

PROFESSIONAL SERVICES AGREEMENT

STATE OF TEXAS
COUNTY OF BEXAR
CITY OF SAN ANTONIO

Downtown Master Lighting Plan

This Professional Services Agreement (hereafter referred to as “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 (hereinafter referred to as “City” and

CONSULTANT FIRM

(hereafter referred to as “Firm”) (City and Firm collective referred to as “the Parties”), said Agreement being executed by City, pursuant to City Charter, Ordinances and Resolutions of the San Antonio City Council, and by Firm to provide the services described in **Exhibit A**, attached hereto and made a part hereof of this Agreement, hereinafter set forth in connection with the above designated Project for City.

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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 City and Firm, including any other document itemized and expressly referenced in or attached to and expressly made part of this Agreement, to include Firm’s proposal, to the extent accepted by City and not in conflict with the Articles of this Agreement, including the Scope of Services, labeled as **Exhibit A** hereto and made a part of this Agreement and the Fee Proposal, labeled as **Exhibit B** hereto and made a part of this Agreement.
- 1.2 “City” and “Owner” mean the City of San Antonio, Texas.
- 1.3 “Claim” is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of this Agreement terms, payment of money, and 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 City and Firm arising out of or relating to this Agreement.
- 1.4 “Compensation” means the amount paid by City to Firm for completed services accepted by City under this Agreement.
- 1.5 “Director” means the Director of City’s Transportation and Capital Improvements Department (hereafter referred to as “TCI”) or his/her designated project manager identified in the City-issued Notice to Proceed.
- 1.6 “Final Compensation” means the final amounts paid by City to Firm for completed services accepted by City under this Agreement.
- 1.7 “Firm” means _____, its officers, partners, employees, agents, representatives and all Sub-Consultants, if any, and all other persons or entities which Firm legally is responsible.
- 1.8 “Firm’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.
- 1.9 “Invoice” means written request for compensation from Firm to City for services completed under this Agreement.
- 1.10 “Project” means the capital improvement/construction development undertaking of City.
- 1.11 “Proposal” means the proposal of services submitted by Firm in response to City’s Request for Qualifications.
- 1.12 “Total Compensation” means the Not-To-Exceed amount of this Agreement.

**ARTICLE II.
FIRM'S RESPONSIBILITIES**

2.1 Firm warrants services provided by Firm under this Agreement shall 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.

2.2 Acceptance of the final plans by City shall not constitute nor be deemed a release of the responsibility and liability of Firm, 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 City for any defect in the designs, working drawings, specifications or other documents and work prepared by said Firm, its employees, sub-consultants and agents.

2.3 Firm warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Firm, 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 a breach of this warranty, City shall have the right to terminate this Agreement under the provisions of **Article XII** herein.

**ARTICLE III.
BASIC SERVICES**

3.1 Firm shall not commence performance of any services on this Project until being thoroughly briefed on the scope of the Project and being notified by City in writing to proceed. The scope of the Project and Firm's required services shall be dependent on Firm's review of City's criteria and the development of a Proposal by Firm to define the services based on this Agreement, as well as a complete understanding of the goals of City for this Project. Should the goals of the Project subsequently and significantly change, either Firm or City may request a review of the anticipated services, along with an appropriate adjustment in compensation. Any work performed by Firm, prior to the receipt of a written Notice to Proceed issued by City, will be performed at Firm's own risk.

3.2 Firm shall render the professional services described in this **Article III** and in **Exhibit A** necessary for the development of the Project to Substantial Completion, as acceptable to the Director and subject to other provisions of this Agreement.

3.3 Firm shall coordinate its services with those services provided by City and City's Consultants. Firm shall be entitled to rely on the completeness of services and information furnished by City.

3.4 Firm shall manage Firm's services, consult with City, research applicable design criteria and report progress to City.

