TFC Contract No. 18-092-000
RFQ No. 303-7-01245

# INDEFINITE DELIVERY INDEFINITE QUANTITY

# PROFESSIONAL SERVICES AGREEMENT

# BETWEEN

# THE TEXAS FACILITIES COMMISSION

# AND

# CLEARY ZIMMERMANN ENGINEERS, LLC

# INDEFINITE DELIVERY INDEFINITE QUANTITY PROFESSIONAL SERVICES AGREEMENT BETWEEN THE TEXAS FACILITIES COMMISSION AND CLEARY ZIMMERMANN ENGINEERS, LLC

The Texas Facilities Commission (hereinafter referred to as "TFC"), a state agency located at 1711 San Jacinto Boulevard, Austin, Texas 78701, and Cleary Zimmermann Engineers, LLC (hereinafter referred to as "Professional Service Provider" or "PSP"), located at 1344 South Flores, Suite 101, San Antonio, Texas 78204, enter into the following indefinite delivery indefinite quantity professional services agreement (hereinafter referred to as the "Agreement") pursuant to the Professional Services Procurement Act, Tex. Gov't Code Ann. Ch. 2254 (West 2016) to be effective as of the Effective Date (as defined below).

## I. DEFINITIONS

1.1. Definitions. Unless specifically provided otherwise herein, all words and phrases in this Agreement in initial caps shall have the meanings set out in the 2015 Uniform General Conditions (hereinafter referred to as "UGC") and this Section 1.1. In the event of any conflict between the definitions in the UGC, a digital copy of which is incorporated herein by reference for all purposes in portable document format ("PDF") on the compact disk attached hereto and labeled "TFC Contract No. 18-092-000 / Cleary Zimmermann Engineers, LLC / Exhibits CD" (the "Exhibits CD"), and named therein as "Exhibit A," in the A/E Guidelines (as defined below), in the Special Conditions, if any, or in any other document referenced herein and incorporated for all purposes, and the definitions in this Agreement, the definitions in this Agreement shall control of the extent of the conflict.

1.1.1. *Additional Services* means those services not included in the Description of Project section of each Assignment (as defined below) which may be requested by TFC at any time for the duration of an Assignment, as discussed in Article IV below.

1.1.2. *A/E Guidelines* means the 2017 TFC Architectural/Engineering Guidelines, a digital copy of which is incorporated herein by reference for all purposes in PDF format on the EXHIBITS CD, and named therein as "Exhibit B."

1.1.3. *Assignment* means a fully executed document(s) that shall be required in order to evidence any subsequent agreements between TFC and PSP whereby TFC may engage specific professional services of PSP for a particular project(s) pursuant to the terms and conditions therein stated and in this Agreement.

1.1.4. *Building(s)* means such building(s) as may be identified in an Assignment.

1.1.5. *CAD* means AutoCAD DWG format unless specifically provided otherwise herein.

1.1.6. *Construction Documents* has the same meaning as identified in UGC, Section 1.17.

1.1.7. *Contract Documents* has the same meaning as defined in UGC, Section 1.13.

1.1.8. *Contractor* has the same meaning as defined in UGC, Section 1.16.

1.1.9. *Deliverables* means any and all Drawings, Specifications, photos, designs, studies, sketches, computer programs, reports, and other Professional Services which are specified to be delivered by PSP pursuant to the terms of this Agreement.

1.1.10. *Effective Date* means the date that the last signature of a party is affixed hereto or, for an Assignment, the date that the last signature of a part is affixed to the Assignment.

1.1.11. *Governmental Authorities* means the city, the county, any municipal utility district or similar taxing authority in which the Project is located, the State of Texas, the Federal Emergency Management Agency, the United States Army Corps of Engineers, the Environmental Protection Agency, the Texas Commission for Environmental Quality, and any other governmental or quasi-governmental agency or authority having jurisdiction over any development or construction activities on the Project or the PSP.

1.1.12. *Laws and Regulations* means any and all applicable laws, statutes, rules, regulations, ordinances, codes, and orders of any and all Governmental Authorities, including those governing labor, equal employment opportunity, safety, and environmental protection, including but not limited to, all applicable requirements of Title III of the Americans with Disabilities Act and the Texas Architectural Barriers Act and Texas Accessibility Standards found in Texas Government Code, Chapter 469 (West 2012 & Supp. 2016).

1.1.13. *MEP Systems* means mechanical, electrical, and plumbing systems.

1.1.14. *Notice of Termination* means the ten (10) day advance written notice that may be delivered pursuant to the terms of this Agreement.

1.1.15. *Pay Application or Invoice* means the application for payment submitted by PSP as discussed in Article IV, below.

1.1.16. *Person* means an individual, firm, partnership, corporation, association and any other legally recognized entity.

1.1.17. *Professional Services* means professional (i) engineering services; (ii) architectural services; (iii) landscape architecture services; (iv) land surveyor services; as well as (iv) state certified or state licensed real estate appraiser services, all as defined in Texas Government Code, Chapter 2254, Subchapter A, the specific scope of which shall be set out in the Assignment(s).

1.1.18. *Professional Services Schedule* means the schedule/timeline which sets out the deadlines in terms of a fixed number of days after a preceding deadline for completion and

delivery of discrete portions of the Professional Services to be delivered pursuant to any Assignment, and which deadlines shall be calculated from the effective date of a Notice to Proceed.

1.1.19. *Project* shall have the specific meaning as shall be set out in an Assignment, if any.

1.1.20. *Project Analysis* has the same meaning as defined in Texas Government Code, Section 2166.001(5).

1.1.21. *PSP Project Manager* means the individual designated by PSP in each Assignment, and who must be approved by TFC, as the contact person with specific authority to properly supervise and direct the duties and responsibilities of PSP, on behalf of PSP, pursuant to the terms and conditions of the Assignment, and who shall have decision-making authority to bind PSP with respect to the Professional Services and the Project.

1.1.22. *Scope of Services* means the Professional Services as set out in Section 2.2 below.

1.1.23. *Site* means lands or areas indicated in the Contract Documents as being furnished by TFC upon which the Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by TFC which are designated for the use of the Project.

1.1.24. *Subcontract* means any agreements between PSP and a Subcontractor.

1.1.25. *Subcontractor* means any Person that enters into an agreement with PSP to perform any part of the Professional Services.

1.1.26. *TFC Project Manager* means the individual designated by TFC as the owner's designated representative with the direct responsibility to properly supervise the design and construction of the Project, and the services being provided pursuant to this Agreement on behalf of TFC, including, but not limited to, (i) serving as the point of contact between TFC, the Using Agency (if any), and PSP; and (ii) supervising TFC's review and approval of the Professional Services.

1.1.27. *Using Agency* has the same meaning as defined in Texas Government Code, Section 2166.001(10).

1.1.28. *Work* means the administration, procurement, materials, equipment, testing, and all services necessary for PSP, and/or its agents, to fulfill PSP's obligations under any Assignment.

1.1.29. *Work Progress Schedule* has the same meaning as defined in UGC Section 1.49.

## II. DESCRIPTION OF PROJECTS AND SCOPE OF SERVICES

2.1 Description of Projects. TFC may, but is not obligated to, from time to time engage the professional services of PSP for one or more specific projects and identify the particular professional services needed therefor through an Assignment.

2.1.1. Assignments As Amendments. Such Assignments shall constitute amendments to this Agreement; shall be subject to the terms and conditions set forth in this Agreement unless expressly provided otherwise in the Assignment; and shall provide for, among other things, the following, all of which shall be negotiated as part of every Assignment:

2.1.1.1. description of the project assignment;

2.1.1.2. scope of services;

2.1.1.3. schedule and term;

2.1.1.4. PSP personnel assigned to the Project;

2.1.1.5. PSP deliverables;

2.1.1.6. TFC's responsibilities; and

2.1.1.7. compensation specific to the Assignment.

2.1.2. Must Be Written. Any such assignments, and all other required documentation, must be executed by authorized representatives of both parties.

2.1.3. Must Follow Form. Any such Assignment(s) shall be in substantially the same form as the Assignment, a digital copy of which is incorporated herein by reference for all purposes in .pdf format on the Exhibits CD and named therein as "Exhibit C."

2.1.4. Conflicts. In the event of a material conflict:

2.1.4.1. between the provisions of the *2015 Uniform General Conditions* (hereinafter referred to as "UGC"), the Supplementary General Conditions, any Special Conditions, and this Agreement and those of an Assignment, the provisions of the Assignment shall control to the extent of such conflict;

2.1.4.2. between the provisions of this Agreement and/or of an Assignment, and the provisions of the UGC, the Supplementary General Conditions, or any Special Conditions, the provisions of this Agreement and/or of the Assignment shall control to the extent of such conflict; and

2.1.4.3. between the provisions of this Agreement and/or of an Assignment, and the provisions of the A/E Guidelines, the provisions of this Agreement and/or of the Assignment shall control to the extent of such conflict.

2.2. Scope of Services. PSP shall timely provide the usual and customary services necessary and reasonably inferable to complete professional mechanical, electrical and plumbing (hereinafter referred to as "MEP") services on an indefinite delivery, indefinite quantity basis for such projects, and as may be required by a Professional Services Schedule, as deemed necessary by TFC during the term of this Agreement and as shall be more specifically set out in the Assignment.

2.2.1. No Rights of Expectation. PSP acknowledges and agrees that nothing in this Agreement confers any right to, expectation or, or guarantee of, a minimum number of Assignments or amount of Work.

2.2.2. HSP Requirements. PSP must comply with the requirements set out in Article XI regarding HUBS (as defined therein), as a condition precedent to the execution of each Assignment by TFC.

2.2.3. Applicability of A/E Guidelines. Subject to the provisions in this Agreement concerning conflicts, all provisions of the edition of the A/E Guidelines that are in effect as of the Effective Date of any Assignment shall govern the terms and conditions of said Assignment. In the event the A/E Guidelines are modified subsequent to the execution of this Agreement or of an Assignment, the revised newer version of the A/E Guidelines shall, upon delivery of written notice to PSP, replace the prior version; shall govern the Assignment; and shall be attached to the Assignment as an exhibit and incorporated therein by reference.

2.2.4. Firm Registration with Texas Board of Professional Engineers. TFC may only assign projects under this Agreement as permitted by the Texas Engineering Practice Act, Chapter 1001 of the Texas Occupations Code. This Act requires professional services provided and any Subcontractor performing engineering services to maintain firm registration of their business entities with the Texas Board of Professional Engineers. In the event such firm registration lapses, the provider is ineligible to receive Assignments under this Agreement or perform engineering services pursuant to Chapter 1001. For any time period when PSP does not have a valid firm registration, as required under this Section 2.2.4, TFC may not assign PSP work under this Agreement

## III. TERM AND TERMINATION

3.1 Duration. This Agreement shall be effective as of the Effective Date and shall terminate on **August 31, 2019**, unless extended by the parties by amendment to this Agreement or terminated earlier, as provided below. TFC retains the right and option to unilaterally extend this Agreement, upon notice to PSP, for an additional two (2) year period.

