



**PROFESSIONAL SERVICES AGREEMENT  
FOR  
BUILDING SYSTEMS COMMISSIONING  
CAPITOL COMPLEX PROJECT, PHASE 1**

**BETWEEN**

**THE TEXAS FACILITIES COMMISSION  
AND**

**SEBESTA, INC., DBA NV5**

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FOR  
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**THE TEXAS FACILITIES COMMISSION  
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**SEBESTA, INC., DBA NV5**

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 Sebesta, Inc., dba NV5, as Commissioning Agent (as defined below) (hereinafter referred to as Commissioning Agent or “CxA”), located at 1701 Directors Boulevard, Suite 420, Austin, Texas 78744, enter into the following agreement for professional engineering services (hereinafter referred to as the “Agreement”) pursuant to the Professional Services Procurement Act, Tex. Gov’t Code Ann. Ch. 2254, Subchapter. A, to be effective as of the Effective Date (as defined below). The project for which CxA agrees to provide Professional Services is generally described as enhanced commissioning services for the Capitol Complex, Phase 1 in Austin, Texas. The Texas Capitol Complex Phase 1 project is the implementation of the Phase 1 improvements as recommended in the adopted *2016 Capitol Complex Master Plan*. The delivery of the project is broken into six packages as follows: (i) Package 1 – Excavation; (ii) Package 2 – Site Utilities; (iii) Package 3 – Central Utility Plant and Utility Tunnel; (iv) Package 4 – 1801 Congress Building; (v) Package 5 – 1601 Congress Building; and (vi) Package 6 – Texas Mall and Underground Parking Garage. Each Package will have an Architect and/or Engineer of Record (“AOR/EOR,” as defined below), and a Construction Manager-at-Risk (“CMR,” as defined below) for detailed design and construction. The Project has a Master A/E, Page Southerland Page, Inc., overseeing the design of the entire scope and bringing the design to a Schematic Design level, and a Construction Manager Agent (CMA), Balfour Beatty Construction, LLC, serving as the Owner’s Program Manager over the entire scope. It is expected that work will take place on multiple packages concurrently and that work in one package may rely upon completion of work in another package; *e.g.* relocating utilities prior to excavating an area. To ensure consistency of project delivery to TFC, a high level of collaboration will occur between all design and construction teams as well as across all packages. Commissioning services shall occur for Packages 3, 4, 5 and 6, and shall include but not be limited to: (i) Design Development Phase Commissioning; (ii) Construction Phase Commissioning; (iii) Post Construction Phase Commissioning; (iv) Warranty Phase Commissioning; and (v) all coordination efforts with TFC, CMA, AOR/EOR, CMR, and third party testing firm(s). CxA shall develop Pre-Design Acceptance Requirements, Design Review Checklists, commissioning specifications and a commissioning plan for each package which will be updated throughout the process and finalized at the end of the project. Commissioning Agent shall participate in Design review conferences and meetings, provide comments at design milestones and during Construction conduct submittal reviews, attend functional performance tests and make observations and document system installations for each Package (hereinafter

collectively referred to as the “Project”). Nothing in this Agreement shall be interpreted or construed to make Contractor (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. 18-166-000 / Sebesta, Inc., dba NV5 / Exhibits CD” (hereinafter referred to as “Exhibits CD”), and named therein as “Exhibit A,” and “Exhibit B,” respectively, 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. *Approval* or *Approved* means the written approval of TFC. TFC may exercise the right of Approval in its sole discretion. TFC’s Approval shall also require formal approval of TFC’s board of commissioners (the “Commissioners”) whenever approval of the Commissioners is expressly required by this Agreement, or is otherwise required by state law or TFC’s policies. The act of an Approval shall not constitute a waiver of TFC’s rights hereunder or excuse CxA from fulfilling its obligations to perform in accordance with this Agreement.

1.1.3. *Architect/Engineer of Record (“AOR/EOR”)* means Architects or Engineers of Records for each of the Packages in the Capitol Complex Phase 1, and any licensed professionals and other personnel working under the Master A/E’s supervision, or otherwise engaged by TFC to prepare the design for all or a portion of the Project.

1.1.4. *Budget* means the maximum amount of funding that has been authorized by and is available to TFC to pay CMR for the services and Work required under the Construction Contract for the Project, for the Guaranteed Maximum Prices, and all change orders. The Budget may be amended from time to time by TFC in its sole discretion as further assessments, design and construction cost estimates are developed by the Project Team.

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

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

1.1.7. *Certificate of Substantial Completion* means the certificate for each Package signed by CMR, AOR/EOR, and TFC establishing the date of Substantial Completion for the applicable part of the Work, and identifying responsibilities for security and maintenance as set out in UGC, Paragraph 12.1.1.2.

1.1.8. *Close-out and Record Documents Deadline* means the date that is a fixed number of days after the date of delivery of all Close-out Documents for each Package to AOR/EOR.

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

1.1.10. *Commissioning Agent ("CxA")* means individual/s or firm contracted by TFC to perform all of the commissioning as outlined in this Contract. The Commissioning Agent, also referred to herein as the "CxA," shall be part of the Project team who works independently of both designer and Contractor to ensure the proper installation, performance testing, functional testing procedures and operations of all installed and integrated systems. The Commissioning Agent shall be a registered design professional in engineering or architecture.

1.1.11. *Communication Protocol* means the communication and tracking procedures to be utilized for interaction and reporting between TFC, CMR, Contractors, Subcontractors, SSE, AOR/EOR and CxA, including but not limited to, the use of any EPMCS utilized by TFC for the Project.

1.1.12. *Conceptual Design Package(s) or CDP(s)* means one or more sets of documents developed by Master A/E and CMA, as approved by Owner, to provide sufficient information to describe and establish the design parameters for the Packages, including, as appropriate, the legal description of the Sites of the Packages,, site surveys, site development requirements and other information related to the Sites, conceptual criteria for the Packages,, interior space requirements, special material requirements, material quality standards, special equipment requirements, cost or budget estimates, Packages, Schedules, quality control requirements, applicable codes and ordinances, provisions for utilities, parking requirements, or any other requirement, as applicable.