3.5 If Firm writes or uses a computer model or spreadsheet as a part of this Project, Firm shall submit to City for approval all proposed model names and data formats, prior to beginning work on that task. All data shall be submitted to City in written and digital formats with the final product or deliverable. Digital media shall be labeled by Firm to provide sufficient detail to access the information on that media. User manuals shall be submitted by Firm to City, providing complete documentation of computer models developed under this Project. The user manuals also shall contain the source code language and the type of computer equipment necessary to operate the model(s). All computer models, databases and spreadsheets developed herein (written and digital formats) are due on the same date as the final product or deliverable.

3.6 If Firm is required to submit hardcopy submittals, Firm also shall provide the hardcopy submittal, such as final documents and related materials, in a digital format. This digital deliverable shall, to the extent feasible, be assembled into one file rather than separate files for text, tables, graphics, etc. This digital deliverable shall be contained on a CD(s) or DVD(s), and shall be in both Word and Adobe Acrobat format. Any plates, figures, etc., not suitable for Word, shall be in AutoCAD, ArcGIS, Adobe Acrobat or compatible format.

ARTICLE IV. ADDITIONAL SERVICES

Additional Services are not included in Basic Services but may be required for the delivery of the Project. All Additional Services, to include the cost thereof, shall be listed in **Exhibit C** hereto and if such Additional Services are to be performed by Subcontractors or Sub-Consultants, then Firm shall list such Subcontractors or Sub-Consultants, to include the legal names, addresses and telephone numbers. The cost of all Additional Services shall be included in the Not-To-Exceed Total Compensation for this Contract.

ARTICLE V. FURTHER SERVICES REQUIRING AMENDMENT

5.1 If, during the performance of the Project, further services are required of Firm, Firm shall notify City, in a timely manner, to explain the reasons for the further services. Any further services shall be negotiated, agreed upon and added to this Agreement by a written amendment executed by both parties.

5.2 Further services may be provided after the execution of this Agreement without nullifying the Agreement. If further services are required to redraw or redesign caused by City's decision to change the scope or redirect the goals after drawings have been completed and Firm will be charging City for these additional services, Firm shall agree to work on an hourly basis to complete the services. If City elects to add scope and increase the services provided by Firm, there shall be an agreement between the Parties to change the scope and an agreement reached for additional fees, if any. If additional compensation is negotiated for these requested increased services, that compensation shall be added to the Final Compensation and paid to Firm after a written amendment incorporating such services into the Agreement has been executed by both parties. Any further services which Firm negotiates to charge City will be provided on a not-to-exceed basis and set out in a written amendment approving such services.

**ARTICLE VI. and ARTICLE VII.
RESERVED**

**ARTICLE VIII.
TIME AND PERIOD OF SERVICE**

8.1 Prior to commencement of any services, Firm shall provide City with: (1) Service Fees and Reimbursables, listed in **Exhibit B** hereto, which shall list services, fees and reimbursable cost and expenses required by Firm for completion of the services; and (2) a Schedule of Project Services, listed on **Exhibit B** hereto, which shall detail the various service phases.

8.2 Time is of the essence of this Agreement. Firm shall perform and complete its obligations for the services as stated in **Article III "Basic Services"** and **Article IV "Additional Services"** of this Agreement in a prompt and continuous manner, so as to not delay the development of the design and so as to not delay the Project, in accordance with the schedules approved by City. If, upon review of any phase of services, City determines that corrections, modifications, alterations or additions are required by Firm, Firm shall complete these corrections, modifications, alterations or additions before that Phase of Services is approved by City.

8.3 Firm shall not proceed with the next appropriate Phase of Services without written authorization from the Director. City may elect to discontinue Firm's services for any reason or for no reason at any time. Further, if circumstances so dictate, the Director may make adjustments to the scope of Firm's obligations at any time to achieve the required design.

8.4 Firm 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 Firm's reasonable control. Within ten (10) calendar days from the occurrence of any event, for which time for performance by Firm shall significantly be extended under this provision, Firm shall give written notice thereof to City, stating the reason for such extension and the actual or estimated time thereof. If City determines that Firm is responsible for the need for extended time, City shall have the right to make a Claim, as provided in this Agreement.