3.2. Early Termination. This Agreement, as well as any Assignment(s), may be terminated by TFC for its convenience, in whole or in part, at any time without cause, upon delivery of a Notice of Termination to PSP at least ten (10) days prior to the effective date of the termination.

Upon receipt of a Notice of Termination, PSP will immediately cease all Professional Services and undertake to terminate any relevant Subcontracts and will incur no further expense related to this Agreement or any specified Assignment(s). Such early termination shall be subject to the equitable settlement of the respective interests of the parties accrued up to the date of termination.

3.3. Completion of Assignments. This Agreement shall remain in full force and effect for the period required for the completion of any Assignment, including required extensions thereto, unless terminated pursuant to the provisions of this Agreement.

## IV. CONSIDERATION

4.1 Agreement Limit-Fees and Expenses.

4.1.1. Fees and Expenses. The fees for this Agreement shall not exceed the sum of Four Hundred Thousand and No/100 Dollars ($400,000.00), for each term of this Agreement. All fees and expenses that may be payable pursuant to this Agreement shall be as set forth and specified in each Assignment, and will be determined as a result of negotiations between the parties based upon the services to be rendered for the specific project.

4.1.2. Submission of Pay Applications or Invoices. No more frequently than once per month, PSP shall submit a Pay Application to TFC for services performed and reasonable and necessary costs and expenses incurred through the last day of the previous month.

4.2. Proportional Payments. Payments shall be made to PSP monthly in proportion to the services performed.

4.3. Notice of Depletion. Within seven (7) days of when the accumulated amount of Fees and Reimbursable Expenses reaches eighty percent (80%) of the maximum not-to-exceed contract amount(s), PSP shall deliver written notice thereof to TFC. Nothing herein shall be construed to require TFC to increase the approved maximum not-to-exceed contract amount(s) established pursuant to any Assignment hereunder.

4.4. Additional Services. Upon request by TFC for Additional Services, PSP shall prepare and submit a proposal for such Additional Services to TFC for approval. Additional Services shall be performed at a rate negotiated between TFC and PSP and must be approved by the Parties by amendment to any Assignment hereunder. Any Additional Services performed or delivered by PSP prior to execution of the Agreement or amendment thereto, as applicable, cannot be compensated.

4.5. Prompt Payment. All payments shall be governed as follows.

4.5.1. Payments to PSP. PSP shall be paid in accordance with Chapter 2251 of the Texas Government Code (West 2016), also known as the "Prompt Payment Act" and the provisions set out in Article 10 of the UGC, subject to any Special Conditions. Any Professional Services performed or delivered by PSP prior to the Effective Date of this Agreement or after its termination cannot be compensated.

4.5.2. Payments to Subcontractors. For all services rendered, PSP's payment to Subcontractors is due within ten (10) days after receipt of payment from TFC and, when appropriate in the sole discretion of TFC, TFC may issue joint checks to PSP and Subcontractor(s).

4.6. Maximum Reimbursable Expenses. Reasonable lodging and traveling expenses shall be considered a Reimbursable Expense under this Agreement when professional and technical personnel of PSP are away from the cities in which they are permanently assigned and are conducting authorized business directly connected with this Agreement. For the purposes of this Agreement, no travel reimbursement shall be made for travel within 100 miles of the location identified as the principal place of business or branch office of PSP, except for overnight stays, which require prior TFC project manager approval. The maximum amount for each Reimbursable Expense for travel and lodging shall be the rates established by the Texas Comptroller of Public Accounts, and outlined in Textravel, *https://fmx.cpa.state.tx.us/fmx/travel/textravel/index.php*, formerly known as the State of Texas Travel Allowance Guide for state employees. No Reimbursable Expenses shall exceed actual cost. In addition to those items specifically identified above as a Reimbursable Expense, permit fees and associated costs, certain other incidental direct expenses including, but not limited to, copying, telephone, data, and express mail services, and rental of special equipment or tools required in connection with provision of the Professional Services for the Project, may constitute a Reimbursable Expense; provided however, PSP must obtain the written approval of TFC prior to incurring the expense. Approval may be granted only under those limited circumstances wherein such costs are not considered normal or customary basic services under this Agreement. All requests for reimbursement must be accompanied by such documentation which, in the judgment of TFC, allows for complete substantiation of the costs incurred.

## V. ACKNOWLEDGEMENTS, COVENANTS, AND AGREEMENTS

5.1. Acknowledgements, Covenants, and Agreements of TFC. TFC acknowledges, covenants, and agrees as follows.

5.1.1. TFC Deliverables to PSP. Upon execution of an Assignment, TFC shall provide PSP with a copy of, or reasonable access to, the following information and documentation regarding a particular Project:

5.1.1.1. the UGC;

5.1.1.2. any Supplementary General Conditions;

5.1.1.3. any Special Conditions;

5.1.1.4. sample copies of the following:

5.1.1.4.1. contract forms; and

5.1.1.4.2. bond forms.

5.1.1.5. bidding information and instructions;

5.1.1.6. minimum wage rates;

5.1.1.7. the PAR for inclusion in the Specifications;

5.1.1.8. any maps and Drawings in the possession of TFC that reflect or depict Site boundaries, recorded easements, topography, utility locations, and such other documents in the possession of TFC that reflect Site conditions and/or restrictions which may impact the design and/or construction of the Project;

5.1.1.9. any soil reports or traffic impact studies in the possession of TFC;

5.1.1.10. any Project Analysis, or equivalent thereof;

5.1.1.11. any Budget; and

5.1.1.12. the Communication Protocol.

5.1.2. TFC Services to PSP. TFC shall provide, or cause to be provided, PSP with the following services for the Project identified in an Assignment:

5.1.2.1. upon PSP receiving general and criminal background check clearance, assist PSP in obtaining such access to the Sites as is reasonably necessary to enable PSP to provide the Professional Services;

5.1.2.2. designate the TFC Project Manager who will supervise the Work of the Project and the Professional Services being provided pursuant to this Agreement, any Assignment, and the Contract Documents; and

5.1.2.3. provide intermediate reviews of the work product of PSP as necessary to allow PSP to proceed with delivery of the Professional Services in a timely manner.

5.2. Acknowledgements, Covenants, and Agreements of PSP. PSP acknowledges, covenants, and agrees as follows.

5.2.1. Timely Delivery of Conforming Services. PSP will, subject to Force Majeure events (as defined in Section 11.12 below) timely provide the Professional Services in conformity with, and as specified in, this Agreement, any Assignment(s); the UGC, the Supplementary General Conditions, any Special Conditions, and in the Construction Documents.

5.2.2. Modifications to Construction Documents. Modifications to the Construction Documents which are made necessary by the errors and/or omissions of PSP shall be corrected by PSP at its sole cost and expense.

5.2.2.1. For purposes of this subsection, an omission is defined as any change or addition to the Construction Documents required to make the Project conform to its original design intent.

5.2.2.2. For purposes of this subsection, an error is defined as any change or addition to the Construction Documents where remediation of previously constructed or installed Work must take place in order to meet code and/or design intent or any omission that is caused by willful misconduct or gross negligence by PSP. In the event that PSP is determined to have been the cause of such an error, PSP shall bear the reasonable costs, in excess of value added to the Project, to resolve said error.

5.2.3. Limitation of Authority. PSP agrees that the TFC Project Manager shall not have any express or implied authority to vary or otherwise amend the terms and conditions of this Agreement or an Assignment in any way, or waive strict compliance with the terms and conditions of this Agreement or an Assignment, except as to the deadlines set out in Section 2.2 above, any deviation from which must be evidenced by the TFC Project Manager in writing.

5.2.4. PSP Safety. PSP and all PSP personnel conducting work or Services for TFC shall abide by all OSHA rules and regulations provided by the Department of Labor, OSHA, Code of Federal Regulations, Chapter 29. Employees of PSP and Subcontractors shall be trained in accordance with Chapter 29, Occupational Safety and Health Regulations.

5.2.4.1. PSP and Subcontractors shall inform the TFC Project Manager(s) of their Hazardous Electrical Energy Control, Lockout/Tag-out Procedure. PSP's procedure must meet or exceed TFC's procedure as determined by the TFC Project Manager(s).

5.2.4.2. Work shall not be done on energized electrical circuits, components or equipment. When de-energizing is impractical due to possible harm to personnel, equipment or facility damage, negative onsite or offsite environmental impact, or business interruption, PSP must follow OSHA requirements as detailed in OSHA Regulations 1910.331 – 1910.399.

5.2.4.3. TFC, in its sole discretion, may at any time order in writing a temporary stand-down of PSP's performance of the Services ("Safety Stand-Down Order") as a result of any one or more Safety Incidents, whereupon PSP shall immediately direct all PSP Personnel to stop all Services while PSP conducts a comprehensive review of PSP's safety management plan and any Site conditions affecting safety at any Project Site, for the purpose of (i) identifying any safety hazards and unsafe working conditions; (ii) conducting safety training of PSP Personnel involved in performance of the Services who were or may have been exposed to harm in connection with such Safety Incident(s); and (iii) taking any corrective action that PSP determines to be necessary and appropriate to fulfill its obligations in accordance with this Agreement. Upon receipt of TFC's Safety Stand-Down Order, PSP shall not resume performance of the Services until it has issued to TFC a written report, which shall be due within forty-eight (48) hours of the receipt of TFC's Safety Stand-Down Order, detailing the course of action that PSP has taken, or plans to take, to resolve the Safety Incident(s) described therein, and to prevent the recurrence thereof. After reviewing such course of action with TFC, PSP shall, in the exercise

of PSP's reasonable judgment, propose the date by which PSP will complete all corrective action. Services shall resume only upon TFC's delivery of further written notice to PSP withdrawing TFC's Safety Stand-Down Order, which notice of withdrawal shall not be issued until TFC is reasonably satisfied that PSP has sufficiently implemented all appropriate corrective action as necessary to enable PSP to safely resume Services, fulfill its contractual obligations set forth in this Agreement, and thereby avoid recurrence of the Safety Incident(s). PSP shall not be entitled to an adjustment of PSP's Compensation, or the Professional Services Schedule, as the result of TFC's issuance of a Safety Stand-Down Order. If PSP fails to implement the corrective action in the manner proposed by PSP and determined by TFC to be reasonably acceptable, such failure shall be deemed a material breach of this Agreement and TFC may, without further notice, terminate this Agreement for cause. In responding to any Safety Stand-Down Order, PSP's evaluation of the need for, and its plan of, corrective action shall be undertaken as an independent contractor, pursuant to this Section 5.2.4, and nothing herein shall be construed or interpreted to mean that TFC has assumed or agreed to assume any duty of care to PSP Personnel, or to provide guidance or instruction as to PSP's means and methods for managing safety as required by this Agreement. Any action taken by TFC hereunder to enforce TFC's rights to require PSP to fulfill its safety obligations under this Agreement shall be deemed to be undertaken solely for the purpose of fulfilling TFC's contractual expectation of results in terms of delivery of the Project without causing injury or harm to persons or property.

