25579

TFC Contract No. 18-196-000
HMG & Associates, Inc.
RFQ No. 303-8-01766

# PROFESSIONAL MECHANICAL ELECTRICAL AND PLUMBING ENGINEERING AND OTHER RELATED

# PROFESSIONAL AND TECHNICAL SERVICES

# AGREEMENT

# BETWEEN

# THE TEXAS FACILITIES COMMISSION

# AND

# HMG & ASSOCIATES, INC.

The Texas Facilities Commission (hereinafter referred to as "TFC"), a state agency located at 1711 San Jacinto Boulevard, Austin, Texas 78701, as Owner (as defined in *2015 Uniform General Conditions*, Section 1.28) and HMG & Associates, Inc. (hereinafter referred to as "PE"), located at 9606 North Mopac Expressway, Suite 350, Austin, Texas 78759, enter into the following agreement for Professional Mechanical Electrical and Plumbing Engineering and Other Related Professional and Technical Services (hereinafter referred to as the "Agreement") pursuant to the Professional Services Procurement Act, Tex. Gov't Code Ann. Ch. 2254, Subchapter. A, to be effective as of the Effective Date (as defined below). The projects for which PE agrees to provide Professional Services are generally described as the provision of prime professional engineering services for professional mechanical electrical engineering and other related professional and technical services, including each component design/construction package that may be prescribed by TFC, as required to address multiple, yet to be determined interior and/or exterior alterations to existing facilities primarily located in Austin, Texas. Nothing in this Agreement shall be interpreted or construed to make PE (as defined as defined in *2015 Uniform General Conditions*, Section 1.16) a third-party beneficiary hereunder.

## I. DEFINITIONS

1.1. Definitions. Unless specifically provided otherwise herein, all words and phrases in this Agreement in initial caps shall have the meanings set out in the *2015 Uniform General Conditions* (hereinafter referred to as "UGC") and this Section 1.1. In the event of any conflict between the definitions in the UGC, and the *2018 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 compact disk attached hereto and labeled "TFC Contract No. 18-196-000 / HMG & Associates, Inc. / Exhibits CD" (hereinafter referred to as "Exhibits CD"), and named therein as "Exhibit A," and "Exhibit B," respectively, in the A/E Guidelines (as defined 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 Services* 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. *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 CD and named therein as "Exhibit C."

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

1.1.4. *Budget* means the construction budget for the Project. A majority of construction budgets are anticipated to range from between Eight Thousand and No/100 Dollars ($8,000.00) and One Hundred Thousand and No/100 Dollars ($100,000.00); however, some construction budgets could be as high as Seven Hundred Fifty Thousand and No/100 Dollars ($750,000.00) or more. The Budget may be amended from time to time by TFC as further assessments, design and construction manager cost estimates are provided.

1.1.5. *Buildings* means TFC's portfolio of buildings.

1.1.6. *CAD* means AutoCAD DWG format unless specifically provided otherwise Herein.

1.1.7. *Close-out Documents* has the same meaning as defined in UGC, Section 1.10 and includes the Contractor's marked-up "as-builts."

1.1.8. *Communication Protocol* means the communication and tracking procedures to be utilized for interaction and reporting between TFC, Contractors, Subcontractors, and PE, including but not limited to, the use of any EPMCS utilized by TFC for the Project.

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

1.1.10. *Construction Costs* means all hard and soft costs for labor, materials, fees, and other similar costs and expenses required to complete the Project, and prepared in the format promulgated by the Construction Specifications Institute.

1.1.11. *Construction Documents* has the same meaning as defined in UGC, Section 1.17 that in TFC's sole opinion are in satisfactory quality and detail.

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

1.1.13. *Design Program* means, collectively, the overall goals and design objectives of the Project, 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 Project.

1.1.14. *Effective Date* means the date that the last signature of a party is affixed hereto.

1.1.15. *Governmental Authorities* means all federal, state, and local governmental entities having jurisdiction over the Project, and the PE.

1.1.16. *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.

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

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

1.1.19. *Notice to Proceed (or "NTP")* means the written authorization to proceed with commencement of Professional Services that may be delivered to PE by TFC.

1.1.20. *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.

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

1.1.22. *Periodic Reports* means the written reports required to be submitted to TFC by PE, which reports shall be compiled and submitted in such form as prescribed by TFC.

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

1.1.24. *Professional Services* means professional electrical engineering and other related professional and technical services as defined in Texas Government Code, Chapter 2254, Subchapter A, the scope of both of which is set out in Article II below.

1.1.25. *Reimbursable Expenses* means those reasonable and necessary out-of-pocket costs and expenses incurred by PE for the provision of the Professional Services that are approved by TFC.

1.1.26. *RFI* means a request for information as defined in UGC, Section 1.35.

1.1.27. *RFI Response* means a written clarification, instruction, and/or interpretation, including, but not necessarily limited to, an architect's supplemental instructions issued in response to an RFI, which response must be consistent with the intent of the Construction Documents.

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

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

1.1.29. *Subcontract* means any agreements between PE and a Subcontractor.

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

1.1.31. *TDLR* means the Texas Department of Licensing and Regulations.

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

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

1.1.34. *Utilities* means water, sewer, gas, electric, telecom, cable, and like services.

1.1.35. *Utility Providers* means any and all entities that TFC desires to provide Utilities to the Project.

