is made in reliance thereon, that it, its officers, employees and/or agents are neither officers nor employees of Owner. Except with Owner's low-bid contract awards, Contractor warrants and certifies that it has tendered to Owner a Discretionary Contracts Disclosure Statement in compliance with Owner's Ethics Code. Any violation of this article shall constitute malfeasance in office and any officer or employee of Owner guilty thereof shall thereby forfeit his office or position. Any violation of this **Section 14.8**, with the knowledge, express or implied, of the person, persons, partnership, company, firm, association or corporation contracting with Owner shall render a Contract voidable by the Owner's City Manager or City Council.

14.9 Venue. This Contract is performed in Bexar County, Texas, and if legal action is necessary to enforce this Contract, exclusive venue shall lie in Bexar County, Texas.

14.10 INDEPENDENT CONTRACTOR. In performing the Work under this Contract, the relationship between Owner and Contractor is that of an independent contractor. Contractor shall exercise independent judgment in performing the Work and solely is responsible for setting

working hours, scheduling and/or prioritizing the Work flow and determining the means and methods of performing the Work, subject only to the requirements of the Contract Documents. No term or provision of this Contract shall be construed as making Contractor an agent, servant or employee of Owner or making Contractor or any of Contractor's employees, agents or servants eligible for the fringe benefits, such as retirement, insurance and worker's compensation which Owner provides to its employees.

14.11 NONDISCRIMINATION. As a condition of this Contract, Contractor covenants that it will take all necessary actions to insure that, in connection with any Work under this Contract, Contractor and its Subcontractor(s) will not discriminate in the treatment or employment of any individual or groups of individuals on the grounds of race, color, religion, national origin, age, sex or handicap unrelated to job performance, either directly, indirectly or through contractual or other arrangements. Contractor also shall comply with all applicable requirements of the Americans with Disabilities Act, 42 U.S.C.A. §§12101-12213, as amended. In this regard, Contractor shall keep, retain and safeguard all records relating to this Contract or Work performed there under, for a minimum period of four (4) years from Final Completion, unless there is an ongoing dispute under the Contract, then, such retention period shall extend until final resolution of the dispute, with full access allowed to authorized representatives of Owner upon request, for purposes of evaluating compliance with this and other provisions of the Contract.

14.12 GIFTS TO PUBLIC SERVANTS

14.12.1 Owner may terminate this Contract immediately if Contractor has offered, conferred or agreed to confer any benefit on a City of San Antonio employee or official that the employee or official is prohibited by law from accepting.

14.12.2 For purposes of this Article, "benefit" means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct or substantial interest, but does not include a contribution or expenditure made and reported in accordance with law.

14.12.3 Notwithstanding any other legal remedies, Owner may require Contractor to remove any employee of Contractor, a Subcontractor or any employee of a Subcontractor from the Project who has violated the restrictions of this **Article XIV** or any similar State or Federal law and Owner may obtain reimbursement for any expenditures made to Contractor as a result of an improper offer, an agreement to confer or the conferring of a benefit to a City of San Antonio employee or official.

ARTICLE XV. AUDIT

15.1 RIGHT TO AUDIT CONTRACTOR'S RECORDS

15.1.1 By execution of the Contract, Contractor grants Owner the right to audit, examine, inspect and/or copy, at Owner's election at all reasonable times during

the term of this Contract and for a period of four (4) years following the completion or termination of the Work, all of Contractor's written and electronically stored records and billings relating to the performance of the Work under the Contract Documents. The audit, examination or inspection may be performed by an Owner designee, which may include its internal auditors or an outside representative engaged by Owner. Contractor agrees to retain its records for a minimum of four (4) years following termination of the Contract, unless there is an ongoing dispute under the Contract, then, such retention period shall extend until final resolution of the dispute. As used in these General Conditions, "Contractor written and electronically stored records" include any and all information, materials and data of every kind and character generated as a result of the work under this Contract. Example of Contractor written and electronically stores records include, but are not limited to: accounting data and reports, billings, books, general ledgers, cost ledgers, invoices, production sheets, documents, correspondences, meeting notes, subscriptions, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, procedures, Subcontractor agreements, Supplier agreements, rental equipment proposals, federal and state tax filings for any issue in question, along with any and all other agreements, sources of information and matters that may, in Owner's sole judgment, have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Agreement Documents.

15.1.2 Owner agrees that it will exercise the right to audit, examine or inspect Contractor's records only during regular business hours. Contractor agrees to allow Owner and/or Owner's designee access to all of the Contractor's Records, Contractor's facilities and current or former employees of Contractor, deemed necessary by Owner or its designee(s), to perform such audit, inspection or examination. Contractor also agrees to provide adequate and appropriate work space necessary for Owner or its designees to conduct such audits, inspections or examinations.

15.1.3 Contractor shall include this **Article XV** in any Subcontractor, supplier or vendor contract.