5.2.5. Cooperation. All project managers, employees, and associated Subcontractors shall cooperate with and assist each other and all other Contractors and design professionals retained by TFC.

5.2.6. Cooperation by PSP.

5.2.6.1. PSP agrees to conduct all of its services under this Agreement by and through appropriate communications with the TFC Project Manager(s). No work, installation or other services shall be undertaken by PSP except with the prior written authorization of the TFC Project Manager(s).

5.2.6.2. PSP understands and agrees that work, installation or any other service performed without the prior written authorization of the TFC Project Manager(s) is work outside the scope of this Agreement and shall be performed exclusively at PSP's risk.

5.2.6.3. PSP agrees to employ competent personnel meeting the requirements set forth herein, who shall be satisfactory to TFC. Personnel assigned to perform Services may not be reassigned without the prior written approval by the TFC Project Manager(s). TFC may request that PSP replace unsatisfactory personnel, which request shall not be unreasonably denied.

5.2.6.4. PSP agrees to cooperate and coordinate its work and Services with that of other members of the Project Team. Upon discovery of an apparent conflict in the sequencing of work or Services with another service provider, PSP shall report the concern to the TFC Project Manager(s).

5.2.6.5. PSP shall bear all costs associated with the replacement of any of its Key Personnel identified in List of PSP's Key Personnel, "Exhibit D."

5.2.7. E-Verify. By entering into this Agreement, PSP certifies and ensures that it utilizes and will continue to utilize, for the term of this Agreement, the U.S. Department of Homeland Security's E-Verify system, in accordance with the U.S. Department of Homeland Security's rules, to determine the eligibility of: (i) all persons employed to perform duties within the State of Texas, during the term of the Agreement; and (ii) all persons (including subcontractors) assigned by PSP to perform work or Services pursuant to the Agreement, within the United States of America. PSP shall provide, upon request of TFC and if available, an electronic or hardcopy screenshot of the confirmation or tentative non-confirmation screen containing the E-Verify case verification number for attachment to the Form I-9 for the three (3) most recent hires that match the criteria above, by PSP, and PSP's Subcontractors, as proof that this provision is being followed. If this certification is falsely made, the Agreement may be immediately terminated, at the discretion of TFC, and at no fault to TFC, with no prior notification. PSP shall also be responsible for the costs of any re-solicitation that TFC must undertake to replace the terminated Agreement. For persons not eligible for E-Verify screening, PSP (including sub-contractors) shall provide, upon request by TFC, another form of documentation of proof of eligibility to work in the United States of America.

5.2.8. Identification of PSP Project Manager and All Subcontractors. The PSP Project Manager, PSP's employees, and all Subcontractors who will be engaged by PSP to timely provide TFC with the Professional Services pursuant to an Assignment must be identified by PSP in a *List of PSP Project Manager & Subcontractors*, which shall be attached to each Assignment as an exhibit and incorporated therein by reference and shall be provided in substantially the same form as "Exhibit E," attached hereto and incorporated herein for all purposes.

5.2.8.1. TFC retains the right to require that the PSP Project Manager be committed to each Project on a full time basis. TFC reserves the right to approve the appointment of each PSP Project Manager and to demand that the PSP Project Manager, and any of PSP's employees or Subcontractors, be removed and replaced if, in the sole opinion of TFC, their performance on this Project or any other projects, is and/or was not adequate or their continued involvement with a Project is, will, or has become, detrimental to the timely and successful completion of a Project.

5.2.8.2. The PSP Project Manager and Subcontractors identified in a List of PSP Project Manager and Subcontractors shall not be removed or replaced by PSP, nor shall any other Subcontractors be engaged by PSP, unless prior written consent is obtained from TFC, which consent shall not be unreasonably withheld, conditioned, or delayed.

5.2.9. Buy Texas. If PSP is authorized to make purchases under an Assignment, PSP certifies that PSP will buy Texas products, services, and materials when available at a comparable price and in a comparable period of time pursuant to Texas Government Code, Chapter 2155.

5.2.10. No Assumption. No approvals or acceptances by, or on behalf of, TFC shall be deemed to be an assumption of any responsibility by TFC for any defect, error or omission in said Deliverables or Professional Services.

5.2.11. No Guaranty. PSP does not guarantee the performance of any Contractor, provided however, PSP shall promptly notify TFC of any observation of a Contractor's failure to perform their duties and responsibilities in accordance with the Construction Documents and Work Progress Schedule, and shall recommend to TFC measures to correct such failures.

5.2.12. Debts or Delinquencies Owed to the State. Pursuant to Texas Government Code Section 403.055, PSP understands and agrees that any payment due under this Agreement may be applied toward payment of any debt that is owed to the State of Texas including, but not limited to, delinquent taxes and child support.

5.2.13. General and Criminal Background Checks.

5.2.13.1. PSP hereby represents and warrants, and by execution of an Assignment thereby represents and warrants, that neither PSP nor any of PSP's employees have been convicted of a felony criminal offense, or of a crime involving moral turpitude, or that, if such a conviction has occurred, PSP has fully advised TFC in writing as to the facts and circumstances surrounding the conviction(s).

5.2.13.2. All of PSP's employees and Subcontractors that will perform any Professional Services on-site at a state-owned property shall be subject to a criminal background check. Any expense associated with such criminal background check shall be borne by PSP.

5.2.13.3. All criminal background check forms for all of PSP's employees and Subcontractors that will initially commence any work on-site must be fully completed and submitted to TFC as soon as reasonably practicable, but in no event later than the date of execution of an Assignment, and the process thereafter must be diligently pursued by PSP.

5.2.13.3.1. The process must be satisfactorily completed for every employee and Subcontractor before they perform services at a Site.

5.2.13.3.2. All criminal background checks must be accomplished by the Texas Department of Public Safety ("DPS"), which includes fingerprint processing by an independent third-party company selected by DPS. Upon receipt of the fingerprints of PSP's employees and/or Subcontractors, DPS, or TFC, will adjudicate the results of the criminal background searches in accordance with the criteria set forth in the *Criminal Background Checks and Application Guidelines*, a digital copy of which is incorporated herein by reference for all purposes in .pdf format on the EXHIBITS CD, and named therein as "Exhibit F". PSP's or Subcontractor's failure to timely secure criminal background check clearance shall not be considered a legitimate delay in the Professional Services Schedule.

5.2.14. No Outsourcing. All services under any Assignment hereunder shall be performed in the principal offices of the PSP and its consultants. If PSP or consultant offices exist out of the State of Texas, services shall be performed in offices within Texas in so much as proper expertise and timeliness can be accomplished. Services performed outside the State of Texas shall be limited to offices and personnel located in the United States. Outsourcing or subcontracting outside the United States shall not be permitted unless approved in writing by the TFC.

5.2.15. Smoking. All TFC facilities where work is to be performed are nonsmoking buildings. PSP's employees are prohibited from smoking in all areas except in areas designated for smoking.

5.2.16. Equal Opportunity. PSP shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, or national origin. PSP shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, sex, religion, age, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. PSP agrees to post in conspicuous places, available to employees or applicants for employment, notices to be provided setting forth the provisions of this non-discrimination article. PSP shall include the above provisions in all subcontracts pertaining to the Professional Services.

5.2.17. No Advertising. PSP shall not advertise that it is doing business with TFC or use this Agreement or any Assignment as any sort of marketing or sales tool without the prior written consent of TFC.

5.2.18. No Warranties by TFC. PSP acknowledges that any and all tests, maps, reports, and drawings in the possession of TFC that reflect or depict any Site boundaries, recorded easements, topography, utility locations, and other Site conditions and/or restrictions which may impact the design and/or construction of a Project were prepared solely for TFC's benefit, and that PSP shall have no unreasonable right to rely upon such. **TFC EXPRESSLY DISCLAIMS ANY WARRANTIES, EITHER EXPRESS OR IMPLIED, AS TO ALL SUCH TESTS, MAPS, REPORTS AND DRAWINGS.**

## VI. WARRANTIES AND REPRESENTATIONS BY PSP

6.1. Warranties and Representations by PSP. PSP hereby makes the following warranties, representations and certifications, all of which are true, accurate and complete at the time of the Effective Date and throughout the term of the Agreement and any Assignment, and which shall be true, accurate and complete with respect to each Deliverable. All representations and warranties discussed below shall survive the expiration or termination of this Agreement and any Assignment.

6.2 Compliance with All Laws. PSP shall procure and maintain for the duration of this Agreement and any Assignment any state, county, city, or federal license, authorization, insurance, waiver, permit, qualification or certification required by statute, ordinance, law, or regulation to be held by PSP to provide the goods or services required by this Agreement and any Assignment.

PSP will be responsible to pay all taxes, assessments, fees, premiums, permits, and licenses required by law. PSP agrees to be responsible for payment of any such government obligations not paid by its Subcontractors during performance of this Agreement and any Assignment. As part of its delivery of the Professional Services, PSP shall make itself familiar with and at all times shall observe and comply with all Laws and Regulations of all Governmental Authorities that in any manner affect performance under this Agreement and any Assignment.

6.3. Firm Registration with Texas Board of Professional Engineers. TFC may only assign projects under this Agreement as permitted by the Texas Engineering Practice Act, Chapter 1001 of the Texas Occupations Code. PSP shall maintain firm registration of its business entity with the Texas Board of Professional Engineers. In the event such firm registration lapses during the term of this Agreement, PSP shall be ineligible for Project Assignment(s) for the time period when valid registration does not exist.

