



**PROFESSIONAL SERVICES AGREEMENT**  
**SITE ENVIRONMENTAL/ENGINEERING SERVICES FOR**  
**CAPITOL COMPLEX AND NORTH AUSTIN COMPLEX**  
**PROJECTS**  
**BETWEEN**

**THE TEXAS FACILITIES COMMISSION**  
**AND**  
**COBB FENDLEY & ASSOCIATES, INC.**

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The Texas Facilities Commission (hereinafter referred to as “TFC” or the “Owner,” as defined in *2015 Uniform General Conditions*, Section 1.28), a state agency located at 1711 San Jacinto Boulevard, Austin, Texas 78701, and Cobb Fendley & Associates, Inc. (hereinafter referred to as “Site Services Engineer” or “SSE” as defined below), located at 505 East Huntland Drive, Suite 100, Austin, Texas, 78752, enter into the following agreement for professional engineering services (hereinafter referred to as the “Agreement”) pursuant to the Professional Services Procurement Act, Tex. Gov’t Code Ann. Ch. 2254, Subch. A, to be effective as of the Effective Date (as defined below). Nothing in this Agreement shall be interpreted or construed to make Contractor (as defined below) a third-party beneficiary hereunder.

**RECITALS**

WHEREAS, TFC has determined that it requires site environmental, archeological and engineering services of a consultant for its Capitol Complex and North Austin Complex Projects to be located in Austin, Texas; and

WHEREAS, SSE is qualified and has agreed to provide the services contemplated hereunder; and

WHEREAS, TFC has agreed to compensate SSE for these services, as provided herein;

NOW, THEREFORE, in consideration of the mutual promises, commitments and representations herein it is hereby agreed as follows:

**I. DEFINITIONS.**

1.1. Unless specifically provided otherwise herein, all words and phrases in this Agreement in initial caps shall have the meanings set out in this Section 1.1. In the event of any conflict between the definitions in the *2015 Uniform General Conditions* (hereinafter referred to as “UGC”) and the *2015 Supplementary General Conditions*, a digital copy of each of which is incorporated herein by reference for all purposes in Portable Document Format (“.pdf”) on the recordable digital versatile disk attached hereto and labeled “TFC Contract No. 16-101-000 / Cobb Fendley / Exhibits DVD” (hereinafter referred to as the “Exhibits DVD”), and named

therein as “Exhibit A” and “Exhibit B,” respectively, in the A/E Guidelines (as defined in Paragraph 1.1.3, below), or in any other document referenced herein and incorporated for all purposes, and the definitions in this Agreement, the definitions used in this Agreement shall control to the extent of the conflict.

1.1.1. *Additional Service(s)* means those services not included in Article II of this Agreement which may be requested by TFC at any time for the duration of this Agreement, as discussed in Section 4.5 below.

1.1.2. *Approval* or *Approved* means the written approval of TFC, and, as applicable, the CMA and/or Master A/E, where expressly required or allowed herein. TFC may exercise the right of Approval in its sole discretion. TFC’s Approval shall also require formal approval of TFC’s board of commissioners (the “Commissioners”) whenever approval of the Commissioners is expressly required by this Agreement, or is otherwise required by state law or TFC’s policies. The act of an Approval shall not constitute a waiver of TFC’s rights hereunder or excuse the SSE from fulfilling its obligations to perform in accordance with this Agreement.

1.1.3. *Architect/Engineer(s)* means, individually or collectively, the architectural and engineering service providers contracted by TFC to perform all of the professional architectural and engineering design services, and any licensed professionals and other personnel working under the Architect/Engineer’s supervision, or otherwise engaged by TFC to prepare the design for all or a portion of the Projects.

1.1.4. *A/E Guidelines* means the TFC Architectural/Engineering Guidelines, a digital copy of which is incorporated herein by reference for all purposes in .pdf on the Exhibits DVD and named therein as “Exhibit C.”

1.1.5. *Building Information Model* or *BIM* means a computable multi-dimensional representation of the physical and functional characteristics of the Projects’ facilities and their related life-cycle information, to be used as a repository of design and construction information for use by the Project Team during the design, bidding and construction phases of the Projects, and for the TFC’s use throughout the life-cycle of the facilities.

1.1.6. *Budget* means the construction cost estimate initially established for the Projects. The Budget may be amended and Approved from time to time as further assessments, design and construction cost estimates are developed by the Project Team.

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

1.1.8. *Capitol Complex Master Plan* means the 2016 Texas Capitol Complex Master Plan adopted March 23, 2016, and any Approved updates thereto, which is incorporated by reference as if fully stated herein as “Exhibit D,” and located on the TFC website at this link: <http://www.tfc.state.tx.us/divisions/commissionadmin/tools/>.

1.1.9. *Capitol Complex Projects* means the projects described in subparagraph 2.1.1.1.

1.1.10. *Communication Protocol(s)* means the communication and tracking procedures to be utilized for interaction and reporting between the TFC, the CMA (as applicable for the Capitol Complex Projects), the Master A/E (as applicable for the Capitol Complex Projects), the Construction Managers, Contractors, any subcontractors, the SSE, and the Architect/Engineers, including but not limited to, the use of any EPMCS utilized by TFC for the Projects.

1.1.11. *Consideration* means the funds and any and all other forms of valid, legal consideration as discussed in Article IV of this Agreement.

1.1.12. *Construction Costs* means all hard and soft costs for labor, materials, fees, and other similar costs and expenses required to complete the Projects.

1.1.13. *Construction Manager-Agent* or *CMA* means the service provider TFC will engage as the TFC's fiduciary agent to assist TFC with management and coordination of the overall design and construction program for the Capitol Complex Projects. TFC will separately procure the professional design services of an Architect/Engineer for each of these Projects to prepare the Construction Documents for each respective Project. TFC will also separately procure the construction management services of a Construction Manager-at-Risk for each of the respective Projects. Therefore, and for purposes of clarity, the use of the title "Construction Manager-Agent" to describe this service provider is not intended to characterize such service provider as a construction manager-agent for a single project, as is contemplated by Tex. Gov't Code Ann. Ch. 2269, Subch. E; but rather, it is intended to describe the service provider's role as a *program manager* to assist TFC with management and coordination of the overall design and construction program for the TFC's Capitol Complex Projects. As such, the title "Construction Manager-Agent" as used herein shall not be construed to limit the scope of services of this service provider to only those described in Tex. Gov't Code Ann. Ch. 2269, Subch. E. for a construction manager-agent on a single project. Rather, TFC will be procuring the services of this service provider in accordance with the Professional Services Procurement Act, Tex. Gov't Code Ann. Ch. 2254, Subch. A, as referenced in Tex. Gov't Code Ann. Ch. 2269, Subch. E, as such services are program management services for a series of construction projects, rather than a single project.

1.1.14. *Construction Manager-at-Risk* or *Construction Manager* has the same meaning as defined in UGC, Section 1.18, and also refers to the service provider to be engaged by TFC for each Project to perform (or cause to be performed) the Work on each Project as a Construction Manager-at-Risk.

1.1.15. *Construction Documents* has the same meaning as defined in UGC, Section 1.17.

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

1.1.17. *Deliverables* means any and all Drawings, Specifications, Documents, photos, designs, studies, sketches, computer programs, field and laboratory data, reports, and other information, whether in printed or electronic media format, provided or furnished in appropriate phases by SSE in the performance of the Professional Services, which are specified to be

delivered by the SSE pursuant to the terms of this Agreement. Copies of and/or electronic access to any Deliverable to be provided to TFC hereunder, together with any transmittal or other information related to it, shall, when directed by TFC, be simultaneously issued and provided to TFC's CMA and Master A/E.

1.1.18. *Design Program* means, collectively, the overall goals and design objectives of the Projects, the aesthetic considerations, the functional requirements including: (i) allocations of space with uses and adjacency relationships for all areas/spaces; and (ii) operational objectives and such standards of design that TFC may require for all architectural and engineering disciplines in the design and construction of the Projects.

1.1.19. *Documents* shall mean any field and laboratory data, reports, and other Deliverables, whether in printed or electronic media format, provided or furnished in appropriate phases by SSE to TFC pursuant to this Agreement. Drawings, Specifications, record drawings and other deliverables provided or furnished by SSE are also referred to herein as Documents.

1.1.20. *Drawings* means the graphic and pictorial portions of the Documents, and including all information required to maintain the Building Information Model(s), showing the design, location and dimensions of the Work, and generally including plans, elevations, sections, axonometrics, isometrics, details, schedules and diagrams.

1.1.21. *Effective Date* means the latest Date of Execution set forth below the signatures of the Parties' duly authorized officers, as shown on the last page of this Agreement.

1.1.22. *EPMCS* means the Approved electronic project management control system.

1.1.23. *Geographic Information System* or *GIS* means a system designed to capture, store, manipulate, analyze, manage, and present all types of spatial or geographical data.

1.1.24. *Governmental Authorities* means all federal, state, and local governmental entities having jurisdiction over the Projects, and the SSE.

1.1.25. *Hourly Fee Rates* shall mean the rates set forth in "Exhibit E" for Additional Services to be performed by the SSE.

1.1.26. *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.

1.1.27. *Master A/E* means the service provider TFC will engage pursuant to Texas Government Code §2254 as the owner's representative for oversight, coordination and

management of the overall design of the Capitol Complex Projects by each of the Architect/Engineers as the designers of record for the Capitol Complex Projects.