1.1.36. *Work* means the administration, procurement, materials, equipment, testing, and all services necessary for PE, and/or its agents, to fulfill PE's obligations under this Agreement.

## II. SCOPE OF SERVICES

2.1. Scope of Services. Professional Services under this Agreement will be performed for TFC at various State-owned and/or maintained office buildings in the Austin, Texas metropolitan area. There is no guarantee of assigned Work or volume of Work under this Agreement. For each proposed Project under this Agreement, the TFC Contract Manager will contact PE for a proposal. PE will proceed with the Work under the Project only after the proposal is approved by the TFC Contract Manager through the issuance of a "Delivery Release." Work performed without a Delivery Release will not be paid. Each Delivery Release shall be subject to the terms and conditions set forth in this Agreement, and shall include a description of the Project assignment,

scope of services, project schedule, term and compensation specific to the Delivery Release, which shall be negotiated at the time of such Delivery Release. PE agrees to timely deliver the Professional Services described below in accordance with the negotiated project schedule for each Delivery Release.

2.1.1. Pre-Design Phase. PE shall timely deliver the following Pre-Design Tasks to TFC.

2.1.1.1. Consult with staff of TFC, and with any representatives of the Using Agency as may be directed by TFC, and become thoroughly familiar with a Project's requirements.

2.1.1.2. Inspect and timely become thoroughly familiar with a Site for a Project.

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

2.1.1.4. Identify all codes, rules, regulations and all other Site-related requirements, including, but not limited to, environmental and/or traffic impact studies that may affect the timely design and construction of the Project.

2.1.1.5. Interface with all Utility Providers as is reasonably necessary in order to determine the necessary specifications for connecting all Utilities to the Project.

2.1.1.6. 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.

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

2.1.1.8. Coordinate the manner of implementing the CAD system that will be utilized by TFC throughout the design and construction of the Project.

2.1.2. Construction Documents Phase. PE shall deliver the following Construction Documents phase services to TFC.

2.1.2.1. In accordance with a mutually agreed upon schedule for each delivery release, PE shall prepare and deliver to TFC the proposed one hundred percent (100%) complete Construction Documents.

2.1.2.2. PE shall meet with TFC to review the one hundred percent (100%) complete Construction Documents.

2.1.2.3. PE shall timely incorporate responses to TFC review comments into the Construction Documents.

2.1.2.4. All Drawings shall be organized in accordance with the A/E Guidelines.

2.1.2.5. Drawing file format and names shall be in accordance with the A/E Guidelines.

2.1.2.6. 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.

2.1.2.7. Upon written request by TFC, PE shall prepare the Construction Documents so as to enable the various phases of the Work to be awarded pursuant to separate contracts, the preparation of which shall constitute an Additional Service.

2.1.2.8. All Drawings and Specifications shall be appropriately signed, sealed and dated by the responsible architect(s) and engineer(s).

2.1.2.9. Construction Documents must comply with all Laws and Regulations. All Drawings and Specifications must, in conspicuous text, expressly prohibit any electrical systems or equipment from being energized or otherwise activated without a minimum of twenty-four (24) hour advance notice to TFC.

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

2.1.3. Contract Bidding and Award Phase. Only upon receipt of an applicable written authorization to proceed, PE shall prepare and deliver to TFC the following contract bidding and award phase services for a Project.

2.1.3.1. Prepare any addenda and/or amendments to the solicitation documents as necessary.

2.1.3.2. In the event PE receives any inquiries whatsoever from bidders or potential bidders regarding a Project, PE must refer such inquiries to the appropriate TFC Procurement Division Purchaser indicated in the solicitation document. PE is not authorized to provide any comments, answers or other similar responses to such inquiries. All inquiries must be forwarded to TFC for response.

2.1.4. Construction Phase–General Administration of Construction Contract. PE shall deliver the following management and administration of construction contract services to TFC during the construction phase of a Project as is specified in the UGC and as follows.

2.1.4.1. When requested by TFC and on an hourly basis, perform professional observation and review of the Work in order to determine that all elements and components of a Project are being timely constructed and installed in substantial compliance with the Construction Documents. Such observation and review shall include, at a minimum, the following services.

2.1.4.1.1. Such observations shall include, but not be limited to, all functions applicable to professional inspections that are described in Texas Government Code, Sections 2166.351(3) and 2166.355.

2.1.4.1.2. No later than the RFI Response deadline, prepare and deliver an RFI Response for each RFI to TFC. If the subject of the RFI cannot be reasonably answered by this deadline, advise TFC and propose an alternative deadline and the basis for such proposal, the acceptance of which shall be in the sole discretion of TFC. Make reasonable efforts to answer a Contractor's questions and RFIs in the shortest timeframe possible in order to collaborate in the prosecution of a Contractor's Work (as defined in UGC Section 1.48) on a schedule that recognizes that "TIME IS OF THE ESSENCE."

2.1.4.1.3. Timely review and deliver to TFC complete responses within the specified deadlines to the submittals described below. If the deadline cannot be met, advise TFC and Contractor and propose an alternative deadline and the basis for such proposal, the acceptance of which shall be within the sole discretion of TFC. Make reasonable efforts to review submittals in the shortest timeframe possible to collaborate in the performance of a Contractor's work on a schedule that recognizes that "TIME IS OF THE ESSENCE".