1.1.13. *Conceptual Design Phase* means, for each Package, that stage of a Project culminating in the preparation and submission of a Conceptual Design Package that includes preliminary design or series of preliminary design alternatives based on CMA's and Master A/E's review of Owner's Design Program, and the *2016 Texas Capitol Complex Master Plan*, located at: <http://www.tfc.state.tx.us/divisions/commissionadmin/tools/> and incorporated herein for all purposes as "Exhibit C"(hereinafter referred to as the "Master Plan"). This phase includes CMA's and Master A/E's preliminary evaluation of alternative approaches to designing the Packages, taking into consideration the requirements of the Packages and the Project Budget, including the

elements of the *Schematic Design Package*. This shall include the combination of: (i) Schematic Design Drawings; (ii) an outline summary of the areas within the proposed Package, such summary corresponding to the general categories in the space allocation outlined in the Design Program; and (iii) a description of the building and general Site development that shall include an overview of proposed exterior architectural materials and structural systems together with the MEP Systems and services being contemplated.

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

1.1.15. *Construction Contract* means all the contract documents comprising the contract between Owner and CMR for each Package, including, as applicable, all exhibits to the Construction Contract, Owner's solicitation, addenda, notice(s) to bidders, CMR's Guaranteed Maximum Price(s), prevailing wage schedules, list of Subcontractors, Owner's notice to proceed, bonds, general provisions, special provisions, Specifications, Drawings, all modifications, all written amendments, change orders, field orders, orders for minor changes in the work, and the Architect/Engineer's written interpretations and clarifications issued on or after the effective date of such contract.

1.1.16. *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.

1.1.17. *Construction Manager Agent or CMA* means Balfour Beatty Construction, LLC, the service provider engaged hereunder as the TFC's fiduciary agent to assist the TFC with management and coordination of the overall design and construction program for the Capitol Complex Projects.

1.1.18. *Construction Manager-at-Risk* or *CMR* has the same meaning as defined in UGC, Section 1.18, and also refers to the service provider to be engaged by TFC for each Package of Phase 1 of the Project to perform (or cause to be performed) the Work on Phase 1 of the Project as a Construction Manager-at-Risk.

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

1.1.20. *Construction Documents Phase* means that stage of a Package that follows the Design Development Phase, and culminates in the preparation and issuance of fully complete construction design documents that illustrate and incorporate Approved changes to the Design Development Documents and consisting of Drawings and Specifications setting forth in detail the quality levels of materials and systems and other requirements for the construction of the Work, subject to additional information to be provided by CMR for the Architect/Engineer's review, such as shop drawings, product data, samples and other similar submittals.

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

1.1.22. *CxA Personnel* means all CxA's staff, Subcontractors, subconsultants and vendors of any tier who contract to perform any of CxA's obligations or duties hereunder, as shown in List of CxA's Key Personnel, incorporated herein for all purposes as "Exhibit D."

1.1.23. *CxA's Fee Schedule and Staffing Plan* is that fee schedule that provides for payment of CxA's fee and includes CxA's plan for staffing to be covered by CxA's Fee, as described in CxA's Fee Schedule and Staffing Plan, incorporated herein for all purposes as "Exhibit E."

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

1.1.25. *DD Documents* means the design development documents, i.e., such plans, elevations, and such other drawings, calculations, and outline specifications that are of such quality and detail that enable TFC to fix and illustrate the size and character of the Package in its essentials as to kinds of materials and assembly details and type of structure and to coordinate the interface of all architectural and structural elements with all building systems.

1.1.26. *Deliverables* means any and all drawings, specifications, designs, studies, sketches, computer programs, reports, and other information, whether in printed or electronic media format, provided or furnished in appropriate phases by CxA in the performance of the Professional Services, which are specified to be delivered by CxA pursuant to the terms of this Agreement.

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

1.1.28. *Design Development Phase* means that phase of a Package that follows the Conceptual Design Phase, and culminates in the preparation and issuance of detailed design documents that illustrate and incorporate Approved changes to the Schematic Design Documents, and include drawings, specifications, plans, sections, elevations, typical construction details, and diagrammatic layouts of building systems to fix and describe the size and character of a Project and to identify the quality levels of major materials and systems for architectural, life safety, fire protection, civil, structural, mechanical and electrical disciplines, and such other elements and systems as may be appropriate.

1.1.29. *Design Package* means all or a part of the Construction Documents, including all Drawings, Specifications and other Construction Documents issued by the AOR/EOR at a designated point in time as required for bidding, procurement and construction for a specific scope of the Work for each Package.

1.1.30. *Design Program* means, collectively, the overall goals, the design objectives, the aesthetic considerations, the functional requirements, and the design and construction for all Packages within the Project, including: (i) allocations of space with uses and adjacency relationships for all areas/spaces; (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; and (iii) the development of the PIP. *Design Task Report* means a comprehensive report(s) that sets forth the results of, and answers to, each of the Design Tasks discussed in Article II.

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

1.1.32. *Drawings* means the graphic and pictorial portions of the documents developed in connection with the Design Program, Schematic Design Phase, Design Development Phase, Construction Documents Phase, or the construction phase, and including all information required to maintain the Building Information Model(s), showing the design, location and dimensions of the Work for each Package, and generally including plans, elevations, sections, axonometrics, isometrics, details, schedules and diagrams.

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

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

1.1.35. *Final Completion* means that stage of completion by which all "punch-list" items identified in connection with the Substantial Completion of a Phase of the Package have been corrected, completed, or otherwise addressed to the satisfaction of Owner, Architect/Engineer, all building inspectors, and all other Governmental Authorities, as evidenced by the issuance of a certificate of Final Completion signed by CMR and AOR/EOR.