8.5 This Agreement shall remain in effect until Firm completes the Scope of Services, as defined in **Exhibit A** hereto, or this Agreement is terminated pursuant to **Article XIII** herein.

**ARTICLE IX.
INSURANCE REQUIREMENTS**

9.1 Prior to the commencement of any services under this Agreement, Firm shall furnish copies of all required endorsements and a completed Certificate(s) of Insurance to City’s TCI Contract Services Department, which clearly shall be labeled **“Downtown Lighting Master Plan”** 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. City shall not accept Memorandum of Insurance or Binders as proof of insurance. The certificate(s) or form 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 City. City shall have no duty to pay or perform under this Agreement, until such certificate and endorsements have been received and approved by TCI Contract Services Department. No officer or employee of City, other than City’s Risk Manager, shall have authority to waive these insurance requirements.

9.2 City reserves the right to review the insurance requirements of this **Article IX** during the effective period of this contract and any extension or renewal hereof and to request modification of 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 whereupon City may incur increased risk.

9.3 Firm’s financial integrity is of great interest to City. Therefore, subject to Firm’s right to maintain reasonable deductibles in such amounts as are approved by City, Firm shall obtain and maintain, in full force and effect for the duration of this Agreement and any extension hereof, at Firm’s sole expense, insurance coverage written on an occurrence or claims-made basis, as appropriate, by companies authorized to do business in the State of Texas and with an A.M. Best's rating of not less than A- (VII), in the following types and for an amount not less than the amount listed:

INSURANCE REQUIREMENTS	
1. Worker’s Compensation ** Employer’s Liability	Statutory Limits \$500,000/\$500,000/\$500,000
2. Commercial General Broad Form (Public) Liability Insurance to include coverage for the following: Premises Operations Independent Contractors* Products/completed operations Personal Injury Contractual Liability	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
3. 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
*If Applicable	
** Alternate Plans Must Be Approved by Risk Management	

9.4 Without expense to City, City may request to inspect copies of the any insurance policies, declarations page(s) and all endorsements thereto, as they apply to the limits required by City.

9.5 Firm agrees, with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following required provisions:

- (1) Name City and its officers, officials, employees 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 City, with the exception of the workers' compensation and professional liability policies;
- (2) To the extent not inconsistent with the requirements of the issuing insurance carrier, provide for an endorsement that the "other insurance" clause shall not apply to City where City is an additional insured shown on the policy, if such endorsement is permitted by law and regulations;
- (3) Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of City; and
- (4) Provide advance written notice directly to City of any suspension, cancellation or non-renewal or material change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.

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

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

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

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

9.10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement as respects additional insureds.

ARTICLE X. CITY'S RESPONSIBILITIES

10.1 The Director or his/her representative shall act on behalf of City, 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 City's policies and decisions, with respect to materials, equipment, elements and systems pertinent to Firm's services.

10.2 City promptly shall give written notice to Firm whenever City observes or otherwise becomes aware of any defect in Firm's services or any development which affects the scope or timing of Firm's services.

ARTICLE XI. COMPENSATION

11.1 The Total Compensation for all services defined by this Agreement, to include Basic Services, Additional Services and Reimbursables, is the Not-To-Exceed sum of **Two Hundred Seventy Five Thousand Dollars (\$275,000)**. It is agreed and understood that such amount will constitute full compensation to Firm for all Basic Services, Additional Services and Reimbursables. Unless and until City further makes appropriations for any services not included in the Scope of Basic Services, Additional Services and Reimbursables of this Agreement, the obligation of City to Firm for Total Compensation in connection with this Agreement cannot and will not exceed such sum of **Two Hundred Seventy Five Thousand Dollars (\$275,000)** , without further written amendment to this Agreement.

11.2 Firm's Schedule of Project Services, as found in **Exhibit B** hereto, shall be used as the basis for reviewing Firm's Invoices. The Schedule shall include all services to be performed and also shall include Additional Services and Reimbursable which make up the Total Compensation. Firm and City acknowledge that the total Not-To-Exceed compensation amount contained in **Section 11.1** herein has been established predicated upon the Not-To-Exceed costs of all services to be rendered under this Agreement.