6.4. Immigration Reform. The Immigration Reform and Control Act of 1986, as amended, the Immigration Act of 1990, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, require that all employees hired since 1986 provide proof of identity and employment eligibility before they can work in the United States. TFC is committed to complying with all applicable immigration laws of the United States and requires compliance by all contractors and subcontractors who contract with the State. PSP shall not place any employee of PSP at a worksite, nor shall PSP permit any employee, nor any Subcontractor, to perform any work on behalf of, or for the benefit of, TFC without first confirming said employee's authorization to lawfully work in the United States. PSP warrants that PSP: (i) maintains and follows an established policy to verify the employment authorization if its employees and to ensure continued compliance for the duration of employment; (ii) has verified the identity and employment eligibility of all employees in compliance with applicable law; (iii) has established internal safeguards and reporting policies to encourage its employees to report any suspected violations of immigration policies or of immigration law promptly to PSP's senior management; and (iv) is without knowledge of any fact that would render any employee or Subcontractor ineligible to legally work in the United States. PSP further acknowledges, agrees, and warrants that PSP: (i) has complied, and shall at all times during the term of the Agreement and duration of all Assignments comply, in all respects with the Immigration Reform and Control Act of 1986 and 1990, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, and all of the laws, rules, and regulations relating thereto; (ii) has properly maintained, and shall at all times during the term of the Agreement and duration of all Assignments properly maintain, all records required by the Department of Homeland Security, Immigration and Customs Enforcement ("DHS–ICE"), including, without limitation, the completion and maintenance of the Form I-9 for each of PSP's employees; and (iii) has responded, and shall at all times during the term of the Agreement and duration of all Assignments respond, in a timely fashion to any inspection requests related to such I-9 Forms. During the term of the Agreement and duration of all Assignments, PSP shall, and shall cause its directors, officers, managers, agents and employees to, fully cooperate in all respects with any audit, inquiry, inspection or investigation that may be conducted by TFC or any state agency of PSP or any of its employees. PSP acknowledges, agrees and warrants that all Subcontractors permitted by it to perform work will be required to agree to these same terms as a condition to being awarded a Subcontract for such work.

6.4.1. PSP Verification of Employment. PSP hereby warrants, and by execution of any Assignment thereby warrants, that PSP: (i) maintains and follows an established policy to verify the employment authorization of its employees and to ensure continued compliance for the duration of employment; (ii) has verified the identity and employment eligibility of all employees in compliance with applicable law; (iii) has established internal safeguards and reporting policies to encourage its employees to report any suspected violations of immigration policies or of immigration law promptly to PSP's senior management; and (iv) is without knowledge of any fact that would render any employee or Subcontractor ineligible to legally work in the United States.

6.4.2. PSP Compliance. PSP further acknowledges, agrees, and warrants, and by execution of any Assignment thereby acknowledges, agrees, and warrants, that PSP: (i) has complied, and shall at all times during the term of the Agreement comply, in all respects with the Immigration Reform and Control Act of 1986, as amended, the Immigration Act of 1990, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, and all of the laws, rules, and regulations relating thereto; (ii) has properly maintained, and shall at all times during the term of the Agreement and any Assignment properly maintain, all records required by the Department of Homeland Security, Immigration and Customs Enforcement ("DHS–ICE"), including, without limitation, the completion and maintenance of the Form I-9 for each of PSP's employees; and (iii) has responded, and shall at all times during the term of the Agreement and any Assignment respond, in a timely fashion to any inspection requests related to such I-9 Forms. During the term of the Agreement and any Assignment, PSP shall, and shall cause its directors, officers, managers, agents and employees to, fully cooperate in all respects with any audit, inquiry, inspection or investigation that may be conducted by TFC or any state agency of PSP or any of its employees.

6.4.3. PSP Subcontractor Compliance. PSP acknowledges, agrees, and warrants, and by execution of any Assignment thereby acknowledges, agrees, and warrants, that all Subcontractors permitted by it to perform Professional Services will be required to agree to these same terms as a condition to being awarded any Subcontract for such work.

6.5. Proficiency in Systems. PSP is proficient in the use of CAD systems and the EPMCS utilized by TFC.

6.6. Representation as to Services. All Professional Services provided by PSP pursuant to this Agreement and any Assignment 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.

6.7. Representation as to Deliverables. All Deliverables shall be: (i) completed and delivered in a timely manner and in a manner consistent with standards in the applicable trade, profession, or industry; (ii) conform to or exceed the specifications set forth in this Agreement and in any Assignment; and (iii) be fit for ordinary use, of good quality, and with no material defects.

6.8. Eligibility. Pursuant to Texas Government Code Section 2155.004(b), PSP certifies that the individual or business entity named in this Agreement is not ineligible to receive the specified Agreement and acknowledges that this Agreement may be terminated and payment withheld if this certification is inaccurate.

6.9. Family Code Disclosure of Ownership. Pursuant to the requirements of the Texas Family Code, Section 231.006, regarding delinquent child support, the individual or business entity named in this Agreement is not ineligible to receive payment under this Agreement or in any Assignment and, if applicable, PSP has provided, prior to its execution of this Agreement, and prior to the execution of any Assignment, shall provide the name and social security number of each such person (sole proprietors, firm owners, partners, or shareholders) holding at least twenty-five percent (25%) ownership of the business entity entering into this Agreement and into any Assignment. PSP acknowledges that this Agreement and any Assignment may be terminated and payment may be withheld if this certification is inaccurate.

6.10. Deceptive Trade Practices Act; Unfair Business Practices Disclosures. PSP represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under the Texas Business and Commerce Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit and that PSP has not been found to be liable for such practices in such proceedings. PSP certifies that it has no officers who have served as officers of other entities who have been the subject allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

6.11. Agency Executive Head. Under Texas Government Code Section 669.003 relating to contracting with an executive of a state agency, PSP represents that no person who, in the past four (4) years, served as an executive of TFC or any other state agency, was involved with or has any interest in this Agreement or any contract resulting from this PSP. If PSP employs or has used the services of a former executive head of TFC or any other state agency, then PSP shall provide the following information: the name of the former executive, the name of the state agency, the date of separation from the state agency, the position held with PSP, and the date of employment with PSP.

6.11. Financial Interests/Gifts. Pursuant to Texas Government Code Sections 572.051 and 2255.001 and Texas Penal Code Section 36.09, PSP has not given, offered to give, nor intends to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this Agreement. Pursuant to Texas Government Code Chapter 573 and Section 2254.032, if applicable, PSP certifies that PSP knows of no officer or employee of TFC, nor any relative within the second degree of consanguinity or affinity of an officer or employee of TFC, that has a financial interest in PSP's company or corporation. PSP further certifies that no partner, corporation, or unincorporated association which employs, retains or contracts with, or which may employ, retain, or contract with any of the above, has a financial interest in any entity with which PSP will be dealing on behalf of TFC.

6.12. Prior Employment. PSP knows of no officer or employee of TFC, nor any relative within the second degree of consanguinity or affinity of an officer or employee of TFC, that has a financial interest in PSP's firm or corporation. PSP further certifies that no partner, corporation, or unincorporated association that employs, retains or contracts with, or which may employ, retain, or contract with any of the above, has a financial interest in any entity with which PSP will be

dealing on behalf of TFC pursuant to the Texas Government Code, Chapter 573 and Section 2254.032. Furthermore, PSP certifies and agrees that if it employs any former employee of TFC, such employee will perform no work in connection with this Agreement during the twelve (12) month period immediately following the employee's last date of employment at TFC.

6.13. Affirmation as to Submittals. Upon submittal to TFC of any documentation or data that was created or modified by PSP, including but not limited to Drawings, Specifications, and the Budget, all representations contained therein shall be true and accurate as to each such creation or modification.

6.14. Prohibition Against Boycotting Israel. In accordance with Section 2270.002 of the Texas Government Code, by signature hereon, Contractor certifies that it does not boycott Israel and will not boycott Israel during the term of this Contract.

## VII. STATE FUNDING

7.1. State Funding. This Contract shall not be construed as creating any debt on behalf of the State of Texas and/or TFC in violation of the Texas Constitution, Article III, Section 49. In compliance with the Texas Constitution, Article VIII, Section 6, it is understood that all obligations of TFC hereunder are subject to the availability of state funds. If such funds are not appropriated or become unavailable, this Contract may be terminated. In that event, the parties shall be discharged from further obligations, subject to the equitable settlement of their respective interests accrued up to the date of termination. Furthermore, any damages due under this Contract should not exceed the amount of funds appropriated for payment under this Contract, but not yet paid to CMR, for the fiscal year budget in existence at the time of the breach.

## VIII. COPYRIGHTS AND TRADEMARKS

8.1. Copyrights. PSP agrees that all Deliverables provided pursuant to this Agreement are subject to the rights of TFC in effect on the date of execution of this Agreement and any Assignment. These rights include the right to use, duplicate and disclose such subject matter and data, in whole or in part, in any manner for alterations, additions, remodels or maintenance; and to have others do so including production of Deliverables in response to a public information request pursuant to Texas Government Code, Chapter 552. If the Deliverables produced by PSP are subject to copyright protection, PSP hereby grants to TFC a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use such and to authorize others to do so. PSP shall include appropriate provisions to achieve the purpose of this condition in all Subcontracts entered into that produce information subject to copyright protection.

8.2. Disclaimers. All such Deliverables furnished by PSP pursuant to this Agreement and any Assignment shall be considered instruments of its services in respect to the respective Project. It is understood that PSP does not represent such Deliverables to be suitable for reuse on any other study or for any other purpose(s) and TFC releases PSP from liability related to such reuse. If PSP, at TFC's request and authorization, verifies or adapts PSP's Deliverables for TFC's use on another study, PSP shall be compensated for redesign or new design, bidding, and construction administration services.

8.2.1. Delivery to TFC. PSP shall promptly provide copies of the Deliverables to TFC upon completion, termination, or cancellation of this Agreement and any Assignment for any reason, including all copies of the Deliverables in any form or medium specified by TFC in this Agreement and any Assignment, whether written, digital, or electronic.

8.2.2. TFC Right to Use. Any provision herein to the contrary notwithstanding, TFC shall be authorized to make subsequent use of the Deliverables for any and all future renovations, modifications, alterations, maintenance, repairs, and the like of any Project.

8.3. No Use of Name or Trademark. PSP agrees not to make any written use of or reference to TFC's name or registered or unregistered trademarks for any marketing, public relations, advertising, display or other business purpose or make any use of TFC's facilities for any activity related to the express business purposes and interests of TFC pursuant to this Agreement and any Assignment, without the prior written consent of TFC, which consent may be withheld or granted in TFC's sole discretion.

## IX. RECORDS, AUDIT, PROPRIETARY INFORMATION, AND PUBLIC DISCLOSURE

9.1. Books and Records. PSP shall keep and maintain under generally accepted accounting principles full, true and complete records, as are necessary to fully disclose to TFC or the United States Government, or their authorized representatives, upon audits or reviews, sufficient information to determine compliance with the terms and conditions of this Agreement and any Assignment and all state and federal regulations and statutes.