1.1.28. *Master Plans* means collectively the Capitol Complex Master Plan and the North Austin Complex Master Plan.

1.1.29. *North Austin Complex Master Plan* means the North Austin Complex Master Plan dated Spring/Summer 2014 and any Approved updates thereto, which is incorporated by reference as if fully stated herein as “Exhibit F.”

1.1.30. *North Austin Complex Project* means the project described in subparagraph 2.1.1.2.

1.1.31. *Notice of Authorization (or “NOA”)* means the written authorization to proceed to the next phase of SSE’s Services. Notice of Authorization is to be distinguished from a Notice to Proceed.

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

1.1.33. *Notice to Proceed (or “NTP”)* means the written authorization by TFC to proceed with commencement of Services.

1.1.34. *Progress Assessment Report (or “PAR”)* means the progress assessment report in such form as is prescribed by TFC and which has the same meaning as defined in UGC, Section 1.31.

1.1.35. *Pay Application* means the application for payment submitted by SSE as discussed in Article IV below.

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

1.1.37. *Pre-Design Deadline* means the date that is a fixed number of days after delivery of a Notice to Proceed, and by which date SSE shall (i) complete all the Pre-Design Tasks, and (ii) prepare and deliver the Pre-Design Task Reports to TFC.

1.1.38. *Pre-Design Task Report* means a comprehensive report(s) that sets forth the results of, and answers to, each of the Pre-Design Tasks discussed in Article II.

1.1.39. *Pre-Design Tasks* means the mobilization and pre-design services to be provided to TFC as discussed in Article II.

1.1.40. *Professional Services* means (i) professional architectural services; and/or (ii) professional engineering services as defined in Texas Government Code, Chapter 2254, Subchapter A, the scope of which is set out in Article II below.

1.1.41. *Professional Services Schedule* (hereinafter sometimes referred to as the “Schedule”) means the schedule/timeline set out on the Exhibits DVD and named therein as “Exhibit G,” and which schedule/timeline 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, which deadlines shall be calculated from the effective date of an NTP or subsequent NOA. At the discretion of the TFC Project Manager and as mutually agreed upon with SSE, the Professional Services Schedule may be revised and defined with more detail as the Projects develop.

1.1.41.1. The Parties acknowledge that upon execution of this Agreement, the Schedule will not reflect the date of issuance of the NTP, nor whether the Projects will be completed as a single package or in multiple combinations of packages. At such time that an NTP is issued, TFC shall enter said date into the Schedule, which will result in the Professional Services Schedule for such package being filled-in with specific deadlines.

1.1.41.2. Upon entry of the date of issuance of the NTP, the Professional Services Schedule, as revised, shall become, without further notice or action, the effective Professional Services Schedule, and said revised Schedule shall be considered substituted for the original Professional Services Schedule, and shall be deemed added to the Exhibits DVD.

1.1.42. *Projects* collectively means the Capitol Complex Projects and the North Austin Complex Project, as further defined in Article II, which are planned for the Capitol Complex Sites and North Austin Complex Site, and for which the Services under this Contract are to be performed.

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

1.1.44. *Project Team(s)* means the CMA (as applicable for the Capitol Complex Projects), Master A/E (as applicable for the Capitol Complex Projects), SSE, Architect/Engineer(s), Construction Manager(s), and any separate Contractors, consultants, or other service providers employed by TFC for the purpose of planning, programming, design, construction, and commissioning of the Projects. The constitution of the Project Team(s) may vary for each, and at different phases, of the Projects. The Project Team(s) will be designated by TFC and may be modified from time to time by TFC.

1.1.45. *Reimbursable Expenses* means those reasonable and necessary out-of-pocket costs and expenses incurred by SSE for the provision of the Professional Services that are Approved.

1.1.46. *Safety Incident* means any failure of the SSE or any of the SSE Personnel to manage performance of the SSE Personnel in accordance with the safety requirements set forth in Section V of this Agreement as necessary to recognize and successfully prevent or avoid any of the following circumstances (each being a Safety Incident):

1.1.46.1. The reported observation of a potential safety hazard, unsafe work practice, or lapse in prudent safety management that can reasonably be expected to lead to injury or death to any person, or damage to any property;

The presence of any unsafe working condition, including without limitation any unauthorized or improper usage of equipment or faulty equipment, that reasonably be expected to lead to injury or death to any person, or damage to any property;

1.1.46.2. The occurrence of bodily injury or death, or property damage arising out of or in connection with the Projects or the performance of the Services.

1.1.47. *Scope of Services* means the Professional Services as set out in Article II below.

1.1.48. *Services* means the services provided by the SSE, SSE Personnel and/or by Subcontractors and/or consultants retained by the SSE for the Projects.

1.1.49. *Site(s)* means the lands, areas, and/or buildings generally described in Article II as the Capitol Complex Sites and the North Austin Complex Site, and indicated in the Contract Documents as being furnished by TFC as the Sites 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 Contractor, as further described in Article II.

1.1.50. *Site Services Engineer Agreement, Contract or Agreement* means this contract and all of the Exhibits attached hereto and which are expressly identified herein to be incorporated as a part hereof, in addition to all amendments or supplements that may be mutually agreed upon by TFC and SSE, and any Changes that may become effective in accordance with the provisions of this Contract, from time to time.

1.1.51. *Site Services Engineer or SSE* means Cobb Fendley & Associates, Inc., service provider TFC engages to provide the site environmental, archeological and engineering services for the Projects, and who serves in such capacity pursuant to this Agreement.

1.1.52. *SSE Personnel* means all SSE's Subcontractors, subconsultants and vendors of any tier who contract to perform any of SSE's obligations or duties hereunder, as shown in "Exhibit H," the List of SSE Project Manager and Subcontractors.

1.1.53. *Specifications* means that portion of the Construction Documents consisting of the written technical requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services, including all requirements of applicable building and life safety codes.

1.1.54. *SSE Project Manager* means the individual designated by SSE, and who must be Approved, as the contact person with specific authority to properly supervise and direct the duties and responsibilities of SSE, on behalf of SSE, pursuant to the terms and conditions of this Agreement, and who shall have decision-making authority to bind SSE with respect to the Services rendered in connection with this Agreement or the Projects.

1.1.55. *Subcontract* means any agreements between SSE and a Subcontractor.

1.1.56. *Subcontractor* means any Person that enters into an agreement with SSE to perform any part of the Professional Services required under this Agreement.

1.1.57. *TFC Project Manager* means the employee of TFC authorized and assigned to communicate with and act on TFC's behalf to administer the SSE's Agreement, and to manage and oversee the Project Team in connection with the Projects. The person designated as the TFC Project Manager pursuant to Section 5.1.2, below, is authorized to act on behalf of TFC with respect to the day-to-day management of the Services required under this Agreement, inclusive of: (i) acting on the recommendations and advice of the CMA and the Master A/E in connection with the Capitol Complex Projects; (ii) managing TFC's review and Approval of the Professional Services; and (iii) operating as the point of contact between TFC, the Using Agency (if any), and SSE.

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

1.1.59. *Work* means the physical construction and related services required by the Construction Documents to construct the Project, and includes all other labor, materials, equipment and services provided or to be provided by the Construction Manager(s) to fulfill the Construction Manager(s) obligations. The Work may constitute the whole or a part of the Projects.

1.1.60. *Work Product* shall mean all work product, including all instruments of service, submittals, Drawings, Specifications, Documents, plans, data compilations or calculations, Building Information Models, studies, reports, or other documents, and all ideas incorporated therein, and all intellectual property rights associated therewith, which are prepared by or on behalf of any Service Provider, in connection with the Projects or in connection with the performance of the Services or Additional Services hereunder, which Work Product shall, except as otherwise set forth in this Agreement be and remain the property of TFC, and shall only be used by SSE in a manner strictly adhering to SSE's limited use and ownership rights as set forth in this Agreement.

1.1.61. *Worksite(s)* has the same meaning as the defined term "Site(s)", as set forth in Section 1.1.49, above.

## II. DESCRIPTION OF PROJECTS AND SCOPE OF SERVICES

### 2.1. Description of Projects.

2.1.1 The Projects include all aspects of the Master Plans, as may be amended by TFC from time to time, for the planning, development, architecture, engineering, design, procurement, demolition, renovation and construction of facilities and improvements on the Sites described in Section 2.1.2, below. The Projects are described as follows:

#### 2.1.1.1. Capitol Complex Projects.

2.1.1.1.1. One approximately 605,000 GSF Building at Congress Avenue and Martin Luther King Boulevard.

2.1.1.1.2. One approximately 421,000 GSF Building at Congress Avenue and 17th Street.

2.1.1.1.3. Five levels of underground parking under Congress Avenue from 16th Street to Martin Luther King Boulevard.

2.1.1.1.4. One Capitol Complex Physical Plant Annex at the Sam Houston Building.

2.1.1.1.5. Walkable underground thermal utility tunnels from the Physical Plant Annex to new building at Congress Avenue and 17th Street.

2.1.1.1.6. Landscaped Pedestrian Mall on Congress Avenue from 16th Street to Martin Luther King Boulevard.

2.1.1.2. North Austin Complex Project. One approximately 406,000 GSF Building at North Lamar and 51<sup>st</sup> Street and adjacent structured parking for approximately 2,400 passenger vehicles.