11.3 Firm warrants that title to all services covered by one of its Invoices will pass to City no later than the time of Compensation. Firm further warrants that, upon submittal of an Invoice, all services for which Invoices have previously been issued and compensation received from City shall, to the best of Firm's knowledge, information and belief, be free and clear of liens, Claims, security interests or encumbrance in favor of Firm, or other persons or entities making a Claim by reason of having provided labor or services relating to the work. **FIRM SHALL INDEMNIFY AND HOLD CITY HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY ANYONE CLAIMING BY, THROUGH OR UNDER THE ITEMS COVERED BY COMPENSATION PAID BY CITY TO FIRM.**

11.4 Firm shall, within ten (10) calendar days following receipt of Compensation from City, pay all bills for services performed and furnished by others in connection with the Project and shall, if requested, provide City with evidence of such payment. Firm's failure to make payments within such time shall constitute a material breach of this Agreement, unless Firm is able to demonstrate to City bona fide disputes associated with the unpaid Sub-Consultant(s) and its/their services. Firm shall include a provision in each of its sub-agreements imposing the same payment obligations on the Sub-Consultants as are applicable to Firm hereunder and, if City so requests, Firm shall provide City copies of such payments by the Sub-Consultants.

11.5 The final compensation to be made by City to Firm shall be payable upon submission of a statement of release, along with the final Invoice, notifying City that there is no further compensation owed to Firm by City beyond the final Invoice.

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

11.6.1 Delays in the performance of Firm's services;

11.6.2 Third-party Claims filed or reasonable evidence indicating probable filing of such Claims, unless security acceptable to City is provided by Firm;

11.6.3 Failure of Firm to make payments properly to Sub-Consultants or vendors for labor, materials or equipment;

11.6.4 Reasonable evidence that Firm's services cannot be completed for the amount unpaid under this Agreement.

11.6.5 Damage to City.

11.6.6 Persistent failure by Firm to carry out the performance of its services in accordance with this Agreement.

11.7 When the above reasons for withholding are removed or remedied by Firm, Compensation of the amount withheld will be made within a reasonable time. City shall not be deemed in default by reason of withholding Compensation, as provided for in this **Article XI**.

11.8 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 City Firm 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 Firm 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.

11.9 Firm agrees to maintain adequate books, payrolls and records satisfactory to City, in connection with any and all services performed hereunder. Firm 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, City and its duly authorized representatives shall have access to all personnel of Firm and all such books, payrolls and records and shall have the right to audit same.

11.10 City maintains the right to prior approval of any reimbursable expenditure by Firm and shall not pay any expenses that are not agreed to in writing, prior to the execution of this Agreement. If Firm or a Sub-Consultant of Firm should make expenditures, which are not approved in advance in writing by City, either prior to or after the execution of this Agreement, those costs shall be the sole responsibility of Firm and not of City. When authorized by City in advance and in writing, Firm shall be entitled to reimbursement at cost and without markup for services and related expenses incurred for the following items:

11.10.1 Travel outside of the greater San Antonio metropolitan area and only if approved in writing by City prior to such travel. Reimbursement for travel costs shall be limited to costs directly associated with Firm's performance of Service under this Agreement. Travel costs are limited to the per diem rates for San Antonio set annually by the Federal Government's General Services Administration. Firm shall provide detailed receipts for all reimbursable charges. Travel expenses shall not exceed the amount noted in attached Scope of Services without further written approval of City.

11.10.2 Mailing, courier services and copies of documents requested by City in writing, in excess of the copies contractually required to be provided under the Agreement. These costs shall not exceed the amount noted in attached Scope/Budget without further approval of City.

11.10.3 Graphics, physical models and presentation boards requested by City in writing in excess of the copies contractually required to be provided under the Agreement. These costs shall not exceed the amount noted in attached Scope/Budget without further approval of City.