9.2. Inspections and Audits. PSP agrees that all relevant records related to this Agreement and any Assignment or any work product under this Agreement and any Assignment, including practices of its Subcontractors, shall be subject, at any reasonable time, to inspection, examination, review, audit, and copying at any office or location of PSP where such records may be found, with or without notice by the Texas State Auditor's Office ("SAO"), the contracting agency or its contracted examiners, or the Office of the Texas Attorney General, and with regard to any federal funding, the relevant federal agency, the Comptroller General, the General Accounting Office, the Office of the Inspector General, or any of their authorized representatives. All Subcontracts shall reflect the requirements of this section. In addition, pursuant to Texas Government Code, Section 2262.154, the SAO may conduct an audit or investigation of any entity receiving funds under this Agreement and/or any Assignment, including direct payments to PSP and indirect payments under a Subcontract to this Agreement and/or any Assignment; acceptance of such monies acts as acceptance of SAO authority, under legislative audit committee direction, to audit and investigate related to those funds and the entity subject to the audit or investigation must provide SAO with access to any information SAO considers relevant to the scope of the audit or investigation.

9.3. Records Retention. All records relevant to this Agreement shall be retained for a minimum of seven (7) years. This retention period runs from the date of payment for the relevant goods or services by TFC, or from the date of termination of the Agreement, whichever is later. Retention time shall be extended when an audit is scheduled or in progress for a period reasonably

necessary to complete an audit and/or to complete any administrative proceeding or litigation which may ensue.

9.4. Confidentiality Provisions Applicable to PSP.

9.4.1. Protection of Confidential Information. PSP hereby acknowledges, understands and agrees (i) that in the course of conducting its due diligence regarding the provision of Professional Services to TFC, certain Confidential Information, as defined below, will be disclosed to PSP; and (ii) that whether developed by TFC or others employed by or associated with TFC, all Confidential Information is, and shall remain, the exclusive and confidential property of TFC, and shall be at all times regarded, treated and protected as such by PSP in accordance with this Agreement and any Assignment. Failure to mark any information "Confidential" shall not affect the confidential nature of such information.

9.4.2. Definition of Confidential Information. "Confidential Information" shall mean all information, whether or not originated by TFC, which is used in, or a part of, TFC's business and operations and is (i) proprietary to, about, or created by TFC; (ii) gives TFC some competitive advantage or the opportunity of obtaining such advantage or the disclosure of which could be detrimental to the interests of TFC; (iii) designated as "Confidential Information" by TFC, or from all the relevant circumstances should reasonably be assumed by PSP to be confidential and proprietary to TFC; or (iv) not generally known by PSP. Such Confidential Information includes, but is not limited to, the following types of information and other information of a similar nature (whether or not reduced to writing or designated as confidential).

9.4.2.1. Work product resulting from, or related to, work, projects, or services performed or to be performed by TFC for PSP and/or for actual and potential Using Agencies that are related to the business and/or operations of TFC, including but not limited to, methods, processes, procedures, analysis, techniques, and audits used in connection therewith.

9.4.2.2. Computer software of any type or form in any stage of actual or anticipated research and development, including, but not limited to, programs and program modules, routines and subroutines, processes, algorithms, design concepts, design specifications (design notes, annotations, documentation, flowcharts, coding sheets, and the like), source code, object code and load modules, programming, program patches, and system designs.

9.4.2.3. Information relating to TFC's proprietary rights prior to any public disclosure thereof, including but not limited to, the nature of the proprietary rights, production data, technical and engineering data, test data and test results, the status and details of research and development of products and services, and information regarding acquiring, protecting, enforcing and licensing proprietary rights (including patents, copyrights and trade secrets).

9.4.2.4. Internal personnel and financial information, vendor names and other vendor information (including vendor characteristics, services, and agreements), customer lists and contacts, business plan(s), purchasing and internal cost information, internal services and operational manuals, pricing, marketing, and all other manner and methods of conducting TFC's business.

9.4.2.5. Marketing and development plans, price and cost data, price and fee amounts, pricing and billing policies, quoting procedures, marketing techniques and methods of obtaining business, forecasts and forecast assumptions and volumes, and future plans and potential strategies of TFC which have been or are being discussed.

9.4.2.6. Any information obtained from TFC regarding its pursuit or negotiation of agreements with any potential "Contracting Person" regarding a potential "Qualifying Project" as those terms are defined in the Texas Government Code, Section 2267.001, as the same may be amended from time to time, including, but not necessarily limited to, the names of the Contracting Person, including their representatives, (collectively, "Business Customers"); the parties to and substance of any agreements between TFC and said Business Customers; services and data provided, or to be provided, by or to said Business Customers; and the type, quantity and specifications of products and services purchased, leased, licensed or received, or to be purchased, leased, licensed or received, by Business Customers.

9.4.2.7. "Confidential Information" shall not include information that: (i) is or becomes available to the public generally, other than as a result of disclosure by PSP in breach of the terms of this Agreement or any Assignment; (ii) becomes available to PSP from a source (other than TFC) which source is not, to the best of PSP's knowledge, subject to any legally binding obligation to keep the same confidential; or (iii) has been independently acquired or developed by PSP.

9.4.3. Covenants. As a consequence of PSP's acquisition or anticipated acquisition of Confidential Information, PSP will occupy a position of trust and confidence to TFC with respect to TFC's affairs and business. In view of the foregoing and of the mutual consideration to be provided to each party, PSP agrees that it is reasonable and necessary that it make the following covenants:

9.4.4. No Disclosure. Both during and forever after the performance of its due diligence investigation, PSP will not disclose Confidential Information to any Person or entity other than as necessary in carrying out its duties on behalf of TFC and/or due diligence investigation, without first obtaining TFC's prior, written consent, and PSP will take all reasonable precautions to prevent inadvertent disclosure of such Confidential Information. This prohibition against PSP's disclosure of Confidential Information includes, but is not limited to, disclosing the fact that any similarity exists between the Confidential Information and information independently developed by another Person or entity, and PSP understands that such similarity does not excuse PSP from abiding by its covenant or other obligations pursuant to this Agreement or any Assignment.

9.4.5. No Use, Copying, or Transfer. Both during and after the conduct of its due diligence investigation, PSP will not use, copy, or transfer Confidential Information other than as necessary in carrying out its duties on behalf of TFC and/or due diligence investigation, without first obtaining prior written consent of TFC, and will take all reasonable precautions to prevent inadvertent use, copying, or transfer of such Confidential Information. This prohibition against PSP's use, copying, or transfer of Confidential Information includes, but is not limited to, selling,

licensing or otherwise exploiting, directly or indirectly, any products or services (including software in any form) that embody or are derived from Confidential Information.

9.4.6. No Use of Name or Trademark. PSP agrees not to make any written use of or reference to TFC's name or registered or unregistered trademarks (or any names under which TFC conducts business or operations) for any marketing, public relations, advertising, display or other business purpose or make any use of TFC's facilities for any activity related to the express business purposes and interests of TFC pursuant to this Agreement or any Assignment, without the prior written consent of TFC, which consent may be withheld or granted in TFC's sole and absolute discretion.

9.4.7. Non-Circumvention. PSP agrees not to utilize, either directly or indirectly, any Confidential Information in order to facilitate or create direct business relationships with Business Customers of TFC.

9.5. Confidentiality Provisions Applicable to TFC. Subject to the provisions of Section 9.6 below, TFC shall keep confidential all information, in whatever form, produced, prepared, or observed by PSP to the extent that such information is confidential by law; marked or designated "confidential," or words to that effect, in a font size no smaller than 14 point, by PSP; or information that TFC is otherwise required to keep confidential by this Agreement or any Assignment.

9.6. Public Records. Notwithstanding any provisions of this Agreement to the contrary, PSP understands that TFC will comply with the Texas Public Information Act, Texas Government Code, Chapter 552 as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. If contacted by TFC, PSP will cooperate with TFC in the production of documents responsive to the request. PSP agrees to provide the documents responsive to the request in the format specified by TFC. PSP may request that TFC seek an opinion from the Attorney General of the State of Texas. However, TFC will not honor PSP's request for an opinion if the request is not based upon a reasonable interpretation of the Texas Public Information Act. Additionally, PSP will notify TFC's General Counsel within twenty-four (24) hours of receipt of any third-party requests for information that was provided by the State of Texas for use in performing the Agreement. This Agreement and all data and other information generated or otherwise obtained in its performance may be subject to the Texas Public Information Act. PSP agrees to maintain the confidentiality of information received from the State of Texas during the performance of this Agreement, including information which discloses confidential personal information particularly, but not limited to, social security numbers. Furthermore, PSP is required to make any information created or exchanged with the State pursuant to this Agreement, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the State.

## X. INSURANCE

10.1 Insurance Requirements. All persons who enter into an agreement to provide professional services (hereinafter referred to as "Agreement"), including but not limited to: (i) engineering services; (ii) architectural services; (iii) landscape architecture services; (iv) land surveyor services; as well as (iv) state certified or state licensed real estate appraiser services, all as defined in Texas Government Code, Chapter 2254, Subchapter A (West 2016), the specific scope of which

shall be set out in the Assignment(s) (hereinafter collectively referred to as "PSP") with the State of Texas, by and through the Texas Facilities Commission (hereinafter referred to as "TFC"), must comply with the following insurance requirements.

10.1.1. Workers' Compensation and Employers' Liability Insurance. By execution of an Agreement, PSP thereby certifies, pursuant to Tex. Lab. Code, §406.096(a), that PSP provides workers' compensation and employers' liability insurance for all employees employed on this public project with limits of not less than: (i) $1,000,000 each accident; (ii) $1,000,000 disease each employee; and (iii) $1,000,000 disease policy limit.

10.1.1.1. As per Tex. Lab. Code §406.096(b), PSP shall require each Subcontractor to certify in writing to the PSP that said Subcontractor provides workers' compensation and employers' liability insurance for all of Subcontractor's employees employed on this public project. PSP shall forward said certifications to TFC within ten (10) days of the execution of the Agreement.

10.1.1.2. The policy must include an Other States Endorsement to include the State of Texas if PSP's business is domiciled outside the State of Texas.

10.1.2. Commercial General Liability ("CGL") Insurance. Commercial general liability insurance coverage including premises; operations; blanket contractual liability coverage assumed under the Agreement and all contracts relative to the Project, including independent contractor's liability; products and completed operations; and extended to include explosion, collapse, and underground hazards, with a combined single limit of $1,000,000 per occurrence for coverages A, B, & C, and a general aggregate of $2,000,000. The policy shall include ISO endorsement CG2503, Amendment of Aggregate Limits of Insurance (per Project), or its equivalent.

10.2.3. Business Automobile Liability Insurance. Business automobile liability coverage for all owned, non-owned, and hired vehicles with a minimum combined single limit of $1,000,000 per occurrence for bodily injury and property damage. Alternate acceptable limits are $1,000,000 bodily injury per person, $1,000,000 bodily injury per occurrence, and at least $1,000,000 property damage liability per accident.