2.1.2. The Sites planned for development of the Projects are:

#### 2.1.2.1. Capitol Complex Sites – Multiple sites including:

2.1.2.1.1. State of Texas Parking Lot #7 (across from the Texas State History Museum): One full block bounded by North Congress Avenue, Martin Luther King, Jr. Boulevard, Brazos Street, and 18th Street.

2.1.2.1.2. State of Texas Parking Lot #2 (directly west of the Lyndon B. Johnson (LBJ) Building): One half block bounded by North Congress Avenue, 17th Street, the LBJ Building, and 16th Street.

2.1.2.1.3. North Congress Avenue Right of Way extending from Martin Luther King, Jr. Boulevard to 15<sup>th</sup> Street.

2.1.2.1.4. Parking lot and service yard west of the Sam Houston Building (SHB): One half block bounded by SHB, 14<sup>th</sup> Street, San Jacinto Boulevard, and 13<sup>th</sup> Street.

2.1.2.1.5. Street Right of Ways including:

2.1.2.1.5.1. 14<sup>th</sup> Street from Brazos Street to San Jacinto Boulevard;

2.1.2.1.5.2. Brazos Street from 15<sup>th</sup> Street to 14<sup>th</sup> Street;

2.1.2.1.5.3. 15<sup>th</sup> Street from Congress Avenue to Brazos Street;

2.1.2.1.5.4. 16<sup>th</sup> Street from Congress Avenue to Brazos Street

2.1.2.2. North Austin Complex Site - John H. Winters Building grounds: One large parcel bounded by West Guadalupe Street, Lamar Boulevard, West 51st Street, Guadalupe Street, and West 46th Street.

2.2 Scope of Services. SSE agrees to timely deliver the Professional Services described below and in the SSE's Detailed Scope of Services Dated April 7, 2016, attached hereto as "Exhibit I," pursuant to the Professional Services Schedule.

2.2.1. General Duties for Performance of Services, Part One.

2.2.1.1. The SSE shall furnish or provide the site environmental and engineering services necessary for the successful planning, design and construction of the Projects in accordance with TFC's requirements, as outlined in the TFC's relevant data defining the Projects. The site environmental and engineering services shall include Basic Services, plus Additional Services as may be authorized by TFC.

2.2.1.2. SSE shall render all Services necessary and/or reasonably inferable from this Agreement, the Project Analysis (or the equivalent thereof), the Design Program, the Master Plans, and all other relevant data, for the completion of the site environmental and engineering services, and all other facets of usual and customary environmental and engineering services necessary and appropriate in the exercise of the Standard of Care to support the further development of the Design Program and the successful execution of the Projects, regardless of whether expressly described herein.

2.2.1.3. SSE shall, in accordance with its Standard of Care, verify the accuracy and suitability of any drawings, plans, sketches, instructions, information, requirements, procedures, requests for action, and other data supplied by TFC and other members of the Project Team and used by SSE in the performance of the Services.

2.1.2.4. SSE's Services, including all Documents developed by SSE, shall be accurate and free from material errors and/or omissions in accordance with its Standard of Care. Upon notice, SSE shall promptly correct any known or discovered error, omission, or other defect without any additional cost or expense to TFC.

2.2.1.5. The SSE shall take all necessary precautions to prevent damage to TFC's property, visible or concealed, including any rights of way, and shall reasonably restore the Sites to the condition existing prior to the SSE's entry, including, but not limited to, repair of paving, curbs, sidewalks, lawns and plantings unless otherwise agreed to with TFC.

2.2.2. Pre-Design Phase: No later than the Pre-Design Deadline, SSE shall timely deliver the following Pre-Design Tasks to TFC.

2.2.2.1. Consult with staff of TFC, and with any representatives of the Using Agency as may be directed by TFC, and become thoroughly familiar with (i) the Project Analysis, or the equivalent thereof; (ii) the Design Program; and (iii) the Master Plans.

2.2.2.2. Inspect and timely become thoroughly familiar with the Sites for the Projects.

2.2.2.3. Review and become thoroughly familiar with any and all relevant and existing Project, Site, and facilities studies and information.

2.2.2.4. Identify all codes, rules, regulations and all other Site-related requirements, including but not limited to City of Austin land development requirements that TFC may consider in the execution of the Projects, State environmental requirements, and necessary traffic impact studies.

2.2.2.5. Interface with all utility providers as is reasonably necessary to perform the Services required hereunder.

2.2.2.6. Receive and become familiar with requirements of the technical and design standards of TFC and the Using Agency, including, but not limited to, the A/E Guidelines.

2.2.2.7. Determine and identify to TFC which additional Subcontractor(s), if any, that are not engaged, or to be engaged, by SSE pursuant to this Agreement, will be necessary to perform the Professional Services in order to fulfill the requirements of this Agreement.

2.2.2.8. If requested, assign appropriate SSE staff to receive instruction regarding the use of the EPMCS to be utilized by TFC.

2.2.2.9. Deliver a Pre-Design Task Report to TFC. Upon consent of TFC, SSE may deliver one (1) amendment to the Pre-Design Task Report no later than the Pre-Design Deadline.

2.2.3. Phase I Services for All Sites.

2.2.3.1. Review Master Plans and provide detailed on-site investigations to estimate available utility capacity for phased construction at the Sites. SSE shall review the City of Austin Policies and Procedures for Requesting Street or Alley Vacations, which Policies and Procedures are attached hereto and incorporated by reference herein as “Exhibit J.”

2.2.3.2. Conduct a Phase 1 Environmental Site Assessment in accordance with ASTM Standard E1527.

2.2.3.3. Conduct, in accordance with the guidelines of the Texas Historical Commission, archival research and investigation to determine potential of existing archeology. Dependent on outcome of environmental and archeological surveys, TFC may authorize SSE to perform additional investigations. Additional investigation, if found to be necessary, will be performed by SSE as an Additional Service pursuant to Section 4.5.

2.2.3.4. Perform existing boundary surveys and topographic surveys.

2.2.3.5. Perform site surveys to enable separate buildings and parking structures to be parceled so each asset has an independent title.

2.2.3.6. Coordinate with utility providers and local units of government to ensure all utilities are available for the development of the Projects.

2.2.3.7. Identify all permits customarily required for site and utility work.

2.2.3.8. Deliver comprehensive report of all findings for Phase I Services including an executive summary, separate tabs for discreet portions of the study and supporting documentation as exhibits.

2.2.4. Format of Deliverables. Each of SSE’s Deliverables shall be submitted electronically in a format acceptable to TFC, and shall be appropriately labeled to include identification of the software program (and version thereof) utilized for each Deliverable.

2.2.4.1. All Drawings shall be organized within the layering system in accordance with the A/E Guidelines.

2.2.4.2. Layer format and names shall be in accordance with the A/E Guidelines.

2.2.4.3. All electronic data shall include an organized indexing system and/or a table of contents sufficiently detailed as to each discrete subject matter so as to allow for easy identification and location of each file or page of information.

2.2.4.4. Signed & Sealed. All Documents, reports, Drawings and Specifications shall be appropriately signed, sealed, and dated by the responsible architect(s) and engineer(s).

2.2.4.5. Compliance with Laws and Regulations. The Documents issued by SSE must comply with all Laws and Regulations.

2.2.4.6. SSE shall submit all documents required to secure approval of all Governmental Authorities. All requests for reimbursement for any direct costs associated with submitting documents to such authorities and for permit fees shall be governed by Article IV of this Agreement.

2.2.4.7. No Unauthorized Release. No Documents shall be issued, delivered, or released for any purpose without the prior written consent of TFC.

2.2.5. SSE Services During All Phases. SSE shall timely deliver the following services, as applicable, during all phases for which SSE is obligated to provide Professional Services to TFC.

2.2.5.1. Critically review and closely scrutinize all documents submitted by all third parties\.

2.2.5.2. Maintain work progress and perform Services consistent with the Professional Services Schedule.

2.2.5.3. Provide supplemental information beyond that presented in a submission of Documents which may be reasonably requested of SSE.

2.2.5.4. Actively participate in all meetings and/or teleconferences to bring the full measure of SSE's collective experience, expertise and recommendations to the Projects.

2.2.5.5. Prepare and deliver all meeting agendas and meeting minutes, field reports, and other similar documentation within one (1) week of the respective work or event, unless directed otherwise by TFC.

2.2.5.6. Answer questions and provide clarifications for the other members of the Project Team to facilitate their thorough examination of all reports Drawings, Specifications and other Documents.

2.2.5.7. Participate in constructability reviews with the other members of the Project Team.

2.2.5.8. Ensure that SSE Project Manager and any other representative of SSE whose presence is requested by TFC attend all meetings and participate in all conference calls that are scheduled by TFC.

2.2.6. TFC Approvals. Any provisions in this Agreement to the contrary notwithstanding, all consents and/or approvals by TFC shall be in its sole and absolute discretion, and must be in writing.

2.2.6.1. No changes to: (i) the scope of the Professional Services or (ii) the Consideration shall be valid or enforceable unless evidenced by a fully executed written amendment to this Agreement.

2.2.6.2. SSE is not authorized to commence providing any Professional Services to TFC or any Using Agency with respect to the Projects unless and until an appropriate Notice to Proceed is delivered by TFC.

2.2.6.3. TFC, including by and through the TFC Project Manager, reserves the right to extend any of the deadlines described above.