2.1.4.1.4. Submittals shall be due within fourteen (14) calendar days after receipt.

2.1.4.1.5. Proposed Change Order (as defined in UGC Section 1.32) reviews and Unilateral Change Order (as defined in UGC, Section 1.47) reviews shall be due within five (5) days after receipt.

2.1.4.2. Prepare such amended or revised Drawings (as defined in UGC Section 1.22) and/or Specifications (as defined in UGC Section 1.41) as would be necessary to fully and accurately reflect any approved changes.

2.1.4.2.1. Deliver said amended or revised Drawings and/or Specifications to TFC.

2.1.4.2.2. Thereafter, review the Contractor's proposal and recommend approval or disapproval to TFC.

2.1.4.3. In the event TFC and PE conclude that the Work, or any portion thereof, has not been performed or completed in accordance with the Construction Documents, notify TFC in a written report.

2.1.4.4. Continue to perform the foregoing described service until TFC can establish that the work is complete.

2.1.4.5. In the event TFC and PE conclude that any of the pre-final inspection punchlist items have not been corrected or completed in accordance with the Construction Documents, prepare and deliver, no later than the post-final inspection punchlist deadline, a post-final inspection punchlist to TFC.

2.1.4.6. Upon request from TFC, review Record Documents (as defined in UGC Section 1.34) for accuracy and completeness and provide a report of any deficiencies.

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

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

2.1.5.2. Thoroughly review and closely scrutinize the performance, schedules and costs of a contractor and all its subcontractors.

2.1.5.3. Critically review and evaluate Contractor's proposed schedule and costs as relevant to each consultant's discipline.

2.1.5.4. Maintain work progress and products consistent with the schedules.

2.1.5.5. Provide supplemental information beyond that presented in a submission of documents which may be reasonably requested to assist cost estimating.

2.1.5.6. Promptly communicate with pertinent parties, including topics regarding information needs and responses to needs of other parties.

2.1.5.7. Actively participate in all meetings and/or teleconferences to bring the full measure of PE's collective experience, expertise and recommendations to a Project as it pertains to the overall project or to a specific discipline.

2.1.5.8. 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.

2.1.5.9. Answer questions and provide clarifications for the Contractor and its Subcontractors to facilitate their thorough examination of all Drawings, Specifications and other documents authored by PE for accuracy, intended completeness and constructability.

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

2.1.6. 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.

2.1.6.1. No changes to the scope of the Professional Services or the Consideration shall be valid or enforceable unless evidenced by a fully executed written amendment to this Agreement, as set forth in Article IV of this Agreement.

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

2.1.6.3. TFC, including by and through the TFC Project Manager, reserves the right to extend any of the deadlines set out above.

2.1.7. Inspections. TFC hereby reserves the right, if deemed appropriate by TFC in its sole discretion, to conduct reviews or inspections during the course of design and construction of a Project. However, PE shall not be relieved of any of its obligations arising pursuant to this Agreement. No inspections of the Project conducted by TFC during the course of construction, either singularly or in the aggregate, shall reduce the level or extent of PE's responsibilities arising pursuant to this Agreement. Neither the approval and/or final acceptance of a Project or any Deliverables, the payment of any Pay Application, or the issuance of any Certificates of Final Completion (as defined in UGC Section 1.7) or Substantial Completion (as defined in UGC Section 1.8) by TFC shall constitute, nor be deemed, a release of PE's obligation to perform and timely deliver the Professional Services and any Additional Services (i) in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances; or (ii) as required under this Agreement.

## III. TERM AND TERMINATION

3.1. Duration. This Agreement shall be effective as of the Effective Date and shall terminate on August 31, 2020, unless extended or renewed by the parties by amendment to this Agreement or terminated earlier, as provided below. TFC retains the right and option to unilaterally renew this Agreement, upon notice to PE, for an additional two (2) year period.

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 PE at the address of record as specified in this Agreement. Upon receipt of a Notice of Termination, PE 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

4.1. Contract Limit–Fees and Expenses.

4.1.1. Fees. In exchange for the timely delivery of the Professional Services as specified by this Agreement, PE shall be paid fees and Reimbursable Expenses not to exceed the total sum of Two Hundred Forty Thousand and No/100 Dollars ($240,000.00). Hourly rates shall be invoiced in accordance with *PE's Schedule of Rates and Fees*, a digital copy of which is attached hereto and incorporated herein by reference for all purposes in .pdf format on the Exhibits CD and named therein as "Exhibit D." Any Professional Services performed or delivered by PE 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, PE shall submit a Pay Application to TFC for (i) services performed based on the schedule set forth in "Exhibit D"; and (ii) reasonable and necessary costs and expenses incurred through the

last day of the previous month. TFC agrees to pay PE in accordance with Chapter 2251 of the Texas Government Code, also known as the "Prompt Payment Act."

4.2. Payments. Payments shall be made to PE monthly in proportion to the services performed. The compensation for services shall be based upon hours of work performed and completed.