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

11.10.4 Markup on Sub-Consultant work. Absent advanced written approval by City, no markup on Sub-Consultant work shall be allowed and Firm shall invoice and be reimbursed only for the actual hourly costs incurred in managing its Sub-Consultant(s). If advanced written approval is given by City, markups for Sub-Consultant work shall not exceed five percent (5%). There shall be no markup on reimbursables from Sub-Consultants.

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 produced by Firm, shall remain the property of the Firm as instruments of service. However, Firm understands and agrees that City 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 without the specific written verification or adaptation by Firm will be at City's sole risk and without liability or legal exposure to Firm.

12.2 Firm acknowledges and agrees, upon payment, City 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 City desires. All documents and/or deliverables, including the original drawings, estimates, specifications and all other documents and data, shall be delivered to City at no additional cost to City upon request or termination or completion of this Agreement without restriction on future use. However, any reuse on a different Project without specific written verification or adaptation by Firm will be at City's sole risk and without liability or legal exposure to Firm.

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

12.4 FIRM HEREBY ASSIGNS ALL STATUTORY AND COMMON LAW COPYRIGHTS TO ANY COPYRIGHTABLE WORK THAT, IN PART OR IN WHOLE, WAS PRODUCED FROM THIS AGREEMENT TO CITY, 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 FIRM. ALL REPORTS, MAPS, PROJECT LOGOS, DRAWINGS OR OTHER COPYRIGHTABLE WORK PRODUCED UNDER THIS AGREEMENT SHALL BECOME THE PROPERTY OF CITY (EXCLUDING ANY PRIOR-OWNED INSTRUMENT OF SERVICES, UNLESS OTHERWISE SPECIFIED HEREIN). FIRM SHALL, AT ITS EXPENSE, INDEMNIFY CITY AND DEFEND ALL SUITS OR PROCEEDINGS INSTITUTED AGAINST CITY AND PAY ANY AWARD OF DAMAGES OR LOSS RESULTING FROM AN INJUNCTION, AGAINST CITY, 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.

12.5 Firm may make copies of any and all documents and items for its files. Firm shall have no liability for changes made to or use of the drawings, specifications and other documents by other Firms, consultants,

Architects and/or Engineers or other persons, subsequent to the completion of the Project. Firm shall note Firm's agreement or disagreement with all changes or modifications on all documents by other Firms and/or other persons outside of Firm's control, including electronic copies, prior to the completion of the Project.

12.6 Notwithstanding anything to the contrary contained herein, all previously owned intellectual property of Firm including, but not limited to, any computer software (object code and source code), tools, systems, equipment or other information used by Firm or its suppliers in the course of delivering the services hereunder and any know-how, methodologies, or processes used by Firm to provide the services or protect deliverables to City 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 Firm and/or its suppliers.

12.7 Intellectual Property

12.7.1 City shall be the sole and exclusive owner of all of the design and artwork (hereafter referred to as "Work Product"), and of all copyright, patent, trademark, trade secret and other proprietary rights in the Work Product. Ownership of Work Product will inure to the benefit of City from the date of creation or of fixation in a tangible medium of expression, as applicable, of such Work Product. Firm hereby assigns and agrees to assign to City exclusively all right, title, and interest in and to the Work Product, and all copies thereof, and the copyright, patent, trademark, trade secret, and all other proprietary rights in the Work Product, without further consideration, free from any claim, lien for balance due, or rights of retention thereto on the part of Firm. Firm shall obtain similar written undertakings from its employees and consultants who will perform services relating to this Agreement, so as to ensure City's ownership of the Work Product. Firm shall promptly and fully disclose and deliver the Work Product to City, in writing if requested by City, and shall execute and deliver any and all lawful patent, copyright, or other applications, assignments, and other documents that City requests for protecting the Work Product, whether in the United States or any other country. City shall have the full and sole power to prosecute such applications and to take all other action concerning the Work Product, and Firm shall cooperate fully and in a lawful manner, at the expense of City, in the preparation and prosecution of all such applications and in any legal actions and proceedings concerning the Work Product. Firm shall retain all right, title, and interest in all intangible ideas, know-how, and techniques developed by Firm that are not Work Product and Firm hereby grants to City a perpetual, non-exclusive, royalty free license to use any such ideas, know-how, and techniques that are embedded in the Work Product.