2.2.7. Inspections. TFC hereby reserves the right, if deemed appropriate by TFC in its sole discretion, to conduct reviews or inspections during the course of planning, pre-design, design, construction and commissioning of the Projects, and to require the SSE to participate therein. However, such participation shall not relieve SSE of any of its obligations arising pursuant to this Agreement.

2.2.7.1. No inspections of the Projects conducted by TFC, either singularly or in the aggregate, shall reduce the level or extent of SSE's responsibilities arising pursuant to this Agreement. Neither the approval and/or final acceptance of a Project or any Deliverable, the payment of any Pay Application, nor the issuance of any Certificates of Final or Substantial Completion by TFC shall constitute, or be deemed to be, a release of SSE's obligation to perform and timely deliver the Professional Services and any Additional Services in a manner consistent with the Standard of Care in accordance with this Agreement.

### **III. TERM AND TERMINATION**

3.1. Duration. This Agreement shall be effective as of the Effective Date and shall terminate on June 30, 2020, unless extended by the parties by amendment to this Agreement or terminated earlier, as provided below.

3.2. Early Termination. This Agreement 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 SSE at the address of record as specified in this Agreement. Upon receipt of a Notice of Termination, SSE will immediately cease all Professional Services and undertake to terminate any relevant Subcontracts and will incur no further expense related to this Agreement. Such early termination shall be subject to the equitable settlement of the respective interests of the parties accrued up to the date of termination.

### **IV. CONSIDERATION; PAYMENT CONDITIONS**

4.1. Contract Limit–Fees and Expenses.

4.1.1. Fixed Fee. In exchange for the timely delivery of the Professional Services as specified by this Agreement, SSE shall be paid a fixed fee of Six Hundred Nine Thousand Two Hundred Fifty-Two and No/100 Dollars (\$609,252.00). Any Professional Services performed or

delivered by SSE prior to the Effective Date of this Agreement or after its termination cannot be compensated.

4.1.2. Submission of Pay Applications or Invoices. No more frequently than once per month, SSE 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. TFC agrees to pay SSE in accordance with Chapter 2251 of the Texas Government Code, also known as the “Prompt Payment Act.”

4.2. Proportional Payments. Payments shall be made to SSE monthly in proportion to the percentage of completion of services performed, as follows:

4.2.1. Capitol Complex Part One.

- 4.2.1.1. Project Management.
- 4.2.1.2. Survey.
- 4.2.1.3. Utilities.
- 4.2.1.4. Phase I Environmental.
- 4.2.1.5. Archival Research for Archaeology.
- 4.2.1.6. Geotech.
- 4.2.1.7. Physical Plan and Utilities.
- 4.2.1.8. Street Vacation Permit Strategy.

4.2.2. North Austin Campus Part One.

- 4.2.2.1. Project Management.
- 4.2.2.2. Survey.
- 4.2.2.3. Utilities.
- 4.2.2.4. Phase I Environmental.
- 4.2.2.5. Archival Research for Archaeology.
- 4.2.2.6. Geotech.
- 4.2.2.7. Physical Plan and Utilities.
- 4.2.2.8. Street Vacation Permit Strategy.

4.2.3. Capitol Complex Phase III, Partial.

4.2.3.1. Topographical Survey.

4.2.4. North Austin Campus Phase III, Partial.

4.2.4.1. Topographical Survey.

4.2.5. Insurance Costs. To be invoiced at 100%.

4.3. Maximum Reimbursable Expenses. Reasonable lodging and traveling expenses shall be considered a Reimbursable Expense under this Agreement when professional and technical personnel of SSE 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 SSE, 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/texttravel/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, SSE must obtain the written Approval 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 the TFC, allows for complete substantiation of the costs incurred.

4.4. 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), SSE 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 this Agreement.

4.5. Additional Services. Upon request by TFC for Additional Services, SSE shall prepare and submit a proposal for such Additional Services to TFC for approval. Additional Services shall be performed at the Hourly Rates established by "Exhibit E." Any Additional Services performed or delivered by SSE prior to execution of the Agreement or amendment thereto, as applicable, cannot be compensated.

4.6. Payments to Subcontractors. For all services rendered, SSE'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 SSE and Subcontractors.

4.7. Certification of Correctness. Each submission of a Pay Application shall constitute SSE's representation to TFC that the Services and reimbursable expenses reflected thereon have been

fully rendered or incurred in accordance with this Contract, and that payment of the indicated amount has been earned by, and is properly due and payable to, SSE in accordance with this Contract. Notwithstanding the foregoing, the amount reflected on any Pay Application shall only be due and payable to SSE to the extent such payment has actually been earned by SSE in accordance with this Contract.

4.8. Right to Withhold Payment. Notwithstanding anything in this Contract to the contrary, TFC shall not be obligated to make, and may withhold interest free, any payment to SSE under this Contract if any one or more of the following three (3) conditions exist:

4.8.1. SSE is in default of any of its obligations under this Contract, and fails to commence to correct, and continuously and diligently proceed to cure, such default within seventy-two (72) hours after receiving TFC's written notice of such default;

4.8.2. SSE seeks payment for Services that were not performed under and in accordance with this Contract, in which case the amount of such payment may be withheld without notice; or

4.8.3. SSE has failed to make promptly when due any payment to any SSE Personnel or other third party used by SSE to perform this Contract, and for which TFC has paid SSE, in which case payment equal to such amount may be withheld without notice.

TFC's right to withhold payment hereunder is in addition to any and all legal and/or equitable remedies available to TFC under the law.

4.9. Prior to final payment to the SSE, the SSE shall furnish evidence satisfactory to TFC that there are no claims, obligations or liens outstanding in connection with its Services. Acceptance of final payment shall constitute a waiver of all claims by the SSE for compensation for its Services.

4.10. Should there be any claim, obligation or lien asserted before or after final payment is made that arises from the SSE's Services, the SSE shall reimburse TFC for any costs and expenses, including attorneys' fees, costs and expenses, incurred by TFC in satisfying, discharging or defending against any such claim, obligation or lien, including any action brought or judgment recovered, provided TFC is making payments or has made payments to the SSE in accordance with the terms of this Agreement.

4.11. Should the SSE or its consultants cause damage to the Projects, or fail to perform or otherwise be in default under the terms of this Agreement, TFC shall have the right to withhold from any payment due or to become due, or otherwise be reimbursed for, an amount sufficient to protect TFC from any loss that may result. Payment of the amount withheld shall be made when the grounds for the withholding have been removed.

## **V. ACKNOWLEDGEMENT, COVENANTS, AND AGREEMENTS**

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

5.1.1. TFC Deliverables to SSE. TFC shall provide SSE a copy of, or reasonable

access to any documents in the possession of TFC related to the Sites, provided, however, SSE shall not be entitled to rely on the accuracy or completeness of any such documents.

5.1.1.1. The Project Analysis, or equivalent thereof.

5.1.1.2. The Communication Protocol.

5.1.2. TFC Obligations to SSE. TFC shall:

5.1.2.1. Upon SSE's receipt of general and criminal background check clearance, assist SSE in obtaining such access to the Sites as is reasonably necessary to enable SSE to provide the Professional Services.

5.1.2.2. Designate the TFC Project Manager.

5.1.2.3. Provide intermediate reviews of the Work Product of SSE as necessary to allow SSE to proceed with delivery of the Professional Services in a timely manner.

5.1.2.4. Notwithstanding any provision in this Agreement to the contrary, TFC shall not be responsible for the adequacy of any planning, performance or design criteria for the Projects. TFC shall be entitled to rely upon SSE to determine the adequacy, accuracy and completeness of all Services rendered for the Project, including the adequacy of any planning, performance or design criteria related to the Services. SSE shall also be responsible for determining the adequacy, accuracy and completeness of any information furnished to the SSE by or on behalf of TFC and used by the SSE in rendering its Services.

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

5.2.1. Timely Delivery of Conforming Services. SSE will, subject to Force Majeure events, as defined in Section 11.13 below, timely provide the Professional Services in conformity with, and as specified in, this Agreement, the UGC, the 2015 Supplementary General Conditions, any Special Conditions, and in the Construction Documents.

5.2.2. Modifications. Modifications to any Deliverables which are made necessary by the errors and/or omissions of SSE shall be corrected by SSE 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 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 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 the negligence, willful misconduct or gross negligence of SSE or any SSE Personnel. In the event that SSE is determined to have been the cause of such an error, SSE shall bear the reasonable Construction Costs to resolve said error.

5.2.3. Limitation of Authority. SSE 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 in any way, or waive strict compliance with the terms and conditions of this Agreement, except as to the deadlines set out in “Exhibit G,” the Professional Services Schedule, pursuant to Section 2.2 above. Any deviation from a deadline must be approved by the TFC Project Manager in writing issued prior to the expiration of any such deadline.

5.2.4. SSE Safety. (i) SSE and all SSE 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 SSE and Subcontractors shall be trained in accordance with Chapter 29, Occupational Safety and Health Regulations. (ii) SSE and Subcontractors shall inform the TFC Project Manager of their Hazardous Electrical Energy Control, Lockout/Tag-out Procedure. SSE’s procedure must meet or exceed TFC’s procedure as determined by the TFC Project Manager. (iii) Work or Services 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, SSE must follow OSHA requirements as detailed in OSHA Regulations 1910.331 – 1910.399.