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 PE 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 PE, except for overnight stays, which require prior TFC project manager approval. The maximum amount for each Reimbursable Expense for travel and lodging shall be the rates established by the Texas Comptroller of Public Accounts, and outlined in Textravel, *https://fmx.cpa.state.tx.us/fmx/travel/textravel/index.php*, formerly known as the State of Texas Travel Allowance Guide for state employees. No Reimbursable Expenses shall exceed actual cost. In addition to those items specifically identified above as a Reimbursable Expense, permit fees and associated costs, certain other incidental direct expenses including, but not limited to, copying, telephone, data, and express mail services, and rental of special equipment or tools required in connection with provision of the Professional Services for the Project, may constitute a Reimbursable Expense; provided however, PE must obtain the written approval of TFC prior to incurring the expense. Approval may be granted only under those limited circumstances wherein such costs are not considered normal or customary basic services under this Agreement. All requests for reimbursement must be accompanied by such documentation which, in the judgment of 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), PE 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, PE shall prepare and submit a proposal for such Additional Services to TFC for approval. Additional Services shall be performed at a rate negotiated between TFC and PE and must be approved by the parties by amendment to this Agreement. Any Additional Services performed or delivered by PE prior to execution of the Agreement or amendment thereto, as applicable, cannot be compensated.

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

## 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 PE. TFC shall provide PE a copy of, or reasonable access to, the following information and documentation regarding the Project, the substance of which PE shall incorporate into the DD Documents.

5.1.1.1. The UGC.

5.1.1.2. Any Supplementary General Conditions.

5.1.1.3. Any Special Conditions.

5.1.1.4. Sample copies of the following:

5.1.1.4.1. contract forms; and

5.1.1.4. 2. bond forms.

5.1.1.5. Bidding information and instructions.

5.1.1.6. Minimum wage rates.

5.1.1.7. The PAR for inclusion in the Specifications.

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

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

5.1.1.10. The Project Analysis, or equivalent thereof.

5.1.1.11. The Budget.

5.1.1.12. The Communication Protocol.

5.1.2. TFC Services to PE. TFC shall provide, or cause to be provided, the following services to PE.

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

5.1.2.2. Designate the TFC Project Manager who will supervise the design and construction of the Project and the services being provided pursuant to this Agreement and the respective Contract Documents.

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

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

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

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

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

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

5.2.3. Limitation of Authority. PE agrees that the TFC Contract 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 Section 2.1 above, any deviation from which must be evidenced by the TFC Contract Manager in writing.

5.2.4. PE Safety. All PE's and subcontractors conducting work 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 PE and subcontractors shall be trained in accordance with Chapter 29, Occupational Safety and Health Regulations. PE and subcontractors shall inform the Contract Administrator of their Hazardous Electrical Energy Control, Lockout/Tag-out Procedure. PE's procedure must meet or exceed TFC's procedure as determined by the Contract Administrator. Work shall not be done on energized electrical circuits, components or equipment. When de-energizing is impractical due to possible harm to personnel, equipment or facility damage, negative onsite or offsite environmental impact, or business interruption Contractor must follow OSHA requirements as detailed in OSHA Regulations 1910.331 – 1910.399.

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

5.2.6. PE Cooperation. PE agrees to conduct all of its services under this Agreement by and through appropriate communications with the Contract Administrator. No work, installation or other services shall be undertaken by PE except with the prior written direction of the Contract Administrator. PE understands and agrees that work, installation or any other service performed without the prior written direction of the Contract Administrator is work outside the scope of this

Agreement and shall be performed exclusively at PE's risk. PE 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 Agreement may not be reassigned without the prior written approval by the Contract Administrator. TFC may request that PE replace unsatisfactory personnel, which request shall not be unreasonably denied. PE agrees to cooperate and coordinate its work with that of other Contractors retained by owner. Upon discovery of an apparent conflict in the sequencing of work with another Contractor, PE shall report the concern to the Contract Administrator who will resolve the conflict.

5.2.7. E-Verify. By entering into this Agreement, PE certifies and ensures that it utilizes and will continue to utilize, for the term of this Agreement, the U.S. Department of Homeland Security's E-Verify system, in accordance with the U.S. Department of Homeland Security's rules, to determine the eligibility of: all persons employed to perform duties within the State of Texas, during the term of the Agreement; and all persons (including subcontractors) assigned by the PE to perform work pursuant to the Agreement, within the United States of America. PE 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 PE, and PE's subcontractors, as proof that this provision is being followed. If this certification is falsely made, the Agreement may be immediately terminated, at the discretion of TFC, and at no fault to TFC, with no prior notification. PE shall also be responsible for the costs of any re-solicitation that TFC must undertake to replace the terminated Agreement. For persons not eligible for E-Verify screening, PE (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 Project Manager identified in the initial List of PE 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 CD and named therein as "Exhibit F," will supervise the efforts of Contractor to timely provide TFC with the Construction Services.

5.2.8.1. The Project Manager must be committed to the Project on a full- time basis. TFC reserves the right to approve the appointment of the Project Manager and to demand that the Project Manager, and any of PE's employees or Subcontractors, be removed and replaced if, in the sole opinion of TFC, their performance on this Project or any other Projects, is and/or was not adequate or their continued involvement with the Project will, is, or has become, detrimental to the timely and successful completion of the Project, 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 Project Manager and Subcontractors identified in the List shall not be removed or replaced by PE, nor shall any other Subcontractors be engaged by PE, unless prior written consent is obtained from TFC, which consent shall not be unreasonably withheld, conditioned, or delayed.

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

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

5.2.11. No Guaranty. PE does not control or guarantee the performance of any Contractor, provided however, PE shall promptly notify TFC of any observation of a Contractor's or subcontractor's failure to perform their duties and responsibilities in accordance with the Construction Documents and Work Progress Schedule, 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. PE represents and warrants that neither PE nor any of PE'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, PE has fully advised TFC in writing as to the facts and circumstances surrounding the conviction(s).