1.1.36. *Final Inspection* means the same process and procedure described in UGC, Subsection 12.1.2.

1.1.37. *Final Inspection Deadline* means the date that is thirty (30) days after the Substantial Completion Inspection, and by which date CxA must conduct a Final Inspection for each Package.

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

1.1.39. *Hourly Fee Rates* shall mean the rates set forth in the Schedule of CxA's Hourly Fee Rates for Additional Services, incorporated herein for all purposes as "Exhibit F," for Additional Services to be performed by CxA.

1.1.40. *Initial Conceptual Designs* means initial concept drawings and block diagrams that are of such quality and detail to enable TFC to establish design direction.

1.1.41. *Laws and Regulations* means any and all applicable laws, statutes, rules, regulations, ordinances, codes, and orders of any and all Governmental Authorities, including those governing labor, equal employment opportunity, safety, and environmental protection, including but not limited to, all applicable requirements of Title III of the Americans with Disabilities Act and the Texas Architectural Barriers Act and Texas Accessibility Standards found in Texas Government Code, Chapter 469 (West 2012 & Supp. 2015).

1.1.42. *Master A/E* means Page Southerland Page, Inc., the service provider TFC has engaged pursuant to Texas Government Code §2254 as the TFC's agent for oversight, coordination and management of the overall design of the Capitol Complex Projects by each of the Architect/Engineers for the Packages.

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

1.1.44. *Notice of Termination* means the written notice of termination described in Section 3.2.

1.1.45. *Notice to Proceed* or *NTP* means the written authorization to proceed with commencement of Professional Services that may be delivered to CxA by TFC.

1.1.46. *Owner, Texas Facilities Commission, or TFC* means and includes the State of Texas, the Texas Facilities Commission, and any other agency of the State of Texas acting through the Texas Facilities Commission in connection with this Agreement.

1.1.47. *Package* means one portion of the Project as delineated by Master A/E, CMA, and TFC. It is anticipated there will be 6 Packages within the Project. The exact boundaries and scope of each Package are included within the Conceptual Design Packages. More detail for each Package is given in Article II.

1.1.48. *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.

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

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

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

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

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

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

1.1.55. *Pre-Final Inspection Report* means the deficiency list for each Package of any unresolved items that CxA will deliver to CMR when a Certificate of Substantial Completion is delivered by TFC as discussed in UGC, Paragraph 12.1.1.2.

1.1.56. *Pre-Final Inspection Report Deadline* means the date that is a fixed number of days after the completion of the Substantial Completion Inspection for each Package, and by which date CxA shall prepare and deliver a proposed Post-Substantial Completion Inspection Report to TFC.

1.1.57. *Professional Services* means the services required by this Agreement, as further described in Article II below.

1.1.58. *Project* means Capitol Complex Phase 1 Project, as further described in Article II.

1.1.59. *Project Analysis* has the same meaning as defined in Texas Government Code, Section 2166.001(5) (West 2016).

1.1.60. *Project Management Plan* (“PMP”) is the management plan put forth by the CMA and updated monthly.

1.1.61. *Project Manual* means the compilation of the general requirements and the Specifications to be developed and issued for the Work within each Package for the Project by the AOR/EOR.

1.1.62. *Project Stage(s)* means a discrete period during the construction of the Project in which a scope of Work required by a Design Package is performed by CMR.

1.1.63. *Project Team* means the SSE, Master A/E, AOR/EOR, CxA, CMA, CMR, and any separate Contractors, consultants, or other service providers employed by TFC for the purpose of planning, programming, design, construction, and commissioning of the Project. The constitution of the Project Team may vary at different phases of the Project and may be modified from time to time by TFC.

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

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

1.1.66. *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.

1.1.67. *RFI Response Deadline* means the date that is seven (7) calendar days after receipt, or uploading, of an RFI, and by which date CxA must deliver an RFI Response to CMR.

1.1.68. *Schematic Design Drawings* means, for purposes of this agreement, the Conceptual Design Drawings as defined in Section 1.1.14.

1.1.69. *Schematic Design Package* means, for purposes of this agreement, the Conceptual Design Package as defined in Section 1.1.15.

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

1.1.71. *Services* means the services provided by CxA, CxA Personnel and/or by Subcontractors and/or consultants retained by CxA for the Project.

1.1.72. *Site(s)* means the lands, areas, and/or buildings generally described in Article II as the Capitol Complex Site, and indicated in the Contract Documents as being furnished by TFC as the Sites upon which the Work is to be performed.

1.1.73. *Site Services Engineer* or *SSE* means Cobb, Fendley & Associates, Inc., the service provider TFC has engaged to provide the site environmental and engineering services for the Project.

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

1.1.75. *Subcontract* means any agreements between CxA and a Subcontractor or consultant.

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

1.1.77. *Substantial Completion* means that stage of completion for each Package by which the Work or a portion thereof is accepted by execution of a certificate of Substantial Completion by Owner, Master A/E, and CMR as sufficiently completed, inspected, and approved by the appropriate Governmental Authorities as evidenced by issuance of a certificate of Substantial Completion, for Owner's occupancy or partial occupancy for its intended purposes, excluding only minor portions of the Work that remain unfinished pending Final Completion and final inspection. Partial use or occupancy shall not result in the Package being deemed substantially complete and shall not be evidence of substantial completion, nor shall execution of a certificate of Substantial Completion be deemed to excuse unidentified or uncorrected defects in the Work or services of a service provider.

1.1.78. *Substantial Completion Inspection* means the process and procedure described in UGC, Subsection 12.1.1.

1.1.79. *Substantial Completion Inspection Deadline* means the date for each Package that is a fixed number of days after proper written notification is delivered to TFC and CxA by CMR that CMR has fully satisfied the requirements set out in UGC, Paragraph 12.1.1.1, and by which date CxA must conduct a Substantial Completion Inspection.