5.2.4.1. Right of TFC to Issue Safety Stand-Down Order. TFC, in its sole discretion, may at any time order in writing a temporary stand-down of SSE’s performance of the Services (“Safety Stand-Down Order”) as a result of any one or more Safety Incidents, whereupon SSE shall immediately direct all SSE Personnel to stop all Services while SSE conducts a comprehensive review of SSE’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 the SSE 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 SSE determines to be necessary and appropriate to fulfill its obligations in accordance with this Agreement. Upon receipt of TFC’s Safety Stand-Down Order, SSE 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 SSE 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, SSE shall, in the exercise of the SSE’s reasonable judgment, propose the date by which SSE will complete all corrective action. Services shall resume only upon TFC’s delivery of further written notice to SSE withdrawing the TFC’s Safety Stand-Down Order, which notice of withdrawal shall not be issued until the TFC is reasonably satisfied that SSE has sufficiently implemented all appropriate corrective action as necessary to enable SSE to safely resume Services, fulfill its contractual obligations set forth in this Agreement, and thereby avoid recurrence of the Safety Incident(s). SSE shall not be entitled to an adjustment of the SSE’s Compensation, or the Professional Services Schedule, as the result of TFC’s issuance of a Safety Stand-Down Order. If SSE fails to implement the corrective action in the manner proposed by SSE 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, SSE’s evaluation of the need for, and its plan of, corrective action shall be undertaken as an independent contractor, pursuant to Section 11.4, and nothing herein shall be construed or interpreted to mean that TFC has assumed or agreed to assume any duty of care to the SSE

Personnel, or to provide guidance or instruction as to the SSE'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 SSE 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 Projects without causing injury or harm to persons or property.

5.2.5. Cooperation. All project managers, employees, and associated Subcontractors of SSE shall cooperate with and assist each other and all other members of the Project Team retained by TFC.

5.2.6. Cooperation by SSE. (i) SSE agrees to conduct all of its services under this Contract by and through appropriate communications with the TFC Project Manager. No work, installation or other services shall be undertaken by SSE except with the prior written direction of the TFC Project Manager. (ii) SSE understands and agrees that work, installation or any other service performed without the prior written direction of the TFC Project Manager is work outside the scope of this Contract and shall be performed exclusively at SSE's risk. (iii) SSE agrees to employ competent personnel meeting the requirements outlined in the specifications, who shall be satisfactory to TFC. Personnel assigned to perform services under this Contract may not be reassigned without the prior written approval by the TFC Project Manager. TFC may request that SSE replace unsatisfactory Personnel, which request shall not be unreasonably denied. (iv) SSE 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, SSE shall report the concern to the TFC Project Manager.

5.2.7. E-Verify. (a) By entering into this Contract, Contractor certifies and ensures that it utilizes and will continue to utilize, for the term of this Contract, 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 Contract; and (ii) all persons (including subcontractors) assigned by the Contractor to perform work pursuant to the Contract, within the United States of America. (b) Contractor 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 the Contractor, and Contractor's subcontractors, as proof that this provision is being followed. If this certification is falsely made, the Contract may be immediately terminated, at the discretion of TFC, and at no fault to TFC, with no prior notification. Contractor shall also be responsible for the costs of any re-solicitation that TFC must undertake to replace the terminated Contract. (c) For persons not eligible for E-Verify screening, Contractor (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 Project Manager and All Subcontractors. The SSE Project Manager identified in the initial List of SSE Project Manager and Subcontractors (hereinafter referred to as the "List"), a digital copy of which is incorporated herein by reference for all purposes in .pdf on the Exhibits DVD and labeled therein as "Exhibit H," will supervise the

efforts of SSE to timely provide TFC with the Services.

5.2.8.1. The SSE Project Manager must be committed to the Project on a full-time basis. TFC reserves the right to Approve the appointment of the SSE Project Manager and to demand that the SSE Project Manager, and any of SSE's employees or Subcontractors, be removed and replaced if, in the sole opinion of TFC, their performance on the Projects is and/or was not adequate or their continued involvement with the Projects will, is, or has become, detrimental to the timely and successful completion of the Projects, including but not limited to, for such reasons as: (i) any past or present violation of any statute, rule, regulation or ordinance of any city, county, the State of Texas, or the United States, or any other Laws and Regulations; (ii) TFC's reasonable belief that failure to obtain an acceptable criminal background check will occur; (iii) prior unsatisfactory performance on other TFC projects; and (iv) any other like reasons.

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

5.2.9. Buy Texas. If SSE is authorized to make purchases under this Agreement, SSE certifies that SSE 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 the Deliverables or Professional Services.

5.2.11. No Guaranty. SSE does not control or guarantee the performance of any Service Provider not under the supervision or control of SSE; provided however, SSE shall promptly notify TFC of any observation of a Service Provider's failure to perform their duties and responsibilities in accordance with applicable Laws and Regulations, and shall recommend to TFC candidate measure(s) to correct such failures.

5.2.12. Debts or Delinquencies Owed to the State. Any payment due under this Agreement may be withheld and applied toward payment of any debt that is owed to the State of Texas including, but not limited to, delinquent taxes and child support pursuant to Texas Government Code, Section 43.055.

5.2.13. General and Criminal Background Check.

5.2.13.1. SSE represents and warrants that neither SSE nor any of SSE'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, SSE has fully advised TFC in writing as to the facts and circumstances surrounding the conviction(s).

5.2.13.2. All of SSE'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 SSE.

5.2.13.2.1. All criminal background check forms for all of SSE employees and Subcontractors that will initially commence any work or Services on-site must be fully completed and submitted to TFC within fifteen (15) days of the date of the notice of award, and the process thereafter must be diligently pursued by SSE.

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

5.2.13.2.3. 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 SSE'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 *Texas Facilities Commission Criminal Background Checks and Application Guidelines*, a digital copy of which is incorporated herein by reference for all purposes in .pdf on the Exhibits DVD, and named therein as "Exhibit K." SSE'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. Equal Opportunity. SSE shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, or national origin. SSE 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. SSE shall post in conspicuous places, available to employees or applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination subsection. SSE shall include the above provisions in all Subcontracts pertaining to the Professional Services.

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

5.2.16. No Warranties by TFC. SSE acknowledges that any and all tests, maps, reports, and drawings and any other documentation (hereinafter referred to collectively as "Reports") 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 SSE's prosecution of the Services or work were prepared solely for the benefit of TFC, and that SSE shall have no right to rely upon such and that any reliance thereon shall be at SSE's own risk. TFC HEREBY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTIES AS TO THE ACCURACY OR COMPLETENESS OF THE ABOVE-MENTIONED REPORTS.

5.2.17. No Outsourcing. All Services under this Agreement shall be performed in the principal offices of the SSE and SSE Personnel. If SSE's offices or the offices of any SSE Personnel 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.

## **VI. WARRANTIES AND REPRESENTATIONS BY SSE**

6.1. Warranties and Representations by SSE. SSE 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 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.

6.1.1. Compliance with All Laws. SSE shall procure and maintain for the duration of this Agreement 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 SSE to provide the goods or services required by this Agreement. SSE will be responsible to pay all taxes, assessments, fees, premiums, permits, and licenses required by law. SSE agrees to be responsible for payment of any such government obligations not paid by its Subcontractors during performance of this Agreement. As part of its delivery of the Professional Services, SSE 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.

6.1.2. Immigration Reform; Compliance with Laws and Regulations. The Immigration Reform and Control Act of 1986 and 1990 requires 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. SSE shall not place any employee of SSE at a worksite, nor shall SSE permit any employee, nor any Subcontractor, to perform any Professional Services on behalf of or for the benefit of the State, without first confirming said employee's authorization to lawfully work in the United States.

6.1.2.1. SSE warrants that SSE: (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 SSE'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.

6.1.2.2. SSE further acknowledges, agrees, and warrants that SSE: (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 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 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 SSE’s employees; and (iii) has responded, and shall at all times during the term of the Agreement respond, in a timely fashion to any inspection requests related to such I-9 Forms. During the term of the Agreement, SSE 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 SSE or any of its employees.

6.1.2.3. SSE warrants and represents that all Services shall be performed in compliance with all Laws and Regulations, including any laws and regulations dealing with employer-employee relations, including, as amended, the “Fair Labor Standards Act” of 1938, the “Walsh-Healy Act,” and “Nondiscrimination in Employment,” Executive Order No. 11246 of September 24, 1964. All codes, laws and regulations required to be incorporated in a contract of this character are hereby incorporated herein by reference, including but not limited to all applicable requirements of the Texas Department of Licensing and Regulation. Compliance with the above shall include the adoption of all programs, making of all certifications and filing of all reports as required thereby. All terms required by any of the foregoing are hereby incorporated herein by reference. SSE shall execute and deliver to TFC such documents as may be required to effect or evidence compliance.

6.1.2.4. SSE further warrants and represents that in carrying out its duties and responsibilities under this Agreement, it will neither undertake nor cause, nor permit to be undertaken, any activity which either: (i) is illegal under any Laws and Regulations, decrees, or rules, in effect in the United States, or (ii) would have the effect of causing TFC to be in violation of any laws, decrees, rules, or regulations in effect in the United States. The SSE shall protect and indemnify TFC and TFC’s officers and agents against any claim or liability arising from or based on any violation of the same.