10.1.3.1. No aggregate shall be permitted.

10.1.3.2. Such insurance must include coverage for loading and unloading hazards.

10.1.4. Architect/Engineers Professional Liability Insurance.

10.1.4.1. Architect/Engineers professional liability/errors & omissions coverage with a minimum limit of $1,000,000.00 per claim and in the aggregate to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any negligent act, error, or omission committed with respect to plans, maps, drawings, analysis, reports, surveys, change orders, designs, or specifications prepared by the insured.

10.1.4.2. PSP shall maintain this coverage for the duration of this Agreement or for a period of not less than twenty-four (24) months following completion of the Project, whichever is longer.

10.2. General Requirements for All Insurance. The following provisions shall apply to all insurance requirements:

10.2.1. Deductibles and Self-Insured Retentions. PSP shall be responsible for all deductibles and self-insured retentions, if any, stated in the policies. All deductibles and self-insured retentions shall be disclosed on the certificates of insurance.

10.2.2. Claims–Made Policies. If coverage is underwritten on a claims-made basis, the retroactive date for the policy and all renewals shall be coincident with the date of the Agreement and the certificate of insurance shall state that the coverage is claims-made and the retroactive date. Any premiums for this extended reporting period shall be paid by PSP.

10.2.3. Additional Policy Requirements. In the event the primary insurance policy does not so provide, PSP shall obtain and maintain endorsements for each deficient policy, or provide such other document(s) as may be approved in advance by TFC, that satisfy all of the following requirements:

10.2.3.1. naming "Texas Facilities Commission, P.O. Box 13047, Austin, Texas 78711, its officials, directors, employees, representatives, and volunteers" as additional insureds, provided however, this requirement does not apply to professional liability insurance or workers' compensation insurance;

10.2.3.2. the policy, or such other document(s) as may be acceptable to TFC, must obligate the insurer, or a third-party acceptable to TFC, to notify the Texas Facilities Commission, Attention: Insurance Analyst, P.O. Box 13047, Austin, Texas 78711, of any (i) non-renewal; (ii) cancellation; or (iii) material changes, in writing, at least thirty (30) days prior to change or cancellation for any reason, except in the case of cancellation for non-payment of premiums, for which the notification must be at least ten (10) days prior to cancellation.

10.2.3.2.1. "Material Change" means any of the following changes to the Policy:

10.2.3.2.1.1. a change in the Policy period;

10.2.3.2.1.2. a material revision to, or removal of, a coverage section;

10.2.3.2.1.3. a reduction of the amount of limits of insurance, provided such reduction is not the result of payment of damages, medical expenses, or claim expenses; or

10.2.3.2.1.4. an increase of the amount of any self-insured retention(s);

10.2.3.3. as to those policies wherein TFC is an additional insured, said insurance coverages must be primary and non-contributing with respect to insurance or self-insurance carried by TFC, if any; and

10.2.3.4. the policy must provide for a waiver of subrogation rights to TFC for the workers' compensation, employers' liability, commercial general liability, and business automobile liability policies.

10.2.4. No Commencement of Work. PSP shall not, nor allow any Subcontractor(s) to, commence the performance of Professional Services under this Agreement until the proof of satisfaction of the insurance requirements has been received and approved by TFC. However, any approval of the proof of satisfaction of the insurance requirements as described in Section 10.3, below, by TFC shall not relieve or decrease the liability of PSP hereunder.

10.2.5. No Cancellation or Lapse. PSP shall not cause or permit any required insurance to cancel or lapse prior to the expiration of all warranty periods, provided however, policy duration for architect/engineers professional liability/errors & omissions coverage is not governed by this provision. PSP must update all expired policies prior to submission of any Application for Payment.

10.2.6. Notice of Erosion. PSP shall provide TFC with thirty (30) days written notice of erosion of any aggregate limits.

10.2.7. Right to Review. TFC reserves the right to review the insurance requirements and to require deletion, revision, and/or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulations that are binding upon TFC, PSP, or the underwriter) on any such policies when deemed necessary and prudent by TFC based upon changes in statutory law, court decisions, or the claims history of the industry and/or of PSP, provided however, such modifications must be commercially available to PSP. TFC shall make an equitable adjustment to the Contract Sum for any additional cost resulting therefrom.

10.2.8. Losses Paid by PSP. Actual losses not covered by the required insurance shall be paid by PSP.

10.2.9. Failure to Obtain, Maintain or Renew. Failure to timely obtain, maintain and/or renew the insurance policies as required may, at the sole discretion of TFC, subject PSP to, among all other available remedies, at law and in equity, the following:

10.2.9.1. disqualification from eligibility to participate in any other or future projects with TFC;

10.2.9.2. suspension of Work for cause;

10.2.9.3. in the event PSP fails to timely renew or pay any of the renewal premiums for any expiring policies, TFC shall have the right (but not the obligation) to: (i) make such payments; and/or (ii) acquire replacement coverage, and thereafter set off the amount(s) or costs thereof against the next payment(s) coming due to PSP under the Agreement or under any other agreement between TFC and PSP; and/or

10.2.9.4. TFC may withhold any payments due to PSP from this Project or any other TFC project until satisfaction is achieved.

10.2.10. TFC a Third-Party Beneficiary. TFC shall be a third-party beneficiary of any agreement(s) between PSP and any and all Persons who procure, or cause to be procured, the above-described insurance coverages, and all renewals thereof, for the Project.

10.2.11. Required Insurance Coverages No Effect On Indemnifications. The insurance and insurance limits required herein shall not be deemed as a limitation on PSP's liability under the indemnifications granted to TFC.

10.2.12. No Warranty That Insurance Limits Will Be Adequate to Fully Protect PSP. The insurance requirements set out herein shall not be interpreted as any representation or warranty that the insurance coverage and limits will necessarily be adequate to fully protect PSP.

10.3. Method of Proof of Satisfaction of Insurance Requirements.

10.3.1. Required Method of Proof. In order to obtain adequate assurances of the PSP's satisfaction of the insurance requirements for this Project, TFC requires that within three (3) days of receipt of a notice of award, PSP must:

10.3.1.1. obtain and maintain, at no expense to TFC, insurance in the types and amounts specified above for the duration of the Agreement (unless specifically provided otherwise herein);

10.3.1.2. deliver, or cause to be delivered, to TFC, at no expense to TFC, a fully completed and current certificate of insurance for the errors and omissions (hereinafter referred to as "E&O") insurance policy (or other similar professional liability insurance policy) from each Person (hereinafter referred to as "Agent") who obtained or otherwise procured the insurance identified in the PSP's certificate of insurance. The Agent's certificate of insurance must state, at a minimum, the coverage, the limits, any applicable deductibles and self-insured retentions, and expiration dates. The policy limits for said E&O insurance coverage must be at least $2,000,000. At the option of the Agent, and upon advance notice to TFC, the Agent shall be permitted to provide the above-described certificate of insurance with the policy limits redacted; provided however, the redacted certificate of insurance must be accompanied by written certification to TFC that the error and omissions policy(ies) identified in the certificate of insurance satisfies the policy limit described above. **THE AGREEMENT SHALL NOT BE EXECUTED UNLESS AND UNTIL THE FOREGOING REQUIREMENTS ARE TIMELY SATISFIED AND FAILURE TO TIMELY SATISFY THE FOREGOING REQUIREMENTS MAY**

**RESULT IN THE DISQUALIFICATION OF PSP. ADDITIONALLY, THE FAILURE TO TIMELY PROVIDE ALL OF THE DOCUMENTATION DESCRIBED IN THE PROOF OF SATISFACTION SHALL CONSTITUTE A BREACH OF THE AGREEMENT.**

10.4. Insurance Carriers. All PSP's insurance shall be issued by insurance carriers authorized to do business in Texas at the time the policy is issued (and at all times during the term of this Agreement) and rated by A.M. Best Company as A-VII or better, confirmed by one or more insurance certificates conforming to the following requirements:

10.4.1. Accord Form. Certificates of insurance shall be prepared on an Acord 25 (2016/03) form, or any later edition of this form.

10.4.2. Certificate Holder. Certificates shall designate TFC as certificate holder, together with TFC's mailing address.

10.4.3. Name of Insured. The named insured's name must match PSP's name as shown in this Agreement.

10.4.4. List of Insurance Companies. Certificates shall list each insurance company producing each form of coverage, together with the applicable policy number and policy date.

10.4.5. Contact Information of Issuing Producer. Certificates shall include the name, address, phone number, fax number and email address of the issuing producer, and the signature of the authorized representative of the producer.

10.4.6. Additional Insured Endorsements. Certificates for all applicable policies shall attach copies of all applicable additional insured endorsements.

## XI. MISCELLANEOUS PROVISIONS

11.1. **INDEMNIFICATION.**

11.1.1. **ACTS OR OMISSIONS. PSP SHALL INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES ARISING OUT OF, OR RESULTING FROM ANY ACTS OR OMISSIONS OF PSP OR ITS AGENTS, EMPLOYEES, SUBCONTRACTORS, ORDER FULFILLERS, OR SUPPLIERS OF SUBCONTRACTORS IN THE EXECUTION OR PERFORMANCE OF THE AGREEMENT AND ANY PURCHASE ORDERS ISSUED UNDER THE AGREEMENT. THE DEFENSE SHALL BE COORDINATED BY PSP WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND PSP MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE**

**OFFICE OF THE ATTORNEY GENERAL. PSP AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.**

11.1.2. **INFRINGEMENTS. PSP SHALL INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS AND TFC, AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL THIRD PARTY CLAIMS INVOLVING INFRINGEMENT OF UNITED STATES PATENTS, COPYRIGHTS, TRADE AND SERVICE MARKS, AND ANY OTHER INTELLECTUAL OR INTANGIBLE PROPERTY RIGHTS IN CONNECTION WITH THE PERFORMANCES OR ACTIONS OF PSP PURSUANT TO THIS AGREEMENT. PSP AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. PSP SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY PSP WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND PSP MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. PSP SHALL HAVE NO LIABILITY UNDER THIS SECTION IF THE ALLEGED INFRINGEMENT IS CAUSED IN WHOLE OR IN PART BY: (i) USE OF THE PRODUCT OR SERVICE FOR A PURPOSE OR IN A MANNER FOR WHICH THE PRODUCT OR SERVICE WAS NOT DESIGNED, (ii) ANY MODIFICATION MADE TO THE PRODUCT WITHOUT PSP'S WRITTEN APPROVAL, (iii) ANY MODIFICATIONS MADE TO THE PRODUCT BY THE PSP PURSUANT TO TFC'S SPECIFIC INSTRUCTIONS, (iv) ANY INTELLECTUAL PROPERTY RIGHT OWNED BY OR LICENSED TO TFC, OR (v) ANY USE OF THE PRODUCT OR SERVICE BY TFC THAT IS NOT IN CONFORMITY WITH THE TERMS OF ANY APPLICABLE LICENSE AGREEMENT. IF PSP BECOMES AWARE OF AN ACTUAL OR POTENTIAL CLAIM, OR TFC PROVIDES PSP WITH NOTICE OF AN ACTUAL OR POTENTIAL CLAIM, PSP MAY (OR IN THE CASE OF AN INJUNCTION AGAINST TFC, SHALL), AT PSP'S SOLE OPTION AND EXPENSE; (i) PROCURE FOR TFC THE RIGHT TO CONTINUE TO USE THE AFFECTED PORTION OF THE PRODUCT OR SERVICE, OR (ii) MODIFY OR REPLACE THE AFFECTED PORTION OF THE PRODUCT OR SERVICE WITH FUNCTIONALLY EQUIVALENT OR SUPERIOR PRODUCT OR SERVICE SO THAT TFC'S USE IS NON-INFRINGING.**