5.2.13.2. All of PE'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 PE.

5.2.13.2.1. All criminal background check forms for all of PE employees and Subcontractors that will initially commence any work 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 PE.

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 (hereinafter referred to as "DPS"), which includes fingerprint processing by an independent third-party company selected by DPS. Upon receipt of the fingerprints of PE'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 CD, and named therein as "Exhibit F." PE'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. PE shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, national origin, disability, political affiliation, or religious belief. PE shall take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, 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. PE shall post in conspicuous places, available to employees or applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination subsection. PE shall include the above provisions in all Subcontracts pertaining to the Professional Services.

5.2.15. No Advertising. PE 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. PE 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 PE's prosecution of the Work were prepared solely for the benefit of TFC, and that PE shall have no right to rely upon such and that any reliance thereon shall be at PE'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 PE and its consultants. If PE or consultant offices exist out of the State of Texas, services shall be performed in offices within Texas in so much as proper expertise and timeliness can be accomplished. Services performed outside the State of Texas shall be limited to offices and personnel located in the United States. Outsourcing or subcontracting outside the United States shall not be permitted unless approved in writing by the TFC.

## VI. WARRANTIES AND REPRESENTATIONS BY PE

6.1. Warranties and Representations by PE. PE 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. PE 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 PE to provide the goods or services required by this Agreement. PE will be responsible to pay all taxes, assessments, fees, premiums, permits, and licenses required by law. PE 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, PE 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. 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. PE shall not place any employee of PE at a worksite, nor shall PE 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. PE warrants that PE: (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 PE'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. PE further acknowledges, agrees, and warrants that PE: (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, including, without limitation, the completion and maintenance of the Form I-9 for each of PE'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, PE 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 PE or any of its employees.

6.1.2.3. PE 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. PE is proficient in the use of CAD systems and the EPMCS utilized by TFC.

6.1.4. Warranty of Services. All Professional Services provided by PE pursuant to this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.

6.1.5. Warranty of Deliverables. All Deliverables shall be: (i) completed and delivered in a timely manner and in a manner consistent with standards in the applicable trade, profession,

or industry; (ii) conform to or exceed the specifications set forth in this Agreement; and (iii) be fit for ordinary use, of good quality, and with no material defects.

6.1.6. Additional Warranties. In performing its Professional Services for the Project, PE shall submit, be bound by, and comply with, proposals for each project or group of projects to be assigned, to the extent any warranties, representations, and/or promises of additional services are made therein, and only to that extent.

6.1.7. Eligibility. PE 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).

6.1.8. 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, PE 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. PE acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.

6.1.9. Deceptive Trade Practices Act; Unfair Business Practices Disclosures. PE 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. PE 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 PE or any of PE's officers have occurred or are currently pending in an administrative proceeding or in a lawsuit filed with any court, then PE 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.

6.1.10. 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 PE employs or has used the services of a former executive head of TFC or any other state agency, then PE 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 PE, and the date of employment with PE.

6.1.11. No Conflicts. PE represents and warrants that PE has no actual or potential conflicts of interest in providing services to the State of Texas under this PE and that PE's provision of services under this Agreement would not reasonably create an appearance of impropriety.

6.1.12. Financial Interest/Gifts. Pursuant to Texas Government Code Sections 572.051 and 2255.001 and Texas Penal Code Section 36.09, PE has not given, offered to give, nor intends to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this Agreement. Pursuant to Texas Government Code Chapter 573 and Section 2254.032, if applicable, PE certifies that PE 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 PE's company or corporation. PE 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 PE will be dealing on behalf of TFC.

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

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

6.1.15. Prohibition Against Boycotting Israel. In accordance with Section 2270.002 of the Texas Government Code, by signature hereon, A/ E certifies that it does not boycott Israel and will not boycott Israel during the term of this Agreement.

6.1.16. Prohibition Against Contracting with Companies Engaged in Business with Iran, Sudan, or Foreign Terrorist Organizations. In accordance with Section 2251.152 of the Texas Government Code, TFC is prohibited from entering into a governmental contract (as defined in Texas Government Code Section 2252.151(3)) with a company that is identified on a list prepared and maintained under Texas Government Code Section 806.051, 807.051, or 2252.153. If contractor is on the above-referenced list the Contract will be considered void or voidable and TFC will not be responsible to pay Contractor for any work performed.

## 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 PE, for the fiscal year Budget in existence at the time of the breach.

## VIII. COPYRIGHTS AND TRADEMARKS

8.1. Copyrights. PE 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 PE are subject to copyright protection, PE hereby grants to TFC a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use such and to authorize others to do so. PE 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 PE pursuant to this Agreement shall be considered instruments of its services in respect to the Project. It is understood that PE does not represent such Deliverables to be suitable for reuse on any other study or for any other purpose(s). If PE, at TFC's request and authorization, verifies or adapts PE's Deliverables for TFC's use on another study, PE shall be compensated for redesign or new design, bidding, and construction administration services.

8.1.2. Delivery to TFC. PE 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. PE 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. PE 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. PE 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 PE 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 PE 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 Agreement shall be retained for a minimum of seven (7) years. This retention period runs from the date of payment for the relevant goods or services by TFC, or from the date of termination of the Agreement, whichever is later. Retention time shall be extended when an audit is scheduled or in progress for a period reasonably necessary to complete an audit and/or to complete any administrative proceeding or litigation which may ensue.