12.7.2 Intellectual Property Indemnification

12.7.2.1 Firm shall hold City harmless and indemnify City from the payment of any royalties, damages, losses or expenses, including attorney's fees, for suits, claims or otherwise, growing out of infringement or alleged infringement of copyrights, patents, materials and methods used in the Work Product. Firm shall defend City in all suits for infringement of any Intellectual Property rights. Further, if Firm has reason to believe that the design, service, process or product specified is an infringement of an Intellectual Property right, it promptly shall convey such information to the City.

12.7.2.2 Upon receipt of notification of a third-party claim that the Work Product infringes upon any United States patent or copyright, Firm immediately shall:

- (1) either obtain, at Firm's sole expense, the necessary license(s) or rights that will allow City to continue using the Work Product; or
- (2) alter the Work Product so the alleged infringement is eliminated and reimburse City for any expense(s) incurred by City to produce an alternate Work Product, including costs of design, printing and distribution, incurred while Firm is in the process of implementing the requirements set forth above.

Firm further agrees to:

- (3) assume the defense of any claim, suit or proceeding brought against City for infringement of any United States patent or copyright arising from the use and/or sale of the Work Product; and
- (4) assume the expense (including any expense incurred by City) of such defense, including costs of investigations, reasonable attorneys' fees, expert witness fees, damages, and any other litigation-related expenses; and
- (5) indemnify City against any monetary damages and/or costs awarded in such suit;

Provided that:

- (a) Firm is given sole and exclusive control of all negotiations relative to the settlement thereof, but that Firm agrees to consult with the City Attorney of City during such defense or negotiations and make a good faith effort to avoid any position adverse to the interest of City; and
- (b) the Work Product is used by City in the form, state or condition as delivered by Firm or as modified without the permission of Firm, so long as such modification is not the source of the infringement claim; and
- (c) the liability claimed shall not have arisen out of City's negligent act or omission and City promptly provides Firm with written notice, within fifteen (15) days following the formal assertion of any claim, with respect to which City asserts that Firm assumes responsibility under this **Section XII**.

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 signed, written Notice of Termination (citing this **Section 13.1**) to the other party, declaring the other party to be in default and stating the

reason(s) why the other party 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 ten-day period, commencing upon receipt of the notice of termination, if such party has not cured any failure to perform, such termination shall become effective without further written notice.

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

13.3 City reserves the right to suspend this Agreement for the convenience of City by issuing a signed, written 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 what the total number of days of suspension will occur. Such suspension shall immediately take effect upon Firm's receipt of said notice of suspension.

13.4 Firm hereby is given the right to terminate this Agreement in the event such suspension by City extends for a period in excess of one hundred and twenty (120) days. Firm may exercise this right to terminate by issuing a signed, written notice of termination (citing this **Section 13.4**) to City after the expiration of sixty (60) days from the effective date of the suspension. Termination (under this **Section 13.4**) shall become effective immediately upon City's receipt of said written notice from Firm.

13.5 The procedures which Firm 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 directs or unless Firm immediately takes action to cure a failure to perform under the cure period set out hereinabove, Firm 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 Firm successfully has cured a failure to perform), Firm shall submit a statement showing in detail the services performed under this Agreement prior to the effective date of termination. City shall have the option to grant an extension to Firm of the time period for 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, prepared pursuant to this Agreement prior to the effective date of termination, shall be delivered to City, in the form requested by City, as a pre-condition to payment by City to Firm of final Compensation.

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

13.5.4 City, as a public entity, has a duty to document the expenditure of public funds. Firm hereby acknowledges this duty on City. To this end, Firm understands the failure of Firm to comply with the submittal of the statement and documents, as required herein, shall constitute a waiver by Firm of any and all rights or Claims to compensation for services performed by Firm, pursuant to this Agreement.