6.1.2.5. SSE 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.

6.1.3. Proficiency in Systems. SSE is proficient in the use of CAD systems, BIM systems, GIS, and the EPMCS utilized by TFC.

6.1.4. Standard of Care. SSE will perform, or cause to be performed, all Services and undertakings of SSE hereunder expeditiously, and in no event later than is required to conform to the Professional Services Schedule, and shall do so with that degree of professional skill and care practiced, and in accordance with industry standards customarily adhered to, by other firms practicing in the same or similar locality experienced in the performance of services and undertakings of the same or similar nature for other projects of comparable value. SSE shall employ and exercise the professional judgment of its experienced and qualified site environmental and engineering professionals to provide TFC confidence that the Projects will be completed in conformity with TFC’s requirements. All SSE Personnel performing Services under this Contract shall at all times be under SSE’s exclusive direction and control and SSE

shall be responsible for proper supervision and examination of the performance of the Services by SSE Personnel consistent with the requirements of this Contract. SSE Personnel assigned to the Projects shall possess sufficient skills and professional expertise as required to satisfactorily meet all obligations and requirements of this Contract.

6.1.5. Warranty of Deliverables. All Deliverables shall, in accordance with the Standard of Care, 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; (iii) be fit for ordinary use, of good quality, and with no material defects; and (iv) comply with all applicable Laws and Regulations. SSE has carefully reviewed the Professional Services Schedule included in “Exhibit G” and, based upon the professional judgment of its experienced and qualified site environmental and engineering professionals, SSE represents and warrants that it is able to complete the Services within the time provided in Professional Services Schedule, in conformity with TFC’s requirements.

6.1.6. Familiarity with Sites. SSE represents that it: (i) has thoroughly reviewed all documentation provided by TFC or otherwise available to the SSE for the Projects and the Sites; (ii) has visited the Sites for the Projects; and (iii) has thoroughly familiarized itself with the local conditions under which the Services are to be performed. SSE has considered all of the foregoing in agreeing to be bound to perform the Services for the fixed fee established in Section 4.1.1 of this Agreement.

6.1.7. No Material Change in Qualifications or Responses to Request for Qualifications. SSE represents that all information contained in SSE’s responses to TFC’s RFQ, RFQ No. 303-6-00980, dated February 1, 2016, including but not limited to SSE’s statements and representations as to its history, experience, capabilities, litigation disclosure, financial information, and other qualifications are accurate and complete, and no material change in circumstances has occurred that would cause SSE’s responses to be untrue or materially different than what was originally stated.

6.1.8. Financial Ability and Insurance. SSE represents that it is financially solvent and possesses or is able to engage sufficient working capital to complete the Services as required by this Contract. SSE’s insurance policies are and will be maintained in the form required under Owner’s Requirements of Insurance (“Exhibit M”).

6.1.9. General and Professional Licensing. SSE represents that SSE, including SSE Personnel, and its employees and representatives hold in its and their names all licenses required to render the Services, and they are duly qualified, licensed, registered and authorized as required by Laws and Regulations to perform the Services required hereunder.

6.1.10. Execution of Contract Duly Authorized. SSE represents that SSE’s execution and adoption of this Contract has been duly authorized, approved and/or ratified, and SSE has confirmed the authority of the person executing this Contract on behalf of the SSE to bind the SSE to this Contract.

6.1.11. Royalties and Licenses to Use Intellectual Property. SSE represents that it will pay all royalties and license fees due in connection with the Services. SSE warrants that neither the Services nor use of SSE's Work Product will infringe any patent or other proprietary right. Should SSE, in consultation with TFC, determine that SSE's proprietary information, data or systems will be used on the Projects, TFC agrees to enter into a licensing agreement as necessary to enable TFC to utilize SSE's proprietary information, data or system, in connection with the Projects, which license agreement shall be non-exclusive, perpetual, and not require further expenditure by TFC or its representatives for such purposes.

6.1.12. Warranty of Services. SSE represents the Services rendered hereunder shall be performed in accordance with SSE's Standard of Care, all Laws and Regulations, and the requirements of this Contract. SSE shall re-perform any Services or Additional Services in accordance with this Contract as required to correct any error, omission, defect or deficiency arising within a period of two (2) years following the completion of all Services required under this Contract to the extent any such error, omission, defect or deficiency arises as a result of SSE's failure to perform the Services or Additional Services hereunder in accordance with SSE's Standard of Care.

6.1.13. Additional Warranties. In performing its Professional Services for the Projects, SSE shall be bound by, and comply with, any warranties, representations, and/or promises of additional services included in SSE's Response to the Request for Qualifications, dated February 1, 2016, a digital copy of which is incorporated herein by reference in .pdf on the Exhibits DVD and named therein as "Exhibit L," but only to the extent any such warranties, representations, and/or promises of additional services are made therein.

6.1.14. Eligibility. SSE 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 pursuant to Texas Government Code, Section 2155.004(b).

6.1.15. 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 and, if applicable, SSE has provided, prior to its execution of this Agreement, 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. SSE acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.

6.1.16. Deceptive Trade Practices Act; Unfair Business Practices Disclosures. SSE has not been found liable of Deceptive Trade Practices Act violations under Chapter 17 of the Texas Business and Commerce Code or of any unfair business practice in any administrative hearing or court suit. SSE further certifies that it has no officers who have served as officers of other entities who have been found liable of Deceptive Trade Practices violations or of any unfair business practices in an administrative hearing or court suit. In the event that allegations of Deceptive Trade Practices violations under Chapter 17 of the Texas Business and Commerce Code or of any unfair business practices against either SSE or any of SSE's officers have

occurred or are currently pending in an administrative proceeding or in a lawsuit filed with any court, then SSE has disclosed all such matters to TFC and provided a brief description of each allegation, information regarding the administrative body or court before which the matter is pending, and the current status of the matter.

6.1.17. Disclosure of Former State Executives. Pursuant to Texas Government Code, Section 669.003 relating to contracting with an executive of a state agency, 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 Agreement. If SSE employs or has used the services of a former executive head of TFC or any other state agency, then SSE has provided the name of the former executive, the name of the state agency, the date of separation from the state agency, the position held with SSE, and the date of employment with SSE.

6.1.18. Financial Interest/Gifts. (i) Pursuant to Texas Government Code Sections 572.051 and 2255.001 and Texas Penal Code Section 36.09, SSE 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 Contract. (ii) Pursuant to Texas Government Code Chapter 573 and Section 2254.032, if applicable, SSE certifies that SSE 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 SSE's company or corporation. SSE 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 SSE will be dealing on behalf of TFC.

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

6.1.20. Affirmation as to Submittals. Upon submittal to TFC of any documentation or data that was created or modified by SSE, 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.

## VII. STATE FUNDING

7.1. State Funding. This Agreement shall not be construed as creating any debt on behalf of the State of Texas and/or TFC in violation of TEX. CONST. art. III, § 49. In compliance with TEX. CONST. art. VIII, § 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

Agreement 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 Agreement should not exceed the amount of funds appropriated for payment under this Agreement, but not yet paid to SSE, for the fiscal year Budget in existence at the time of the breach.

## VIII. COPYRIGHTS AND TRADEMARKS

8.1. Copyrights. SSE 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. 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 SSE are subject to copyright protection, SSE hereby grants to TFC a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use such and to authorize others to do so. SSE shall include appropriate provisions to achieve the purpose of this condition in all Subcontracts entered into that produce information subject to copyright protection.

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

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

8.1.3. 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 the Project.

8.2. No Use of Name or Trademark. SSE 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, 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. SSE 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 all state and federal regulations and statutes.

9.2. Inspections and Audits. SSE agrees that all relevant records related to this Agreement or any Work Product under this Agreement, 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 SSE 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 2262.003, the SAO may conduct an audit or investigation of any entity receiving funds under this Agreement, including direct payments to SSE and indirect payments under a Subcontract to this Agreement; 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 Contract 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 Contract, 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 SSE.

9.4.1. Protection of Confidential Information. SSE 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 SSE; 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 SSE in accordance with this Agreement. 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 SSE to be confidential and proprietary to TFC; or (iv) not generally known by SSE. 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 SSE for TFC 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 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 SSE in breach of the terms of this Agreement; (ii) becomes available to SSE from a source (other than TFC) which source is not, to the best of SSE's knowledge, subject to any legally binding obligation to keep the same confidential; or (iii) has been independently acquired or developed by SSE.

9.4.3. Covenants. As a consequence of SSE's acquisition or anticipated acquisition of Confidential Information, SSE 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, SSE agrees that it is reasonable and necessary that it make the following covenants:

9.4.3.1. No Disclosure. Both during and forever after the performance of its due diligence investigation, SSE 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 SSE will take all reasonable precautions to prevent inadvertent disclosure of such Confidential Information. This prohibition against SSE'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 SSE understands that such similarity does not excuse SSE from abiding by its covenant or other obligations pursuant to this Agreement.

9.4.3.2. No Use, Copying, or Transfer. Both during and after the conduct of its due diligence investigation, SSE 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 SSE'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.

9.4.3.3. No Use of Name or Trademark. SSE 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, without the prior written consent of TFC, which consent may be withheld or granted in TFC's sole and absolute discretion.