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

1.1.81. *TFC Project Manager(s)* means the employee(s) of TFC authorized and assigned to communicate with and act on TFC's behalf to administer CxA's Agreement, and to manage and oversee the Project Team in connection with the Packages. An individual designated as a TFC Project Manager pursuant to this Agreement is authorized to act on behalf of TFC with respect to the day-to-day management of the Services required under this Agreement, inclusive of managing TFC's review and Approval of the Professional Services and operating as the point of contact between TFC, the Using Agency (if any), and CxA.

1.1.82. *Using Agency* has the same meaning as defined in Texas Government Code, Section 2166.001(10) (West 2016).

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

1.1.84. *Utility Providers* means any and all entities that provide Utilities to the Project.

1.1.85. *Warranty Report* means the comprehensive report of the findings of CxA pursuant to the inspections, and which must include, but not be necessarily limited to, a list of the items needing replacement, correction, or repair for each Package.

1.1.86. *Warranty Report Deadline* means the date that is three hundred thirty-five (335) days after the date that a Certificate of Substantial Completion for each Package has been issued as to the Work, or a discrete portion thereof, and by which date CxA shall deliver the warranty and guarantee phase services.

1.1.87. *Work* means the physical construction and related services required by the Construction Documents to construct each Package of the Project, and includes all other labor, materials, equipment and services provided or to be provided by CMR to fulfill CMR's obligations. The Work may constitute the whole or a part of a Package.

1.1.88. *Worksite(s)* has the same meaning as the defined term "Site(s)," as set forth in Section 1.1.72, above.

## II. SCOPE OF SERVICES

2.1. Scope of Services. CxA agrees to timely deliver enhanced commissioning services in accordance with this Contract and the American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) *Guideline 0*, and the Associated Air Balance Council Commissioning Group *ACG Commissioning Guideline*.

2.1.1. Commissioning Design Phase. No later than the Design Phase Deadline, CxA shall timely deliver the following 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: (i) the Project Analysis, or the equivalent thereof; and (ii) the Design Program.

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

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

2.1.1.4. Receive and become familiar with requirements of the technical and design standards of TFC and the Using Agency, including, but not limited to, the Owner's Project Requirements.

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

2.1.1.6. Coordinate the manner of implementing the CAD system, BIM Coordination Plan, and the EPMCS that will be utilized by TFC throughout the design and construction of the Project.

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

2.1.1.8. Deliver a Commissioning Task Report to TFC. Upon consent of TFC, CxA may deliver one (1) amendment to the Commissioning Task Report no later than the Design Deadline.

2.1.2. Owner Coordinated Document Review Process. CxA agrees to timely deliver the Owner Coordinated Document Review Process, as follows.

2.1.2.1. During the design phase of each Package, the design schedule shall accommodate a periodic review of the Commissioning Plan at various milestones, to be coordinated by TFC, at the following milestones and in the sequential order listed: (i) 100% DD (ii) 65% Construction Documents (iii) 95% Construction Documents; and (iv) 100% Construction Documents. CxA to participate in Design Review conferences and Pre-Construction meetings.

2.1.2.2. Each review shall include the following steps to comprise a complete review for each milestone listed above.

2.1.2.2.1. The CxA shall have a fixed number of days after TFC's notice of authorization to CxA to proceed with the next phase of design, as described in the CMA's PMP.

2.1.2.2.2. TFC, CMA, Master A/E, AOR/EOR, CxA and CMR shall meet to review all milestone submittals, as described in the PMP.

2.1.2.2.3. Conduct Design reviews and provide comments at the agreed upon milestone submission schedule as described in the PMP.

2.1.3. Commissioning Design Services during all Milestone reviews for each Package.

2.1.3.1. Review the Owner's Project Requirements, ("OPR") and the CxA Basis of Design ("BOD") provided for CxA's review.

2.1.3.2. Develop Pre-Design Acceptance Requirements per OPR and develop Design Review Checklists to be used for each submittal and associated review. Review the CxA Programming document and provide a report.

2.1.3.3. Develop a Preliminary Commissioning Plan to be updated throughout the project.

2.1.3.4. Conduct Design reviews and provide comments at the agreed upon milestone submission schedule. Coordinate with the TFC, AOR/EOR. CMA and CMR. Collaborate with third party testing firms throughout project.

2.1.4. Development of Commissioning Plan. CxA shall develop a commissioning plan that will form the basis of the process to be followed throughout the construction as well as start-up and acceptance of each Package. The commissioning plan will identify commissioning related activities and include roles and responsibilities for team members including the TFC, Owner's representatives, contractors, and vendors. Commissioning activities will include tests, procedures, meetings, documentation, scheduling and sequencing of tasks. The commissioning plan will identify systems/equipment to be commissioned and the methodology to be followed in demonstrating performance and operation. The commissioning plan will be

updated with checklists and functional protocols as they are developed during construction. The following building systems are to be commissioned in accordance with *ASHRAE Guideline 0* and the *ACG Commissioning Guideline*. All systems to be commissioned at 100% unless noted otherwise.

2.1.4.1. Building Automation/Energy Management Systems.

2.1.4.2. Life Safety and Security Systems.

2.1.4.3. Fire Suppression Systems.

2.1.4.4. Heating, Ventilation, Air Conditioning (“HVAC”) Systems.

2.1.4.5. Plumbing and Irrigation Systems.

2.1.4.6. Renewable Energy Systems.

2.1.4.7. Emergency Power Systems.

2.1.4.8. Electrical Systems.

2.1.4.9. Data and Communication Systems. The following standards will be required for these systems:

2.1.4.9.1. Optics Cabling EIA/TIA-568-C-x; and

2.1.4.9.2. Data Communication commissioning shall include reviewing pertinent submittals, witnessing testing (conducted by others), providing testing documentation, reviewing the test reports and tracking issues discovered.