9.4. Confidentiality Provisions Applicable to PE.

9.4.1. Protection of Confidential Information. PE 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 PE; 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 PE 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 PE to be confidential and proprietary to TFC; or (iv) not generally known by PE. Such Confidential Information includes, but is not limited to, the following types of information and other information of a similar nature (whether or not reduced to writing or designated as confidential):

9.4.2.1. Work product resulting from, or related to, work, projects, or services performed or to be performed by TFC for PE 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 PE in breach of the terms of this Agreement; (ii) becomes available to PE from a source (other than TFC) which source is not, to the best of PE's knowledge, subject to any legally binding obligation to keep the same confidential; or (iii) has been independently acquired or developed by PE.

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

9.4.3.1. Both during and forever after the performance of its due diligence investigation, PE 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 PE will take all reasonable precautions to prevent inadvertent disclosure of such Confidential Information. This prohibition against PE'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 PE understands that such similarity does not excuse PE from abiding by its covenant or other obligations pursuant to this Agreement.

9.4.3.2. Both during and after the conduct of its due diligence investigation, PE 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 PE'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. PE 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. PE 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 PE 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, PE 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 PE; (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 PE 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 PE; 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, PE understands that TFC will comply with the Texas Public Information Act, Texas Government Code, Chapter 552. If contacted by TFC, PE will cooperate with TFC in the production of documents responsive to the request. PE agrees to provide the documents responsive to the request in the format and within the time frame specified by TFC. PE 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, PE 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. PE 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, PE 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 electrical engineering services and other related professional and technical, as defined in Texas Government Code, Chapter 2254, Subchapter A (hereinafter collectively referred to as "PE") with the State of Texas, by and through the Texas Facilities Commission (hereinafter referred to as "TFC"), must comply with the insurance requirements established by the particular program area of TFC before the PE is authorized to commence providing those professional services.

10.2. Required Insurance Coverages. The required insurance coverages for this particular project are as follows.

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

10.2.1.1. Pursuant to Texas Labor Code Section 406.096(b), PE shall require each Subcontractor to certify in writing to the PE that said Subcontractor provides workers' compensation and employers' liability insurance for all of Subcontractor's employees employed

on this public project. PE shall forward said certifications to TFC within ten (10) days of the Effective Date of the Agreement.

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

10.2.1.3. The policy shall be endorsed to include Waiver of Subrogation in favor of TFC.

10.2.2. Commercial General Liability. Commercial general liability insurance coverage including premises; operations; blanket contractual liability coverage assumed under the Agreement and all contracts relative to the Project, including independent contractor's liability pursuant to unamended ISO, or its equivalent; products and completed operations; and extended to include explosion, collapse, and underground hazards, with a combined single limit of $1,000,000 per occurrence for coverages A and B; and a general aggregate of $2,000,000.

10.2.2.1. The policy shall include endorsement CG2503, Amendment of Aggregate Limits of Insurance (per Project), or its equivalent.

10.2.2.2. The policy shall be endorsed to include Additional Insured status in favor of TFC.

10.2.2.3. The policy shall be endorsed to include Waiver of Subrogation in favor of TFC.

10.2.2.4. The policy shall be endorsed to include thirty (30) Day Notice of Cancellation, ten (10) Days for Non-Payment of Premium, in favor of TFC.

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

10.2.3.1. No aggregate shall be permitted.

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

10.2.3.3. The policy shall be endorsed to include Additional Insured status in favor of TFC.

10.2.3.4. The policy shall be endorsed to include Waiver of Subrogation in favor of TFC.

10.2.3.5. The policy shall be endorsed to include thirty (30) Day Notice of Cancellation, ten (10) Days for Non-Payment of Premium, in favor of TFC.

10.2.4. Architect/Engineers Professional Liability Insurance.

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

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

10.2.4.3. The policy shall be endorsed to include thirty (30) Day Notice of Cancellation, ten (10) Days for Non-Payment of Premium, in favor of TFC.

10.2.5. Umbrella Liability Insurance. Umbrella liability insurance for a period not to expire or terminate prior to the expiration of all warranty periods, insuring Architect/Engineer for an amount of not less than $1,000,000, which provides coverage at least as broad as, and applies in excess and follows form of, the primary liability coverages required hereinabove. The policy shall provide coverage where underlying primary insurance coverage limits are exhausted or otherwise unavailable or inadequate to cover a loss.

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

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

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

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

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

10.3.3.2. The policy, or such other document(s) as may be acceptable to TFC, must obligate the insurer, or a third-party acceptable to TFC, to notify the Texas Facilities Commission, Attention: Insurance Analyst, P.O. Box 13047, Austin, Texas 78711, of any (i) non-renewal; (ii) cancellation; or (iii) material changes, in writing, as soon as is reasonably possible prior to any such non-renewal, cancellation or change.

10.3.3.3. "Material Change" means any of the following changes to the Policy during the term of the Policy: (i) a change in the Policy period; (ii) a material revision to, or removal of, a coverage section; (iii) a reduction of the amount of limits of insurance, provided such reduction is not the result of payment of damages, medical expenses, or claim expenses; or (iv) an increase of the amount of any self-insured retention(s).

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

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

10.3.5. Qualifications of Insurer. Insurance shall be written by a company licensed to do business in the State of Texas at the time the policy is issued and renewed, and shall be written by a company with an A.M. Best rating of A- or better.