9.4.3.4. Non-Circumvention. SSE 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.

9.4.4. Open Records Request or Similar Requests for Information. In the event that SSE receives a request to disclose all or any part of the Confidential Information under the terms of the Texas Public Information Act, a subpoena or other order issued by a court of competent jurisdiction or by another governmental agency, SSE shall (i) notify TFC of the existence, terms, and circumstances surrounding such a request within one (1) business day of the receipt of the request; (ii) notify the entity requesting the information that such a request for information should be submitted to TFC, not SSE; (iii) provide the entity requesting the information the contact information of TFC's public information coordinator; and (iv) forward all responsive information to TFC within two (2) business days of the receipt of the request.

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 SSE to the extent that such information is: (i) confidential by law; (ii) marked or designated “confidential,” or words to that effect, in a font size no smaller than 14 point, by SSE; or (iii) information that TFC is otherwise required to keep confidential by this Agreement.

9.6. Public Records. Notwithstanding any provisions of this Agreement to the contrary, SSE understands that TFC will comply with the Texas Public Information Act, Texas Government Code, Chapter 552. If contacted by TFC, SSE will cooperate with TFC in the production of documents responsive to the request. SSE agrees to provide the documents responsive to the request in the format and within the time frame specified by TFC. SSE may request that TFC seek an opinion from the Office of the Texas Attorney General. However, the final decision whether to seek a ruling from the Office of the Texas Attorney General will be made by TFC in its sole discretion to comply with the legal requirements of the Texas Public Information Act. Additionally, SSE will notify TFC’s general counsel within twenty-four (24) hours of receipt of any third-party requests for information written, produced, collected, assembled, or maintained in connection with this Agreement and/or any amendment to this Agreement. This Agreement and/or any amendment to this Agreement and all data and other information generated or otherwise obtained in its performance is subject to the Texas Public Information Act. SSE 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, SSE 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 as specified by TFC 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, professional engineering services and/or professional architectural services, as defined in Texas Government Code, Chapter 2254, Subchapter A with the State of Texas, by and through the TFC, must comply with the insurance requirements established hereunder before the SSE is authorized to commence providing such professional services.

10.2. Required Insurance Coverages. The required insurance coverages for this Agreement are as set forth in “Exhibit M,” *Owner’s Requirements of Insurance*, attached hereto and incorporated herein for all purposes.

10.3.11. TFC a Third-Party Beneficiary. No provision of this Agreement shall confer or be construed to create any right or benefit in any third party, including any SSE Personnel or any other entity which has assumed any of SSE’s obligations hereunder, or in any way inure to the benefit of any third person (including the public at large) so as to constitute any such person a third-party beneficiary of the Agreement or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any person not a party hereto. SSE shall be solely responsible for all contractual obligations to the SSE Personnel, and shall pay for the Services and Work of its SSE Personnel in accordance with Laws and Regulations. SSE shall provide that the Owner, the Texas Facilities Commission, may, at its election, assume the status of a third party

beneficiary to any contracts, subcontracts, consulting agreements, purchase orders and other agreements executed by SSE in connection with this Agreement and/or the Projects, which election may be exercised as to any such agreement by TFC's issuance of written notice of such election to the other party or parties to such agreement.

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

10.3.13. No Warranty That Insurance Limits Will Be Adequate to Fully Protect SSE. 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 SSE.

## XI. MISCELLANEOUS PROVISIONS

11.1. INDEMNIFICATION. SSE SHALL INDEMNIFY AND HOLD HARMLESS THE STATE OF TEXAS AND CUSTOMERS, 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 SSE 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 SSE WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND SSE MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. SSE AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

11.1.1 INFRINGEMENTS. (A) SSE 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 SSE PURSUANT TO THIS AGREEMENT. SSE AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. SSE SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY SSE WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND SSE MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. (B) SSE 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 SSE'S WRITTEN APPROVAL, (iii) ANY MODIFICATIONS MADE TO THE PRODUCT BY THE SSE 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. (C) IF SSE BECOMES AWARE OF AN ACTUAL OR POTENTIAL CLAIM, OR TFC PROVIDES SSE WITH NOTICE OF AN ACTUAL OR POTENTIAL CLAIM, SSE MAY (OR IN THE CASE OF AN INJUNCTION AGAINST TFC, SHALL), AT SSE'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-INFRINGEMENT.**

**11.1.2. TAXES/WORKERS' COMPENSATION/UNEMPLOYMENT INSURANCE – INCLUDING INDEMNITY. (A) SSE AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS AGREEMENT, SSE SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF SSE'S AND SSE'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS AGREEMENT. SSE 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 SSE, 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. (B) SSE 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. SSE SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY SSE WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND SSE MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. SSE AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.**

**11.1.3. LEGAL OBLIGATIONS. SSE shall procure and maintain for the duration of this Agreement 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 SSE**

to provide the goods or services required by this Agreement. SSE will be responsible to pay all taxes, assessments, fees, premiums, permits, and licenses required by law. SSE agrees to be responsible for payment of any such government obligations not paid by its subcontractors during performance of this Agreement.

11.1.4. Notice to TFC. In the event SSE becomes aware of any claim that may be subject to the above-described indemnification, SSE shall notify TFC of such claim within five (5) business days of becoming aware.

11.1.5. Settlement Authority. No settlement of any such claim shall be made by SSE without TFC's prior written approval.

11.2. Copyright Infringement. SSE shall, at its own expense, defend, or at its option settle, any suit or proceeding brought against TFC based on an allegation that the practice or use by TFC of any of SSE's Work Product, including Drawings, Specifications, Documents and engineering criteria such as methods, processes, techniques or procedures given to TFC in connection with SSE's performance of this Agreement, constitutes an infringement of any United States patent, trade secret, or copyright, if SSE is notified promptly in writing and given authority, information, and assistance in a timely manner for the defense of said suit or proceeding. SSE will pay any fines, penalties, and fees imposed as a result of said infringement and any damages and costs awarded in any suit or proceeding so defended. In case the process, as a result of any suit or proceeding so defended, is held to constitute infringement or its use by TFC is enjoined, SSE will, at its option and its own expense, either: (a) procure for TFC the right to continue using said process, (b) replace it with a substantially equivalent non-infringing process, or (c) modify the process so it becomes non-infringing.

11.3. Historically Underutilized Businesses ("HUBs"). In accordance with state law, it is TFC's policy to assist HUBs, 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 SSE's obligations with TFC. If SSE subcontracts with others for some or all of the services to be performed under this Agreement, SSE shall comply with all HUB requirements pursuant to Chapter 2161 of the Texas Government Code. When required, SSE shall submit an updated HUB Subcontracting Plan, a digital copy of the form for which is incorporated herein by reference for all purposes in .pdf on the Exhibits DVD, and named therein as "Exhibit N." SSE shall provide the HUB program of TFC with pertinent details of any participation by a HUB in fulfilling the duties and obligations arising hereunder on the HUB Subcontracting Plan PAR, a digital copy of the form for which is incorporated herein by reference for all purposes in .pdf on the Exhibits DVD, and named therein as "Exhibit O."

11.4. Relationship of the Parties. SSE 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, SSE is and shall be an independent contractor. Subject only to the terms of this Agreement, SSE shall have the sole right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this Agreement. SSE agrees that TFC

shall be entitled to have confidence in and rely upon the SSE to undertake the rendering of Services in accordance with this Contract for and on behalf of TFC, and at all times to act in TFC's best interests with respect to the performance of the Services required hereunder. Nothing contained in this Agreement 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 SSE or any other party. SSE shall be solely responsible for, and TFC shall have no obligation with respect to:

- 11.4.1. withholding of income taxes, FICA, or any other taxes or fees;
- 11.4.2. industrial or workers' compensation insurance coverage;
- 11.4.3. participation in any group insurance plans available to employees of the State of Texas;
- 11.4.4. participation or contributions by the State to the State Employees Retirement System;
- 11.4.5. accumulation of vacation leave or sick leave; or
- 11.4.6. unemployment compensation coverage provided by the State.

11.5. No Assignment and Subcontracts. SSE shall neither assign, transfer, nor delegate any rights, obligations, or duties under this Agreement without the prior written consent of TFC. Notwithstanding the foregoing, it is mutually understood and agreed that SSE may engage Subcontractors to perform some or all of the Professional Services. In any Approved Subcontracts, SSE shall legally bind such Subcontractor to perform and make such Subcontractor subject to all the duties, requirements, and obligations of SSE specified herein. Nothing herein shall be construed to relieve SSE of the responsibility for ensuring that the goods delivered and/or the services rendered by SSE and/or any of its Subcontractors comply with all the terms and provisions of this Agreement. SSE must provide written notification to TFC of any such Subcontractor performing work under this Agreement, 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.

11.6. Drug Free Work Place. SSE, SSE's employees and all 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 SSE, SSE's employees, and all Subcontractors shall comply with the relevant provisions thereof, including any amendments to the final rule that may hereafter be issued.