2.1.5. Development of Commissioning Specifications. CxA shall develop commissioning specifications for all commissioned equipment and shall coordinate with the AOR/EOR design team and TFC to integrate the commissioning specifications into the overall project manual specifications package. The commissioning specifications shall include definitions of key terms, a detailed description of the responsibilities of all parties, details of the commissioning process, reporting and documentation requirement, alerts to coordination issues, deficiency resolution, construction checklist and startup requirements, the functional testing process and specific functional test requirements including testing conditions and acceptance criteria for equipment to be commissioned.

2.1.6. Construction Phase Services. CxA shall deliver the following management and administration of commissioning services to TFC during the construction phase of the Project as is specified in the UGC and as follows. CxA shall have primary responsibility for execution of the commissioning plan and shall perform the following commissioning construction related activities.

2.1.6.1. Plan and conduct a commissioning kick-off meeting for each Package at the project site with all contractors.

2.1.6.2. Update the commissioning plan and provide up to (6) monthly commissioning updates.

2.1.6.3. Review submittals for the equipment and systems within the scope of commissioning and ensure compliance with the commissioning plan

2.1.6.4. Update and finalize the Pre-Functional checklists and Functional Performance Tests. Checklists and tests initially developed during design will be updated during the Construction phase to incorporate submittals and potential design changes.

2.1.6.5. Review completed Start-Up Reports and completed Pre-Functional Checklist.

2.1.6.6. Review the Test and Balance Report(s) and conduct verification testing with the Test and Balance contractor on up to 20% of the air devices listed in the Test and Balance Report(s)

2.1.6.7. Site Visits during the Construction Phase will be conducted to confirm the construction progress, spot check the completion of Pre-Functional Checklists, answer commissioning related questions directly in the field, and identify potential issues/concerns before Functional Performance Testing. Sections 2.1.6.12 and 2.1.6.13, below, generally describe a flexible meeting schedule to meet the commissioning demand for each project. The actual meeting schedule and budget for meetings will be negotiated with the selected firm.

2.1.6.8. Conduct functional performance testing.

2.1.6.9. Review Operations and Maintenance (“O&M”) Manuals and organize and participate in the Owner training process.

2.1.6.10. Develop a Systems Manual upon receipt of the necessary As-Built documentation.

2.1.6.11. Develop a final commissioning report.

2.1.6.12. Conduct monthly Commissioning Meetings for the first twenty two (22) months; Weekly Commissioning Meetings for the next seven (7) months and Daily Commissioning Meetings for the final one (1) month of functional testing.

2.1.6.13. Conduct daily meetings to include morning huddles with the contractors who are directly involved in the commissioning process to ensure understanding of the daily objectives, and to confirm what was accomplished relative to what was planned.

2.1.6.14. Deliver a report to TFC for each observation and review of the commissioning Work. Such Reports must describe in reasonable detail the current status of the following:

- 2.1.6.14.1. the completed Work in relation to the Work Progress Schedule;
- 2.1.6.14.2. projected completion dates;
- 2.1.6.14.3. percentage of completion of each discrete subpart of the Work; and
- 2.1.6.14.4. any existing or potential deficiencies and/or discrepancies.

2.1.6.15. Subject to the provisions of UGC, Subsection 12.1.1, no later than the Substantial Completion Inspection Deadline, CxA shall participate in a Substantial Completion Inspection of the Work with the CxA, while accompanied by the TFC Project Manager, to determine whether said portion of the Work has achieved Substantial Completion.

2.1.6.16. In the event TFC and CxA conclude that the Work, or any portion of the Commissioning scope thereof, has not been performed or completed in accordance with the Construction Documents, CxA shall prepare and deliver, no later than the Pre-Final Inspection Report Deadline, a Pre-Final Inspection Report to Contractor with a copy to TFC.

2.1.7. Warranty Phase Services. During the Warranty phase for each Package, CxA to perform the following activities.

- 2.1.7.1. Conduct seasonal testing.
- 2.1.7.2. Conduct functional testing on up to 20% of equipment originally tested. Confirm operations 10 months into the warranty period with a warranty walk with TFC and CxA.
- 2.1.7.3. Execute a Thermal Comfort Survey through facility operators and occupants.
- 2.1.7.4. Provide Facility Grid Commissioning Software utilizing a cloud based software for the project. Cloud based solution must enable users to distribute to all parties.
- 2.1.7.5. Prepare and submit a final commissioning process report to TFC. Report to include; Approved Test and Balance Reports, all Pre-test checklists and functional performance test checklist results.

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

2.1.7.7. CxA 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.

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

2.1.8. 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 the Project. However, CxA shall not be relieved of any of its obligations arising pursuant to this Agreement. No inspections of the Project conducted by TFC shall reduce the level or extent of CxA's responsibilities arising pursuant to this Agreement. Neither the approval and/or final acceptance of a Package or any Deliverables, the payment of any Pay Application by TFC shall constitute, nor be deemed, a release of CxA'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 May 31, 2020, unless extended by the parties by amendment to this Agreement or terminated earlier, as provided below.

3.2. Early Termination. This Agreement may be terminated by TFC for its convenience, in whole or in part, at any time without cause, upon delivery of a Notice of Termination to CxA at the address of record as specified in this Agreement. Upon receipt of a Notice of Termination, CxA 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. Fixed Fee. In exchange for the timely delivery of the Professional Services as specified by this Agreement, CxA shall be paid a fixed fee of Two Million Nine Hundred Fifty-Nine Thousand Eight Hundred Sixty-Nine and No/100 Dollars (\$2,959,869.00). Any Professional Services performed or delivered by CxA prior to the Effective Date of this Agreement or after its termination cannot be compensated. Such Fixed Fee shall be paid to CxA pursuant to the CxA's Fee Schedule and Staffing Plan, "Exhibit E."

4.1.2. Submission of Pay Applications or Invoices. No more frequently than once per month, CxA shall submit a Pay Application to TFC for services performed and reasonable and necessary costs and expenses incurred through the last day of the previous month. TFC agrees to pay CxA in accordance with Chapter 2251 of the Texas Government Code, also known as the “Prompt Payment Act.”