13.5.5 Failure of Firm to comply with the submittal of the statement and documents, as required herein, shall constitute a waiver by Firm of any and all rights or Claims to collect monies Firm otherwise may have been entitled to collect for services performed pursuant to this Agreement.

13.6 The procedures which Firm is to follow upon Receipt of Notice of Suspension are:

13.6.1 Upon receipt of written notice of suspension, which the date also shall be the effective date of the suspension, Firm shall, unless the notice otherwise directed, 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 Firm 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 and models, prepared pursuant to this Agreement and prior to the effective date of suspension, shall be prepared for possible delivery to City but shall be retained by Firm until such time as City may exercise the right to terminate this Agreement.

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

13.6.5 Any documents prepared in association with this Agreement shall be delivered to City as a pre-condition to final payment.

13.6.6 Upon the above conditions being met, City promptly shall compensate Firm 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 all previously paid Compensation.

13.6.7 City, as a public entity, has a duty to document the expenditure of public funds. Firm hereby acknowledges this duty on City. To this end, Firm understands that the failure of Firm substantially to comply with the submittal of the statements and documents, as required herein, shall constitute a waiver by Firm of any portion of the fee for which Firm did not supply such necessary statements and/or documents.

ARTICLE XIV. INDEMNIFICATION

14.1 FIRM WILL FULLY INDEMNIFY and HOLD HARMLESS City and its officials, officers, agents, employees, volunteers, directors and representatives (hereafter referred to as “Indemnitees”) from and against any and all claims, damages, liabilities or costs, including reasonable attorney fees and defense costs, made upon Indemnitees CAUSED BY OR RESULTING FROM AN ACT OF NEGLIGENCE, INTENTIONAL TORT, INTELLECTUAL PROPERTY INFRINGEMENT OR FAILURE TO PAY A SUB-CONSULTANT, SUBCONTRACTOR OR SUPPLIER COMMITTED BY FIRM OR ITS AGENT, CONSULTANT UNDER CONTRACT OR ANOTHER ENTITY OVER WHICH FIRM EXERCISES CONTROL WHILE IN THE EXERCISE OF RIGHTS OR PERFORMANCE OF THE DUTIES UNDER THIS AGREEMENT. This INDEMNIFICATION SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM INDEMNITEES’ NEGLIGENCE OR WILLFUL MISCONDUCT in instances where THE NEGLIGENCE OR WILLFUL MISCONDUCT CAUSES personal injury, bodily injury, death or property damage. IF A COURT OF COMPETENT JURISDICTION FINDS FIRM AND CITY JOINTLY LIABLE, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF 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.

14.2 The provisions of this **Article XIV** solely are 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 City in writing within twenty four (24) hours of any claim or demand against City or Consultant known to Consultant related to or arising out of Consultant’s activities under this Agreement.

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, an adjustment or interpretation of the Agreement’s terms, the 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 City and Firm arising out of or relating to this Agreement. Claims must be initiated by written notice. Every Claim of Firm, whether for an adjustment or interpretation of terms, payment of additional compensation, an extension of 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 Firm by his/her signature) of Firm, 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 Firm or by City must be initiated within twenty one (21) days after occurrence of the event giving rise to such Claim. Claims by Firm must be initiated by written notice to City. Claims by City must be initiated by written notice to Firm.

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

15.4 Claims for Additional Time. If Firm wishes to make a Claim for an increase in the time for performance, written notice, as provided in this **Section XV**, shall be given. Firm'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 Contract (such provision to survive any termination following such breach), the following standards shall apply both to Claims by the Firm and to Claims by City:

15.5.1 No consequential damages shall be allowed.

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

15.5.3 No profit or markup shall be allowed on any Claim for damage by Firm.

15.6 No Waiver of Governmental Immunity. NOTHING IN THIS SECTION XV SHALL BE CONSTRUED TO WAIVE CITY'S GOVERNMENTAL IMMUNITY FROM LAWSUIT, WHICH IMMUNITY IS EXPRESSLY 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 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) days after one party delivers a written notice of such dispute to the other, the Parties then shall proceed with mediation alternative dispute resolution process contained herein. All negotiations pursuant to this **Article XV** 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 City or Firm 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) days following the date of the request, except upon the agreement of both parties.