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

10.3.7. Notice of Erosion. PE shall provide TFC with thirty (30) days written notice of erosion of any aggregate limits below the minimum amounts required by the Agreement.

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

10.3.9. Losses Paid by PE. Actual losses not covered by the required insurance shall be paid by PE.

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

10.3.10.1. Disqualification from eligibility to participate in any other or future projects with TFC.

10.3.10.2. Suspension of Work for cause.

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

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

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

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

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

## XI. MISCELLANEOUS PROVISIONS

11.1 Indemnification.

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

11.1.2. **INFRINGEMENTS. PE 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 PE PURSUANT TO THIS AGREEMENT. PE AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. PE SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY PE WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND PE MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. PE 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 PE'S WRITTEN APPROVAL, (iii) ANY MODIFICATIONS MADE TO THE PRODUCT BY THE PE PURSUANT TO TFC'S SPECIFIC INSTRUCTIONS, (iv) ANY INTELLECTUAL PROPERTY RIGHT OWNED BY OR LICENSED TO TFC, OR (v) ANY USE OF THE PRODUCT OR SERVICE BY TFC THAT IS NOT IN CONFORMITY WITH THE TERMS OF ANY APPLICABLE LICENSE AGREEMENT. IF PE BECOMES AWARE OF AN ACTUAL OR POTENTIAL CLAIM, OR TFC PROVIDES PE WITH NOTICE OF AN ACTUAL OR POTENTIAL CLAIM, PE MAY (OR IN THE CASE OF AN INJUNCTION AGAINST TFC, SHALL), AT PE'S SOLE OPTION AND EXPENSE; (i) PROCURE FOR TFC THE RIGHT TO CONTINUE TO USE THE AFFECTED PORTION OF THE PRODUCT OR SERVICE, OR (ii) MODIFY OR REPLACE THE AFFECTED PORTION OF THE PRODUCT OR SERVICE WITH FUNCTIONALLY EQUIVALENT OR SUPERIOR PRODUCT OR SERVICE SO THAT TFC'S USE IS NON-INFRINGING.**

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

11.2. Historically Underutilized Businesses ("HUBs"). In accordance with state law, it is TFC's policy to assist HUBs, 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 PE's obligations with TFC. If PE subcontracts with others for some or all of the services to be performed under this Contract, PE shall comply with all HUB requirements pursuant to Chapter 2161 of the Texas Government Code. A digital copy of the Initial Approved HUB Subcontracting Plan ("HSP") is incorporated herein for all purposes in PDF on the Exhibit CD and named therein as "Exhibit G." When required, PE shall submit an updated HSP. Upon TFC approval of HSP update(s), such update(s) shall become, without further notice or action, a part of the incorporated "Exhibit G." A digital copy of the HSP form is incorporated herein for all purposes in PDF on the Exhibits CD and named therein as "Exhibit G-1." Upon execution of a GMP Amendment Acceptance, an updated HSP must be approved. PE 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 HSP Progress Assessment Reporting ("PAR") Form, a digital copy of the form for which is incorporated herein by reference for all purposes in PDF on the Exhibits CD, and named therein as "Exhibit G-2."

11.3. Relationship of the Parties. PE 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, PE is and shall be an independent contractor. Subject only to the terms of this Agreement, PE shall have the sole right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this Agreement. 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 PE or any other party. PE shall be solely responsible for, and TFC shall have no obligation with respect to: (i) withholding of income taxes, FICA, or any other taxes or fees; (ii) industrial or workers' compensation insurance coverage; (iii) participation in any group insurance plans available to employees of the State of Texas; (iv) participation or contributions by the State to the State Employees Retirement System; (v) accumulation of vacation leave or sick leave; or (vi) unemployment compensation coverage provided by the State.

11.4. No Assignment and Subcontracts. PE 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 PE may engage Subcontractors to perform some or all of the Professional Services. In any approved Subcontracts, PE shall legally bind such Subcontractor to perform and make such Subcontractor subject to all the duties, requirements, and obligations of PE specified herein. Nothing herein shall be construed to relieve PE of the responsibility for ensuring that the goods delivered and/or the services rendered by PE and/or any of its Subcontractors comply with all the terms and provisions of this Agreement. PE 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.

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

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

11.7. Notices. All notices, demands and requests required in this Agreement (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. 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

If to PE: HMG & Associates, Inc.
Attention: William E. Harris, Jr., President
9606 North Mopac Expressway, Suite 350
Austin, Texas 78759
Phone: (512) 794-8234
Cell: (512) 917-6639
E-Mail: bharris@hmg-associates.com

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

11.8. Name and Organizational Changes. Contractor must provide TFC with written notification of all name changes and organizational changes relating to Contractor including, but not limited to, merger, acquisition or sale no later than ten (10) business days of such change. Contractor, 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 Contractor, Contractor 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 Contractor 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 Contractor 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 Contractor that materially alters Contractor's ability to perform under the Contract.

11.9. 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, Contractor shall provide the Texas Department of Information Resources ("DIR") with the universal resource locator ("URL") to its Voluntary Product Accessibility Template ("VPAT") for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (*https://app.buyaccessible.gov/baw/Main.jsp*). Contractors not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at *http://www.section508.gov/*.

11.10. 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. PE 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.

11.11. 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. PE acknowledges that this Agreement is effective only for the period of time specified in the Agreement.