4.2. Proportional Payments. Payments shall be made to CxA monthly in proportion to the services performed. The compensation for services shall be at the following cumulative percentages at the completion and acceptance of each of the following phases for each Package of the Professional Services:

- 4.2.1. 100% Design Development: twenty-five percent (25%).
- 4.2.2. 100% Construction Documents: forty-five percent (45%).
- 4.2.3. Substantial Completion: seventy-five percent (75%).
- 4.2.4. Warranty Phase: one hundred percent (100%).

4.3. Maximum Reimbursable Expenses. Reasonable lodging and traveling expenses shall be considered a Reimbursable Expense under this Agreement when professional and technical personnel of CxA 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 CxA, 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://fm.x.cpa.state.tx.us/fm.x/travel/txtravel/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, CxA 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), CxA 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, CxA shall prepare and submit a proposal for such Additional Services to TFC for approval. Additional Services shall

be performed at the Hourly Rates established by “Exhibit F.” Any Additional Services performed or delivered by CxA prior to execution of the Agreement or amendment thereto, as applicable, cannot be compensated.

4.6. Payments to Subcontractors. For all services rendered, CxA’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 CxA 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 CxA. TFC shall provide CxA a copy of, or reasonable access to, the following information and documentation regarding the Project, the substance of which CxA shall incorporate into the DD Documents.

5.1.1.1. The Conceptual Plans for each Package.

5.1.1.2. The Budget.

5.1.1.3. The Communication Protocol.

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

5.1.2.1. Upon CxA’s receipt of general and criminal background check clearance, assist CxA in obtaining such access to the Sites as is reasonably necessary to enable CxA 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 CxA as necessary to allow CxA to proceed with delivery of the Professional Services in a timely manner.

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

5.2.1. Timely Delivery of Conforming Services. CxA 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 CxA shall be corrected by CxA 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 CxA. In the event that CxA is determined to have been the cause of such an error, CxA shall bear the reasonable construction costs to resolve said error.

5.2.3. Limitation of Authority. CxA agrees that the TFC Project Manager shall not have any express or implied authority to vary or otherwise amend the terms and conditions of this Agreement in any way, or waive strict compliance with the terms and conditions of this Agreement, except as to the deadlines set out in Section 2.1 above, any deviation from which must be evidenced by the TFC Project Manager in writing.

5.2.4. CxA Safety. All CxA'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 CxA and subcontractors shall be trained in accordance with Chapter 29, Occupational Safety and Health Regulations. CxA and subcontractors shall inform the Contract Administrator of their Hazardous Electrical Energy Control, Lockout/Tag-out Procedure. CxA'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. CxA Cooperation. CxA 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 CxA except with the prior written direction of the Contract Administrator. CxA 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 CxA's risk. CxA 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 CxA replace unsatisfactory personnel, which request shall not be unreasonably denied. CxA 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, CxA shall report the concern to the Contract Administrator who will resolve the conflict.

5.2.7. E-Verify. By entering into this Agreement, CxA 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 CxA to perform work pursuant to the Agreement, within the United States of America. CxA 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 CxA, and CxA'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. CxA 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, CxA (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 CxA 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 G," 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 CxA'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 CxA, nor shall any other Subcontractors be engaged by CxA, unless prior written consent is obtained from TFC, which consent shall not be unreasonably withheld, conditioned, or delayed.

5.2.9. Buy Texas. If CxA is authorized to make purchases under this Agreement, CxA certifies that CxA 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. CxA does not control or guarantee the performance of any Contractor, provided however, CxA 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. CxA represents and warrants that neither CxA nor any of CxA'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, CxA has fully advised TFC in writing as to the facts and circumstances surrounding the conviction(s).

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

5.2.13.2.1. 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 CxA's employees and/or Subcontractors, DPS or TFC, will adjudicate the results of the criminal background searches in accordance with the criteria set forth in the *Criminal Background Checks and Application Guidelines*, a digital copy of which is incorporated herein by reference for all purposes in PDF on the Exhibits CD, and named therein as "Exhibit H." CxA's or Subcontractor's failure to timely secure criminal background check clearance shall not be considered a legitimate delay.

5.2.14. Equal Opportunity. CxA shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, disability, political affiliation, or religious belief. CxA 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, national origin, age, disability, political affiliation, or religious belief. 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. CxA shall post in conspicuous places, available to employees or applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination subsection. CxA shall include the above provisions in all Subcontracts pertaining to the Professional Services.

5.2.15. No Advertising. CxA 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. CxA 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 CxA’s prosecution of the Work were prepared solely for the benefit of TFC, and that CxA shall have no right to rely upon such and that any reliance thereon shall be at CxA’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 CxA and its consultants. If CxA 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 CXA

6.1. Warranties and Representations by CxA. CxA 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. CxA 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 CxA to provide the goods or services required by this Agreement. CxA will be responsible to pay all taxes, assessments, fees, premiums, permits, and licenses required by law. CxA 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, CxA 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. CxA shall not place any employee of CxA at a worksite, nor shall CxA 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. CxA warrants that CxA: (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 CxA'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. CxA further acknowledges, agrees, and warrants that CxA: (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 CxA'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, CxA 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 CxA or any of its employees.

6.1.2.3. CxA 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. CxA 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 CxA 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, CxA shall be bound by, and comply with, CxA's Proposal dated February 16, 2018, a digital copy of which is incorporated herein by reference for all purposes in PDF on the Exhibits CD and named therein as "Exhibit I," to the extent any warranties, representations, and/or promises of additional services are made therein, and only to that extent.

6.1.7. Eligibility. CxA 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, CxA 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. CxA 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. CxA 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. CxA 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 CxA or any of CxA's officers have occurred or are currently pending in an administrative proceeding or in a lawsuit filed with any court, then CxA 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 CxA employs or has used the services of a former executive head of TFC or any other state agency, then CxA 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 CxA, and the date of employment with CxA.