15.8.3 In the event City and Firm are unable to agree to a date for the mediation or to the identity of the mediator or mediators within thirty (30) 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 equally shall share the mediator's fee and any filing fees incurred. 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.
RESERVED**

**ARTICLE XVII.
ASSIGNMENT OR TRANSFER OF INTEREST**

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

**ARTICLE XVIII.
SEVERABILITY**

If, for any reason, any one or more Articles, Sections, sentences, clauses and/or parts of this Agreement are held invalid or unenforceable, such invalidity or unenforceability shall not affect, impair or invalidate the remaining Articles, Sections, sentences, clauses and/or parts of this Agreement but shall be confined in its effect to the specific Articles, Sections, sentences, clauses and/or parts of this Agreement held invalid or unenforceable. The invalidity or unenforceability of any Articles, Sections, sentences, clauses and/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 CITY CONTRACTS PROHIBITED**

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

19.2 Firm acknowledges that it is informed that the Charter of City and its Ethics Code prohibit a City officer or employee, as those terms are defined in the Ethics Code, from having a financial interest in any contract with City or in any City agency, such as City-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with City or in the sale to City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

19.2.1 a City officer or employee; his parent, child or spouse; and/or

19.2.2 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

19.2.3 a business entity in which any individual or entity above listed is a sub-Firm on a City contract, a partner or a parent or subsidiary business entity.

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

ARTICLE XX. CONFLICTS OF INTEREST DISCLOSURE

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

- (1) being in a partnership or joint venture with the officer or employee;
- (2) having a contract with the officer or employee;
- (3) being joint owners of a business;
- (4) owning at least ten percent (10%) of the stock in a corporation in which a City officer 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 Firm grants City or its designees the right to audit, examine or inspect, at City's election, all of Firm's records relating to the performance of the work under this Agreement during the term of this Agreement and retention period herein. The audit, examination or inspection may be performed by a City designee, which may include its internal auditors or an outside representative engaged by City. Firm agrees to retain its records for a minimum of four (4) years, following the termination of this Agreement, unless there are ongoing disputes related to this Agreement; then, such retention period shall extend four (4) years after final resolution of all disputes relating to this Agreement. "Firm'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 Firm 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 City's judgment, have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Agreement Documents.

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

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

**ARTICLE XXII.
ENTIRE AGREEMENT**

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

**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 the CITY, to:

If intended for the FIRM, to:

Transportation & Capital
Improvements Department

Attention: Contract Services
114 West Commerce, 9th Floor
San Antonio, Texas 78205

**ARTICLE XXV.
INDEPENDENT CONTRACTOR**

In performing services under this Agreement, the relationship between City and Firm is that of independent contractor. By the execution of this Agreement, Firm and City do not change the independent contractor status of Firm. Firm 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 Firm in the performance of this Agreement shall be construed as making Firm the agent, servant or employee of City or of making Firm or any of its agents or employees eligible for any fringe benefits, such as retirement, insurance and/or worker's compensation, which City provides to or for its employees.

**ARTICLE XXVI.
NON-DISCRMINATION**

As a party to this Agreement, Firm understands and agrees to comply with the Non-Discrimination Policy of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, Firm shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law or as otherwise established herein.

**ARTICLE XXVII.
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, by signing below, the City of San Antonio and _____, have executed and bound themselves to this Agreement as of the _____ day of _____, 20____.

CITY OF SAN ANTONIO

Mike Frisbie
TRANSPORTATION & CAPITAL IMPROVEMENTS
DEPARTMENT

TITLE
COMPANY

APPROVED AS TO FORM:

CITY ATTORNEY

EXHIBIT A
SCOPE OF SERVICES

DRAFT

EXHIBIT B
FEE PROPOSAL AND SCHEDULE

DRAFT

EXHIBIT C
ADDITIONAL SERVICES

DRAFT