11.1.3. **TAXES/WORKERS' COMPENSATION/UNEMPLOYMENT INSURANCE – INCLUDING INDEMNITY. PSP AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS AGREEMENT, PSP SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF PSP'S AND PSP'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS AGREEMENT. PSP AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. TFC AND/OR THE STATE SHALL NOT BE LIABLE TO THE PSP, ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS'**

**COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER. PSP AGREES TO INDEMNIFY AND HOLD HARMLESS TFC, THE STATE OF TEXAS AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, AND/OR ASSIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEYS' FEES, AND EXPENSES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION IN ITS PERFORMANCE UNDER THIS AGREEMENT. PSP SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY PSP WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND PSP MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. PSP AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.**

11.2. Historically Underutilized Businesses ("HUBs"). In accordance with state law, it is TFC's policy to assist HUBs, whether minority or women-owned, whenever possible, to participate in providing goods and services to the agency. TFC encourages those parties with whom it contracts for the provision of goods and services to adhere to this same philosophy in selecting subcontractors to assist in fulfilling PSP's obligations with TFC. If PSP subcontracts with others for some or all of the services to be performed under an Assignment to this Agreement, PSP shall comply with all HUB requirements pursuant to Chapter 2161 of the Texas Government Code. At or prior to the execution of an Assignment with a value that meets or exceed One Hundred Thousand and No/100 Dollars ($100,000.00), PSP must provide a completed HUB Subcontracting Plan, which shall be approved by TFC prior to execution of the Assignment, a digital copy of the Form for which is incorporated herein by reference for all purposes in .pdf on the EXHIBITS CD, and named therein as "Exhibit G-1". PSP shall provide the HUB Program of TFC with pertinent details of any participation by a HUB in fulfilling the duties and obligations arising under an Assignment, on the HUB Subcontracting Plan Progress Assessment Report ("PAR"), a digital copy of the Form for which is incorporated herein by reference for all purposes in .pdf format on the EXHIBITS CD, and named therein as "Exhibit G-2."

11.3. Relationship of the Parties. PSP is associated with TFC only for the purposes and to the extent specified in this Agreement, and with respect to performance of the contracted services pursuant to this Agreement and any Assignment, PSP is and shall be an independent contractor. Subject only to the terms of this Agreement and any Assignment, PSP shall have the sole right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this Agreement and any Assignment. Nothing contained in this Agreement or any Assignment shall be deemed or construed to create a partnership or joint venture, to create relationships of an employer-employee or principal-agent, or to otherwise create any liability for TFC whatsoever with respect to the indebtedness, liabilities, and obligations of PSP or any other party. PSP shall be solely responsible for, and TFC shall have no obligation with respect to:

11.3.1. withholding of income taxes, FICA, or any other taxes or fees;

11.3.2. industrial or workers' compensation insurance coverage;

11.3.3. participation in any group insurance plans available to employees of the State of Texas;

11.3.4. participation or contributions by the State to the State Employees Retirement System;

11.3.5. accumulation of vacation leave or sick leave; or

11.3.6. unemployment compensation coverage provided by the State.

11.4. No Assignment and Subcontracts. PSP shall neither assign, transfer, nor delegate any rights, obligations, or duties under this Agreement or any Assignment without the prior written consent of TFC. Notwithstanding the foregoing, it is mutually understood and agreed that PSP may subcontract with third parties for some or all of the Professional Services to be performed. In any approved Subcontracts, PSP shall legally bind such Subcontractor to perform and make such Subcontractor subject to all the duties, requirements, and obligations of PSP specified herein and in any Assignment. Nothing herein or in any Assignment shall be construed to relieve PSP of the responsibility for ensuring that the goods delivered and/or the services rendered by PSP and/or any of its Subcontractors comply with all the terms and provisions of this Agreement and any Assignment. PSP will provide written notification to TFC of any such Subcontractor performing work under this Agreement and any Assignment, including the name and taxpayer identification number of Subcontractor, the task(s) being performed, and the number of Subcontractor employees expected to work on the task.

11.5. Drug Free Work Place. PSP, PSP's employees and Subcontractors shall comply with the applicable provisions of the Drug-Free Work Place Act of 1988 (Public Law No. 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.) and maintain a drug-free work environment; and the final rule, government-wide requirements for drug-free work place (grants), issued by the Office of Management and Budget and the Department of Defense (32 CFR Part 280, Subpart F) to implement the provisions of the Drug-Free Work Place Act of 1988 is incorporated by reference and PSP, PSP's employees, and Subcontractors shall comply with the relevant provisions thereof, including any amendments to the final rule that may hereafter be issued.

11.6 No Smoking. All facilities where work is to be performed are nonsmoking buildings. PSP's employees and Subcontractors are prohibited from smoking in all areas except in areas designated for smoking.

11.7. Notices. All notices, demands and requests required in this Agreement and in any Assignment shall be in writing and shall be deemed to have been properly delivered and received (i) three (3) business days after deposit in a regularly maintained receptacle for the United States mail, certified mail, return receipt requested and postage prepaid; or (ii) one (1) business day after deposit with Federal Express or comparable overnight delivery system for overnight delivery with all costs prepaid. All notices, demands and requests hereunder shall be addressed as follows:

If to TFC: Texas Facilities Commission
1711 San Jacinto Blvd., Suite 400
Austin, Texas 78701
Attention: Legal Services Division

If to PSP: Cleary Zimmermann Engineers, LLC
Attention: Wade Cleary, P.E., Managing Principal
1344 South Flores, Suite 101
San Antonio, Texas 78204
Telephone: (210) 447-6100
E-Mail: wadec@clearyzimmermann.com

Either party hereto may change its address by giving the other party written notice thereof at least five (5) business days in advance of the Effective Date for such new address.

11.8. Governing Law and Venue. This Agreement, all Assignments, and the rights and obligations of the parties to the foregoing shall be governed by, and construed according to, the laws of the State of Texas, exclusive of conflicts of law provisions. Venue of any suit brought pursuant to this Agreement or any Assignment shall be in a court of competent jurisdiction in Travis County, Texas. PSP hereby irrevocably waives any objection, including any objection to personal jurisdiction or the laying of venue or based on the grounds of *forum non conveniens*, which it may now or hereafter have to the bringing of, or responding to, any action or proceeding in such jurisdiction with respect to this Agreement, any Assignment, or any document related hereto.

11.9. Proper Authority. The parties hereto represent and warrant that the Person executing this Agreement on behalf of each party has full power and authority to enter into this Agreement. PSP acknowledges that the Agreement is effective only for the period of time specified in this Agreement.

11.10. Name and Organizational Changes. PSP must provide TFC with written notification of all name changes and organizational changes relating to PSP including, but not limited to, merger, acquisition or sale no later than ten (10) business days of such change. PSP, in its notice, shall describe the circumstances of the name change or organizational change, state its new name, provide the new Tax Identification Number, and describe how the change will impact its ability to perform under the Agreement. If the change entails personnel changes for personnel performing the responsibilities of the Agreement for PSP, PSP shall identify the new personnel and provide resumes to TFC, if resumes were originally required by the solicitation. TFC may request other information about the change and its impact on the Agreement and PSP shall supply the requested information within five (5) working days of receipt of the request. All written notifications of organizational change must include a detailed statement specifying the change and supporting documentation evidencing continued right of PSP or successor entity, as applicable, to maintain its status as a party to this Agreement. TFC may terminate the Agreement due to any change to PSP that materially alters PSP's ability to perform under the Agreement.

11.11. Electronic and Information Resources Accessibility Standards. (a) Effective September 1, 2006, all state agencies and institutions of higher education shall procure products which comply

with the State of Texas accessibility requirements for electronic and information resources specified in Title 1 of the Texas Administrative Code, Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation. (b) If applicable, PSP shall provide the Texas Department of Information Resources ("DIR") with the universal resource locator ("URL") to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (*https://app.buyaccessible.gov/baw/Main.jsp*). Contractors not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at http://www.section508.gov/.

11.12. Force Majeure. Any delays in or failure of performance by either party, except in respect of the obligation for payments under this Agreement, shall not constitute default hereunder if and to the extent such delays or failure of performance are caused solely by occurrence(s) beyond the reasonable control of the party affected, and which by the exercise of due diligence such Party is unable to prevent (hereinafter referred to as "Force Majeure") including acts of God or the public enemy, sabotage, war, mobilization, revolution, civil unrest, riots, strikes, lockouts, fires, accidents breakdowns, or floods, earthquakes, hurricanes, or any other natural disaster or governmental actions. In any such event, the party claiming Force Majeure shall notify the other party of the Force Majeure event in writing within forty-eight (48) hours of the commencement of the Force Majeure event, and within forty-eight (48) hours of the termination of the Force Majeure event. In the event said party fails to timely provide either of the above-described notices, such failure shall constitute, without further notice or action, a waiver of the right to claim Force Majeure for such event. If possible, the notice shall set forth the extent and duration thereof. The party claiming Force Majeure shall exercise due diligence to prevent, eliminate or overcome such Force Majeure event where it is possible to do so and resume performance at the earliest possible date. However, if nonperformance continues for more than thirty (30) days, TFC may terminate this Agreement immediately upon written notification to PSP. Changes in the schedule or in the design or scope of the Project as a result of any Force Majeure which affect the cost of the PSP's services under this Agreement require a written amendment to this Agreement. In any such event, the party claiming Force Majeure shall notify the other party of the Force Majeure event in writing within forty-eight (48) hours of the commencement of the Force Majeure event, and within forty-eight (48) hours of the termination of the Force Majeure event. In the event said party fails to timely provide either of the above-described notices, such failure shall constitute, without further notice or action, a waiver of the right to claim Force Majeure for such event. If possible, the notice shall set forth the extent and duration thereof. The party claiming Force Majeure shall exercise due diligence to prevent, eliminate or overcome such Force Majeure event where it is possible to do so and resume performance at the earliest possible date. However, if nonperformance continues for more than thirty (30) days, TFC may terminate this Agreement or any Assignment immediately upon written notification to PSP. Changes in the schedule or in the design or scope of a Project as a result of any Force Majeure which affect the cost of PSP's services under this Agreement or any Assignment require a written amendment.