6.1.11. No Conflicts. CxA represents and warrants that CxA has no actual or potential conflicts of interest in providing services to the State of Texas under this CxA and that CxA'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, CxA 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, CxA certifies that CxA 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 CxA's company or corporation. CxA 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 CxA will be dealing on behalf of TFC.

6.1.13. Prior Employment. CxA 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 CxA's firm or corporation. CxA 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 CxA will be dealing on behalf of TFC pursuant to the Texas Government Code, Chapter 573 and Section 2254.032. Furthermore, CxA 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 CxA, 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, CxA certifies that it does not boycott Israel and will not boycott Israel during the term of this Agreement.

## 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 Texas Constitution, Article III, Section 49. In compliance with Texas Constitution, Article VIII, Section 6, it is understood that all obligations of TFC hereunder are subject to the availability of state funds. If such funds are not appropriated or become unavailable, this 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 CxA, for the fiscal year Budget in existence at the time of the breach.

## VIII. COPYRIGHTS AND TRADEMARKS

8.1. Copyrights. CxA 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 CxA are subject to copyright protection, CxA hereby grants to TFC a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use such and to authorize others to do so. CxA 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 CxA pursuant to this Agreement shall be considered instruments of its services in respect to the Project. It is

understood that CxA does not represent such Deliverables to be suitable for reuse on any other study or for any other purpose(s). If CxA, at TFC's request and authorization, verifies or adapts CxA's Deliverables for TFC's use on another study, CxA shall be compensated for redesign or new design, bidding, and construction administration services.

8.1.2. Delivery to TFC. CxA 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. CxA 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. CxA 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. CxA 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 CxA 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 CxA 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 CxA.

9.4.1. Protection of Confidential Information. CxA 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 CxA; 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 CxA 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 CxA to be confidential and proprietary to TFC; or (iv) not generally known by CxA. 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 CxA 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). 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.

9.4.2.4. 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.

9.4.2.5. 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.

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

9.4.3. Covenants. As a consequence of CxA's acquisition or anticipated acquisition of Confidential Information, CxA 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, CxA 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, CxA 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 CxA will take all reasonable precautions to prevent inadvertent disclosure of such Confidential Information. This prohibition against CxA'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 CxA understands that such similarity does not excuse CxA 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, CxA 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 CxA'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. CxA 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. CxA agrees not to utilize, either directly or indirectly, any Confidential Information in order to facilitate or create direct business relationships with Business Customers of TFC.

9.5. Open Records Request or Similar Requests for Information. In the event that CxA 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, CxA 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 CxA; (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.

9.6. 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 CxA 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 CxA; or (iii) information that TFC is otherwise required to keep confidential by this Agreement.

9.7. Public Records. Notwithstanding any provisions of this Agreement to the contrary, CxA understands that TFC will comply with the Texas Public Information Act, Texas Government Code, Chapter 552. If contacted by TFC, CxA will cooperate with TFC in the production of documents responsive to the request. CxA agrees to provide the documents responsive to the request in the format and within the time frame specified by TFC. CxA 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, CxA 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. CxA 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, CxA is required to make any information created or exchanged with the State pursuant to this Agreement, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public as specified by TFC at no additional charge to the State.

## X. INSURANCE

10.1. Insurance Requirements. All persons who enter into an agreement to provide professional services (hereinafter referred to as “Agreement”), including, but not limited to, professional engineering services and/or professional architectural services, as defined in Texas Government Code, Chapter 2254, Subchapter A (hereinafter collectively referred to as “CxA”) 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 CxA 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, CxA thereby certifies, pursuant to Texas Labor Code Section 406.096(a), that CxA 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), CxA shall require each Subcontractor to certify in writing to the CxA that said Subcontractor provides workers’ compensation and employers’ liability insurance for all of Subcontractor’s employees employed on this public project. CxA 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 CxA’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. CxA 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. CxA 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 CxA.

10.3.3. Additional Policy Requirements. In the event the primary insurance policy does not so provide, CxA 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: Carol L. Palermo, ACSR, CISR, CAM, 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. CxA 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 CxA 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. CxA 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. CxA must update all expired policies prior to submission of any Application for Payment.

10.3.7. Notice of Erosion. CxA 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, CxA, 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 CxA, provided however, such modifications must be commercially available to CxA. TFC shall make an equitable adjustment to the Contract Sum for any additional cost resulting therefrom.

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

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 CxA 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 CxA 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 CxA under the Agreement or under any other agreement between TFC and CxA.

10.3.10.4. TFC may withhold any payments due to CxA 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 CxA 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 CxA's liability under the indemnifications granted to TFC.

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

## XI. MISCELLANEOUS PROVISIONS

### 11.1 INDEMNIFICATION.

11.1.1. ACTS OR OMISSIONS. CXA SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS TFC AND THE STATE OF TEXAS, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY AND DAMAGES ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES ARISING OUT OF, OR RESULTING FROM ANY ACTS OR OMISSIONS OF CXA OR ITS AGENTS, EMPLOYEES, SUBCONTRACTORS OR SUPPLIERS OF SUBCONTRACTORS IN THE EXECUTION OR PERFORMANCE OF THE AGREEMENT AND ANY PURCHASE ORDERS ISSUED UNDER THE AGREEMENT. THESE REQUIREMENTS SHALL SURVIVE THE TERM OR TERMINATION OF THIS AGREEMENT UNTIL ALL CLAIMS HAVE BEEN SETTLED OR RESOLVED AND SUITABLE EVIDENCE TO THAT EFFECT HAS BEEN FURNISHED TO TFC. THE DEFENSE SHALL BE COORDINATED BY CXA WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CXA MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. CXA AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