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

11.13. 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 PE 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:

11.13.1. Claims for Breach of Contract and Counterclaims.

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

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

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

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

11.13.2. Damages. Damages may include the following.

11.13.2.1. 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 11.13.2.2, below, exceed an amount equal to the sum of:

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

11.13.2.1.2. 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

11.13.2.1.3. any delay or labor-related expense incurred by the PE as a result of an action of or a failure to act by the unit of state government or a party acting under the supervision or control of the unit of state government.

11.13.2.2. 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 11.13.2.1 above.

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

11.13.2.3.1. consequential or similar damages, except delays or labor-related expenses described by Section 11.13.2.1.3 above;

11.13.2.3.2. exemplary damages;

11.13.2.3.3. any damages based on an unjust enrichment theory;

11.13.2.3.4. attorney's fees; or

11.13.2.3.5. home office overhead.

11.13.3. Negotiation. TFC's general counsel shall examine the claim and any counterclaim and negotiate with PE in an effort to resolve them. The negotiation must begin no later than one hundred twenty (120) days after the date the claim is received. TFC's administrative rules located at Title 1, Part 5, Section 111.31 of the Texas Administrative Code apply to this Agreement and govern the negotiation of any dispute arising from this Agreement. In the event negotiation results in the resolution of some disputed issues by agreement or in a settlement, the parties shall reduce the settlement to writing, and each party shall sign the settlement. A partial settlement or resolution of a claim does not waive a party's rights as to the parts of the claim that are not resolved.

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

11.13.5. Adjudication. PE 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.

11.13.6. Payment of Claims. In accordance with the Texas Civil Practice and Remedies Code, Section 114.011, TFC may pay a claim resolved under Section 11.13 only from money appropriated to it for payment of contract claims or for payment of the contract that is the subject of the claim. If money previously appropriated for payment of contract claims or payment of the contract is insufficient to pay the claim or settlement, the balance of the claim may be paid only from money appropriated by the legislature for payment of the claim. Chapter 304 of the Texas Finance Code applies to a judgment awarded to a claimant, except that the applicable rate of interest may not exceed the maximum rate allowed by applicable Laws and Regulations. Consistent with the Texas Civil Practice and Remedies Code, Section 114.011, property owned by the State or any unit of state government is not subject to seizure, attachment, garnishment, or any other creditors' remedy to satisfy a judgment on a breach of contract claim.

11.13.7. 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 11.13.

11.14. 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.

11.15. 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.

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

11.17. Limitation on Authority and No Other Obligations. PE 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. PE may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of TFC or the State of Texas.

11.18. Limitation on Adjudication Awards. In the event PE brings a civil suit against TFC and prosecutes it to final judgment pursuant to Chapter 114 of the Code, any recovery by PE 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. Pre-judgment and post-judgment interest shall be limited to the rate of three percent (3.0%) per annum. PE HEREBY WAIVES ALL CLAIMS FOR MONETARY DAMAGES FOR ANY AMOUNT THAT MAY BE CLAIMED: (i) FOR THE INCREASED COST TO PERFORM WORK AS A DIRECT RESULT OF OWNER-CAUSED DELAYS OR ACCELERATION; (ii) BASED UPON AN UNJUST ENRICHMENT THEORY; (iii) FOR CONSEQUENTIAL AND EXEMPLARY DAMAGES; and (iv) FOR DAMAGES FOR ANY UNABSORBED HOME OFFICE OVERHEAD.

11.19. No Waiver of Sovereign Immunity. Except as may be expressly and specifically provided otherwise by Chapter 114, 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.

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

11.21. 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.

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

11.23. Prohibition on Certain Bids and Contracts. Under Texas Government Code, Section 2155.006, relating to the prohibition of certain bids and contracts, PE 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. PE represents and warrants that during the five (5) year period preceding the date of this Agreement, PE has not been: (i) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Texas Utilities Code, Section 39.459, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or (ii) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result

of Hurricane Rita, as defined by Texas Utilities Code, Section 39.459, Hurricane Katrina, or any other disaster occurring after September 24, 2005.

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

11.25. 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 CD, and are hereby incorporated herein by reference.

| | | |
|---|---|---|
| 11.26.1. | Exhibit A. | 2015 Uniform General Conditions. |
| 11.26.2. | Exhibit B. | 2018 Supplementary General Conditions. |
| 11.26.3. | Exhibit C. | 2018 Architectural/Engineering Guidelines. |
| 11.26.4. | Exhibit D. | PE's Schedule of Rates and Fees. |
| 11.26.5. | Exhibit E. | List of PE Project Manager and Subcontractors. |
| 11.26.6. | Exhibit F. | Criminal Background Checks and Application Guidelines. |
| 11.26.7. | Exhibit G. | Initial Approved HUB Subcontracting Plan. |
| 11.26.8. | Exhibit G-1. | HUB Subcontracting Plan Form. |
| 11.26.9. | Exhibit G-2. | HUB Subcontracting Plan Progress Assessment Report Form. |

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

[This Space Intentionally Left Blank]

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

**TEXAS FACILITIES COMMISSION**

By: Jerry R. Hayes FOR

John S. Raff

Interim Executive Director

Date of Execution: 10/1/18

**HMG & ASSOCIATES, INC.**

By: [signature]

William E. Harris, Jr.

President

Date of Execution: 9/24/18

G.C. NPC

Dir. CDW

D.E.D. MW

# EXHIBITS CD