11.13. Dispute Resolution. Subject to Texas Government Code, Section 2260.002, the dispute resolution process provided for in Chapter 2260 of the Texas Government Code shall be used by the parties to attempt to resolve all disputes arising under this Agreement. In accordance with the Texas Civil Practice and Remedies Code, Section 114.005, the parties agree claims encompassed by Texas Government Code, Section 2260.002(3) and Texas Civil Practice and Remedies Code, Section 114.002 shall be governed by the following dispute resolution process.

11.13.1. Claims for Breach of Contract and Counterclaims.

11.13.1.1. PSP may make a claim against TFC for breach of a contract between TFC and PSP. TFC may assert a counterclaim against PSP.

11.13.1.2. PSP must provide written notice to TFC of a claim for breach of contract not later than one hundred eighty (180) days after the date of the event giving rise to the claim.

11.13.1.3. The notice must state with particularity: (i) the nature of the alleged breach; (ii) the amount PSP seeks as damages; and (iii) the legal theory of recovery.

11.13.1.4. TFC must assert, in a writing delivered to PSP, any counterclaim not later than the sixtieth (60th) day after the date of notice of a claim under Section 11.13.1.1. above.

11.13.1.5. The total amount of money recoverable on a claim for breach of contract under this Section may not, after deducting the amount specified below, exceed an amount equal to the sum of: (i) the balance due and owing on the Agreement price; (ii) the amount or fair market value of orders or requests for additional work made by a unit of state government to the extent that the orders or requests for additional work were actually performed; and (iii) any delay or labor-related expense incurred by the PSP as a result of an action of or a failure to act by the unit of state government or a party acting under the supervision or control of the unit of state government.

11.13.1.6. Any amount owed the unit of state government for work not performed under a contract or in substantial compliance with its terms shall be deducted from the amount in Section 11.13.1.5, above.

11.13.1.7. Any award of damages under this Agreement may not include: (i) consequential or similar damages, except delays or labor-related expenses described by Section 11.13.1.5, above; (ii) exemplary damages; (iii) any damages based on an unjust enrichment theory; (iv) attorney's fees; or (v) home office overhead.

11.13.2. Negotiation. TFC's general counsel shall examine the claim and any counterclaim and negotiate with PSP in an effort to resolve them. The negotiation must begin no later than one hundred twenty (120) days after the date the claim is received. TFC's administrative rules located at Title 1, Part 5, Section 111.31 of the Texas Administrative Code apply to this Agreement and govern the negotiation of any dispute arising from this Agreement. In the event

negotiation results in the resolution of some disputed issues by agreement or in a settlement, the parties shall reduce the settlement to writing, and each party shall sign the settlement. A partial settlement or resolution of a claim does not waive a party's rights as to the parts of the claim that are not resolved.

11.13.3. Mediation. Before the one hundred twentieth (120th) day after the date the claim is filed with TFC and before the expiration of any extension of time mutually agreed upon, the parties may agree to mediate a claim made under this Agreement. TFC's administrative rules located at Title 1, Part 5, Section 111.31 of the Texas Administrative Code apply to this Agreement and govern the mediation of any dispute arising from this Agreement.

11.13.4. Adjudication. On or after the two hundred seventieth (270th) day following the date the claim is filed with TFC, unless the parties agree in writing to an extension of time, PSP may adjudicate any claim in accordance with and to the extent permitted under the Texas Civil Practice and Remedies Code, Chapter 114 or the Texas Government Code, Chapter 2260.

11.13.5. Payment of Claims. In accordance with the Texas Civil Practice and Remedies Code, Section 114.011, TFC may pay a claim resolved under this Section only from money appropriated to it for payment of contract claims or for payment of the contract that is the subject of the claim. If money previously appropriated for payment of contract claims or payment of the contract is insufficient to pay the claim or settlement, the balance of the claim may be paid only from money appropriated by the legislature for payment of the claim. Chapter 304 of the Texas Finance Code applies to a judgment awarded to a claimant except that the applicable rate of interest may not exceed six percent (6%). Consistent with the Texas Civil Practice and Remedies Code, Section 114.011, property owned by the State or any unit of state government is not subject to seizure, attachment, garnishment, or any other creditors' remedy to satisfy a judgment on a breach of contract claim.

11.13.6. Representation of TFC. The Office of the Attorney General of Texas shall defend TFC in any proceeding or adjudication conducted in conjunction with a claim brought under this Section.

11.14. Legal Construction and Severability. In the event any one or more of the provisions contained in this Agreement or any Assignment shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision herein, and this Agreement and any such Assignment shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein. Furthermore, in lieu of each such illegal, invalid, or unenforceable provision there shall be substituted a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

11.15. Multiple Counterparts. This Agreement and any Assignment may be executed in any number of counterparts, each of which shall be an original, and each such counterpart shall together constitute but one and the same agreement.

11.16. Binding Effect. This Agreement and any Assignment shall be binding upon and shall inure to the benefit of the parties hereto, their representatives, successors and assigns.

11.17. Limitation on Authority and No Other Obligations. PSP shall have no authority to act for or on behalf of TFC or the State of Texas except as expressly provided for in this Agreement and in any Assignment; no other authority, power, or use is granted or implied. PSP may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of TFC or the State of Texas.

11.18. Limitation on Adjudication Awards. PSP expressly agrees as follows.

11.18.1. Civil Suit. In the event PSP brings a civil suit against TFC and prosecutes it to final judgment pursuant to Chapter 114 of the Code, any recovery by PSP shall be specifically limited to the balance due and owed by TFC on the Agreement as it may have been amended, including any amounts owed by written change orders.

11.18.2. Interest. Pre-judgment and post-judgment interest shall be limited to the rate of three percent (3%) per annum.

11.18.3. **WAIVER OF CLAIMS. PSP HEREBY WAIVES ALL CLAIMS FOR MONETARY DAMAGES FOR ANY AMOUNT THAT MAY BE CLAIMED: (i) FOR THE INCREASED COST TO PERFORM WORK AS A DIRECT RESULT OF OWNER-CAUSED DELAYS OR ACCELERATION; (ii) BASED UPON AN UNJUST ENRICHMENT THEORY; (iii) FOR CONSEQUENTIAL AND EXEMPLARY DAMAGES; AND (iv) FOR DAMAGES FOR ANY UNABSORBED HOME OFFICE OVERHEAD.**

11.19. No Waiver of Sovereign Immunity. **Except as may be expressly and specifically provided otherwise by Chapter 114 of the Texas Civil Practices and Remedies Code, nothing in the Agreement or in any Assignment shall be construed as a waiver of sovereign immunity; nor constitute or be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to the State of Texas, TFC or the Using Agency.** The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to the State of Texas under the Agreement, any Assignment, or under applicable law shall not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel.

11.20. No Implied Waiver. The failure of a party to insist at any time upon the strict performance of any covenant or agreement or to exercise any option, right, power, or remedy contained in this Agreement or in any Assignment shall not be construed as a waiver or a relinquishment thereof for the future.

11.21. No Third-Party Beneficiaries. This Agreement and any Assignment are made solely and specifically among and for the benefit of the named parties and the Using Agency, and their respective successors and assigns, and no other Person shall have any right, interest, or claims thereunder or be entitled to any benefits pursuant to or on account of this Agreement or any Assignment as a third-party beneficiary or otherwise.

11.22. Further Assurances. PSP shall take such actions and execute such other and additional documents as are reasonably necessary or desirable in order to carry out the purposes and intent of this Agreement.

11.23. No Presumptions for Ambiguities. Each party hereby represents and warrants that although the initial draft of this Agreement and any exhibits may have been prepared by one party, both parties have been given the opportunity to review this Agreement and those exhibits with counsel of their choice, and have made additions, revisions, and amendments hereto. Therefore, each party hereby covenants and agrees that they are co-drafters of this Agreement and those exhibits such that any ambiguities cannot be construed against any party.

11.24. Time is of the Essence. Time is of the essence with respect to this Agreement and any Assignment; *provided however*, in the event that any of the deadlines set forth in an Assignment end on a Saturday, Sunday, or federal legal holiday, such deadline shall automatically be extended to the next day which is not a Saturday, Sunday, or federal legal holiday.

11.25. Schedule of Exhibits. The following shall be the exhibits to this Agreement, which are contained on the CD, and are hereby incorporated herein by reference.

11.25.1. Exhibit A. 2015 Uniform General Conditions.

11.25.2. Exhibit B. 2017 TFC Architectural/Engineering Guidelines.

11.25.3. Exhibit C. Assignment Form.

11.25.4. Exhibit D. List of PSP's Key Personnel.

11.25.5. Exhibit E. List of PSP Project Manager and Subcontractors.

11.25.6. Exhibit F. Criminal Background Checks and Application Guidelines.

11.25.7. Exhibit G-1. HUB Subcontracting Plan Form.

11.25.8. Exhibit G-2. HUB Subcontracting Plan PAR Form.

11.26. Survival of Terms. Termination of the Agreement for any reason shall not release PSP from any liability of obligation set forth in the Agreement that is expressly stated to survive any such termination or by its nature would be intended to be applicable following any such termination, including the provisions regarding confidentiality, indemnification, transition, records, audit, property rights, dispute resolution and invoice and verification.

[This Space Intentionally Left Blank]

11.27. Entire Agreement and Modification. This Agreement and its integrated attachment(s) constitute the entire agreement of the parties and such are intended as a complete and exclusive statement of the promises, representations, negotiations, discussions, and other agreements that may have been made in connection with the subject matter hereof. Unless an integrated attachment to this Agreement specifically displays a mutual intent to amend a particular part of this Agreement, general conflicts in language between any such attachment and this Agreement shall be construed consistently with the terms of this Agreement. Unless otherwise expressly authorized by the terms of this Agreement, no modification, renewal, extension, or amendment to this Agreement shall be binding upon the parties unless the same is in writing and signed by the respective parties hereto.

**TEXAS FACILITIES COMMISSION**

By: _____

Kay Molina

General Counsel

Date of execution: 9/26/17

G.C. _____

Dir. _____

D.E.D. _____

**CLEARY ZIMMERMANN ENGINEERS, LLC**

By: _____

Wade Cleary, P.E.

Managing Principal

Date of execution: 9/21/17

# TFC Contract No. 18-092-000

# Cleary Zimmermann Engineers, LLC

# Exhibits CD