11.1.2. INFRINGEMENTS. CXA 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 OR ARISING FROM ANY WORK PRODUCT, INCLUDING DRAWINGS, SPECIFICATIONS, DOCUMENTS AND ENGINEERING CRITERIA SUCH AS METHODS, PROCESSES, TECHNIQUES OR PROCEDURES, PROVIDED OR FURNISHED BY CXA TO TFC IN CONNECTION WITH THE PERFORMANCES OR ACTIONS OF CXA PURSUANT TO THIS AGREEMENT. CXA AND TFC AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. CXA SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY CXA WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CXA MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. CXA 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 CXA'S WRITTEN APPROVAL; (III) ANY MODIFICATIONS MADE TO THE PRODUCT BY CXA 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 CXA BECOMES AWARE OF AN ACTUAL OR POTENTIAL CLAIM, OR TFC PROVIDES CXA WITH NOTICE OF AN ACTUAL OR POTENTIAL CLAIM, CXA MAY (OR IN THE CASE OF AN INJUNCTION AGAINST TFC, SHALL), AT CXA'S SOLE OPTION AND EXPENSE: (I) PROCURE FOR TFC THE RIGHT TO CONTINUE TO USE THE AFFECTED PORTION OF THE PRODUCT OR SERVICE; OR (II) MODIFY OR REPLACE THE AFFECTED PORTION OF THE PRODUCT OR SERVICE WITH FUNCTIONALLY EQUIVALENT OR SUPERIOR PRODUCT OR SERVICE SO THAT TFC'S USE IS NON-INFRINGEMENT.**

**11.1.3. TAXES/WORKERS' COMPENSATION/UNEMPLOYMENT INSURANCE – INCLUDING INDEMNITY. CXA AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS AGREEMENT, CXA SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF CXA'S AND CXA'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS AGREEMENT. CXA 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 CXA, 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. CXA 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. CXA SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY CXA WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND CXA MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. CXA 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 CxA's obligations with TFC. If CxA subcontracts with others for some or all of the services to be performed under this Agreement, CxA shall comply with all HUB requirements pursuant to Chapter 2161 of the Texas Government Code. When required, CxA shall submit an updated HUB Subcontracting Plan, a digital copy of the form for which is incorporated herein by reference for all purposes in PDF on the Exhibits CD, and named therein as "Exhibit J-1." CxA shall provide the HUB program of TFC with pertinent details of any participation by a HUB in fulfilling the duties and obligations arising hereunder on the HUB Subcontracting Plan Progress Assessment Report, 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 J-2."

11.3. Relationship of the Parties. CxA 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, CxA is and shall be an independent contractor. Subject only to the terms of this Agreement, CxA 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 CxA or any other party. CxA 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. CxA 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 CxA may engage Subcontractors to perform some or all of the Professional Services. In any approved Subcontracts, CxA shall legally bind such Subcontractor to perform and make such Subcontractor subject to all the duties, requirements, and obligations of CxA specified herein. Nothing herein shall be construed to relieve CxA of the responsibility for ensuring that the goods delivered and/or the services rendered by CxA and/or any of its Subcontractors comply with all the terms and provisions of this Agreement. CxA 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. CxA, CxA'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 CxA, CxA'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. CxA'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 CxA: Sebesta, Inc., dba NV5  
Attention: Rey Roca, Vice President  
1701 Directors Boulevard, Suite 420  
Austin, Texas 78744  
Telephone: (512) 687-0790  
E-Mail: Rey.Roca@nv5.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. CxA must provide TFC with written notification of all name changes and organizational changes relating to CxA including, but not limited to, merger, acquisition or sale no later than ten (10) business days of such change. CxA, in its notice, shall describe the circumstances of the name change or organizational change, state its new name, provide the new Tax Identification Number, and describe how the change will impact its ability to perform under the Agreement. If the change entails personnel changes for personnel performing the responsibilities of the Agreement for CxA, CxA shall identify the new personnel and provide resumes to TFC, if resumes were originally required by the solicitation. TFC may request other information about the change and its impact on the Agreement and CxA 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 CxA or successor entity, as applicable, to maintain its status as a party to this Agreement. TFC may terminate the Agreement due to any change to CxA that materially alters CxA's ability to perform under the Agreement.

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” located at: <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. CxA 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. CxA 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 CxA. 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 CxA'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 CxA 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. CxA may make a claim against TFC for breach of a contract between TFC and CxA. TFC may assert a counterclaim against CxA.

11.13.1.2. CxA 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 CxA seeks as damages; and (iii) the legal theory of recovery.

11.13.1.4. TFC must assert, in a writing delivered to CxA, 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 CxA 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 CxA 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. CxA 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. CxA 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. CxA 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 CxA brings a civil suit against TFC and prosecutes it to final judgment pursuant to Chapter 114 of the Code, any recovery by CxA 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. **CXA 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. CxA 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, CxA 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. CxA represents and warrants that during the five (5) year period preceding the date of this Agreement, CxA 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. 2016 Texas Capitol Complex Master Plan, located at: <http://www.tfc.state.tx.us/divisions/commissionadmin/tools/>.

- 11.26.4. Exhibit D. List of CxA's Key Personnel.
- 11.26.5. Exhibit E. CxA's Fee Schedule and Staffing Plan.
- 11.26.6. Exhibit F. CxA's Hourly Fee Rates for Additional Services.
- 11.26.7. Exhibit G. List of CxA Project Manager and Subcontractors.
- 11.26.8. Exhibit H. Criminal Background Checks and Application Guidelines.
- 11.26.9. Exhibit I. CxA's Proposal dated February 16, 2018.
- 11.26.10. Exhibit J-1. HUB Subcontracting Plan Form.
- 11.26.12. Exhibit J-2. HUB Subcontracting Plan Progress Assessment Report Form.

11.27. Survival of Terms. Termination of the Agreement for any reason shall not release CxA 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.

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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**

**SEBESTA, INC., DBA NV5**

By: JSR#

By: [Signature]

John S. Raff

Dwayne Miller

Interim Executive Director

President

Date of Execution: 5-14-18

Date of Execution: 5/1/2018

G.C. URG

Dir. MW

D.E.D. [Signature]

**EXHIBITS CD**