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

11.8. Notices. All notices, demands and requests required in this Agreement (hereinafter referred to as "Notices") must 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 Postal Service, certified mail, return receipt requested with adequate postage prepaid; or (ii) one (1) business day after deposit with Federal Express or other comparable overnight delivery system for overnight delivery with all costs prepaid. Electronic copies of all Notices shall also be sent via electronic mail to the e-mail address(es) listed below; provided, no notice shall be deemed effective notice if only delivered by electronic mail. All Notices hereunder shall be addressed as follows:

If to TFC: Texas Facilities Commission  
Attention: Legal Services  
1711 San Jacinto Boulevard, Suite 400  
Austin, Texas 78701  
Email: [Martin.Blair@tfc.state.tx.us](mailto:Martin.Blair@tfc.state.tx.us)

With a copy to: Texas Facilities Commission  
Attention: John S. Raff, Deputy Executive Director  
1711 San Jacinto Boulevard, Suite 400  
Austin, Texas 78701  
Email: [john.raff@tfc.state.tx.us](mailto:john.raff@tfc.state.tx.us)

If to SSE: Cobb Fendley & Associates, Inc.  
Attention: Dan Warth, P.E.  
505 East Huntland Drive, Suite 100  
Austin, Texas, 78752  
Telephone: (512) 834-9798  
E-Mail: [dwarth@cobbfendley.com](mailto:dwarth@cobbfendley.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.

11.9. Name and Organizational Changes. SSE must provide TFC with written notification of all name changes and organizational changes relating to SSE including, but not limited to, merger, acquisition or sale no later than ten (10) business days of such change. SSE, 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 Contract. If the change entails personnel changes for personnel performing the responsibilities of the Contract for SSE, SSE 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 Contract and SSE 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 SSE or successor entity, as applicable, to maintain its status as a party to this Contract. TFC may terminate the Contract due

to any change to SSE that materially alters SSE's ability to perform under the Contract.

11.10. Electronic and Information Resources Accessibility Standards. (i) 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. (ii) If applicable, SSE 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" (<http://www.buyaccessible.gov>). Vendors and service providers 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/>.

11.11. Governing Law and Venue. This Agreement and the rights and obligations of the parties hereto 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 shall be in a court of competent jurisdiction in Travis County, Texas. SSE 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 or any document related hereto.

11.12. 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. SSE acknowledges that this Agreement is effective only for the period of time specified in the Agreement.

11.13. 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.

11.13.1. 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.

11.13.2. If possible, the notice shall set forth the extent and duration thereof.

11.13.3. 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 SSE. 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 SSE's services under this Agreement require a written amendment to this Agreement.

11.14. Dispute Resolution. Claims, disputes, and other matters in question arising out of or relating to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institutions of legal or equitable proceedings by either party. Failure to follow the dispute resolution process below shall result in any claim filed by A/E in a court of law having jurisdiction over the claim to be summarily dismissed. 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:

11.14.1. Claims for Breach of Contract and Counterclaims.

11.14.1.1. A/E may make a claim against TFC for breach of a contract between TFC and SSE. TFC may assert a counterclaim against A/E.

11.14.1.2. A/E 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.

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

11.14.1.4. TFC must assert, in a writing delivered to A/E, any counterclaim not later than the sixtieth (60th) day after the date of notice of a claim under Section 11.13.1.2 above.

11.14.1.5. Damages.

11.14.1.5.1. The total amount of money recoverable on a claim for breach of contract under this Section may not, after deducting the amount specified in Section 11.14.1.5.2 below, exceed an amount equal to the sum of:

11.14.1.5.1.1. the balance due and owing on the contract price;

11.14.1.5.1.2. 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

11.14.1.5.1.3. any delay or labor-related expense incurred by the A/E 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.

11.14.1.5.2. 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 11.14.1.5.1 above.

11.14.1.5.3. Any award of damages under this Agreement may not include:

11.14.1.5.3.1. consequential or similar damages, except delays or labor-related expenses described by Section 11.14.1.5.1.3 above;

11.14.1.5.3.2. exemplary damages;

11.14.1.5.3.3. any damages based on an unjust enrichment theory;

11.14.1.5.3.4. attorney's fees; or

11.14.1.5.3.5. home office overhead.

#### 11.14.2. Negotiation.

11.14.2.1. TFC's general counsel shall examine the claim and any counterclaim and negotiate with SSE 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.

11.14.2.2. 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.

11.14.2.3. 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.

11.14.3. Mediation.

11.14.3.1. 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 shall agree to mediate a claim made under this Agreement.

11.14.3.2. 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.

11.14.4. Adjudication. SSE 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 only after both parties have completed mediation of the claim in question.

11.14.5. Payment of Claims.

11.14.5.1. In accordance with the Texas Civil Practice and Remedies Code, Section 114.011, TFC may pay a claim resolved under Section 11.14 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.

11.14.5.2. 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 the maximum rate allowed by applicable Laws and Regulations.

11.14.5.3. 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.

11.14.6. Representation of TFC. The Office of the Texas Attorney General shall defend TFC in any proceeding or adjudication conducted in conjunction with a claim brought under this Section 11.14.

11.15. Legal Construction and Severability. In the event any one or more of the provisions contained in this Agreement 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 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.

11.16. Multiple Counterparts. This Agreement 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.

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

11.18. Limitation on Authority and No Other Obligations. SSE 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; no other authority, power, or use is granted or implied. SSE may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of TFC or the State of Texas.

11.19. Limitation on Adjudication Awards. SSE expressly agrees as follows:

11.19.1. In the event SSE brings a civil suit against TFC and prosecutes it to final judgment pursuant to Chapter 114 of the Code, any recovery by SSE 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.

11.19.2. Pre-judgment and post-judgment interest shall be limited to the maximum rate allowed by applicable Laws and Regulations.

11.19.3. SSE 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.

11.20. No Waiver of Sovereign Immunity. Except as may be expressly and specifically provided otherwise by Chapter 114, Texas Civil Practice and Remedies Code, nothing in this Agreement 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 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.

11.21. 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 shall not be construed as a waiver or a relinquishment thereof for the future.

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

11.23. Further Assurances. SSE 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.

11.24. No Presumptions for Ambiguities. Each party hereby agrees, represents and warrants that: (i) the initial draft of this Agreement and any exhibits, and any additions, revisions, and amendments hereto, are the result of the parties' joint negotiations, (ii) each party has experience in the evaluation and assumption of risks and liabilities of the nature provided for herein, and has been represented and advised by legal counsel, and (iii) even though one Party may have drafted one or more of the documents comprising this Agreement, each party has been given the opportunity to review this Agreement and all its related documents with counsel of such party's choice. Therefore, each party hereby agrees, represents and warrants that any ambiguity in this Agreement or its related documents shall not, by virtue of the drafting thereof, be construed more strongly in favor of or against any one party over another party.

11.25. Time is of the Essence. Time is of the essence with respect to this Agreement; provided however, in the event that any of the deadlines set forth herein 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.

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

- 11.26.1. Exhibit A. 2015 Uniform General Conditions;
- 11.26.2. Exhibit B. 2015 Supplementary General Conditions;
- 11.26.3. Exhibit C. A/E Guidelines;
- 11.26.4. Exhibit D. 2016 Texas Capitol Complex Master Plan adopted March 23, 2016, and any Approved updates thereto, which are located on the TFC website at: <http://www.tfc.state.tx.us/divisions/commissionadmin/tools/>;
- 11.26.5. Exhibit E. Schedule of SSE's Hourly Fee Rates for Additional Services;
- 11.26.6. Exhibit F. North Austin Complex Preliminary Master Plan dated Spring/Summer 2014;
- 11.26.7. Exhibit G. Professional Services Schedule;
- 11.26.8. Exhibit H. List of SSE Project Manager and Subcontractors;
- 11.26.9. Exhibit I. SSE's Detailed Scope of Services dated April 7, 2016;
- 11.26.10. Exhibit J. City of Austin Policies and Procedures for Requesting Street or Alley Vacations;
- 11.26.11. Exhibit K. Texas Facilities Commission Criminal Background Checks and Application Guidelines;
- 11.26.12. Exhibit L. SSE's Response to the Request for Qualifications, dated February 1, 2016;

11.26.13. Exhibit M. Owner's Requirements of Insurance;

11.26.14. Exhibit N. HUB Subcontracting Plan Form;

11.26.15. Exhibit O. HUB Subcontracting Plan PAR Form;

11.27 Approval Not a Release. Approval by TFC shall not constitute nor be deemed a release of the responsibility and liability of SSE, SSE Personnel, its employees, Subcontractors, agents and consultants for the accuracy and competency of the Services and Work Product; nor shall such approval be deemed to be an assumption of such responsibility by TFC for any defect, error or omission in the Services, Work Product or other Documents prepared by SSE, SSE Personnel, its employees, subcontractors, agents and consultants. TFC's approval or acceptance of SSE's tasks and/or Services will not release SSE from any liability for such tasks and/or Services because TFC is, at all times, solely relying upon SSE's skill, knowledge and expertise in performing its tasks and Services.

11.28. Survival of Terms. Termination of the Agreement for any reason shall not release SSE 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.

11.29. Entire Agreement and Modification. This Agreement and its integrated attachment(s) constitute the entire agreement of the parties and as 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, superseding all prior or contemporaneous agreements and negotiations between them. TFC shall not be bound by or be liable for any statement, representation, promise, inducement, or understanding of any kind not expressly set forth herein and SSE agrees is it not acting in reliance on any such extraneous matters. 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

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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**

**COBB FENDLEY & ASSOCIATES, INC.**

By: 

Harvey Hilderbran

Executive Director

Date of Execution: 6/1/16

G.C. 

Dir. ymd

D.E.D. 

By: 

Dan Warth, P.E.

Regional Manager, Central Texas

Date of Execution: 5.18.16

**TFC Contract No. 16-101-000**  
**Cobb Fendley & Associates, Inc.**  
**Exhibits DVD**