

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

ENGINEERING SERVICES CONTRACT

THIS CONTRACT, by and between the CITY OF DALLAS, a municipal corporation, located in Dallas County, Texas, hereinafter called "City" and _____, a corporation organized and existing under the law of the State of Texas, hereinafter called "Engineer", evidences the following:

WHEREAS, City desires the professional engineering services of Engineer, for _____
_____ in the City and County of Dallas, Texas, hereinafter called "Project", and

WHEREAS, Engineer is qualified and capable of performing the professional engineering services proposed herein for this Project and is willing to enter into this Contract with City to perform said services;

NOW, THEREFORE, the parties in consideration of the terms and conditions contained herein agree as follows:

1. EMPLOYMENT OF THE ENGINEER

Engineer agrees to perform professional engineering services in connection with the Project as set forth in the following sections of this Contract and City agrees to pay, and Engineer agrees to accept, fees as set forth in the following sections as full and final compensation for all services provided under this Contract.

2. CONTRACT ADMINISTRATION

This Contract shall be administered on behalf of City by its Director of _____, or his designated representatives (hereinafter called "Director"); and on behalf of Engineer by its duly authorized officials.

3. ENGINEER'S SERVICES

A. Engineer agrees to perform services for the Project in accordance with the Scope of Work contained in Exhibit A, attached to and made a part of this Contract.

B. The fixed limit of the total construction budget for the Project is \$_____. **This amount is established as a condition of this Contract, and shall provide the basis for Engineer's design decisions.** Engineer, in consultation with City, shall determine what materials, equipment, component systems and types of construction are to be included in the plans and specifications, and will make reasonable adjustments in the scope of the Project to bring it within the total construction budget. With the prior approval of City, Engineer may also include in the plans and specifications alternate bids to adjust the construction cost to the total construction budget. If the lowest responsible bid is within the fixed limit of the total construction budget for the Project, **or** the Engineer's latest detailed estimate of probable construction cost is still less than the fixed limit of the total construction budget, established as a condition of this Contract, City shall pay the Engineer the fees for basic services in accordance with this Contract.

C. If the lowest responsible bid exceeds its portion of the fixed limit of the total construction budget for the Project, and as a result thereof, or for other reasons, the latest estimate of probable construction cost exceeds the fixed limit of the total construction budget for the Project, established as a condition of this Contract, City at its option may either: (1) give written approval of an increase in the fixed limit, with no obligation to increase Engineer's fee, (2) authorize rebidding within a reasonable time, or (3) cooperate in revising the Project scope and quality as required to reduce the probable construction cost to the fixed limit of the total construction budget. In the case of (3), Engineer, **without additional charge**, shall immediately modify the plans and specifications as necessary to bring the Project cost within the total construction budget, or within any higher fixed limit subsequently authorized by City. The providing of this service shall be the limit of Engineer's responsibility in this regard, and having done so, Engineer shall be entitled to its fees in accordance with this Contract.

4. PAYMENT FOR SERVICES

A. Total payment for services described in Paragraph 3 for the Project shall be a lump sum not to exceed \$_____.

B. Engineer shall submit monthly statements for services rendered, based upon percentage of completion of the work. City shall make prompt monthly payments in the amount shown by the Engineer's approved monthly statements and other documentation submitted. No interest shall ever be due on late payments caused by any good faith claim or dispute in connection with this Contract or that City has a right or obligation to withhold under this Contract or state law. Progress payments under this Contract for the work shall be up to but shall not exceed 95% of the total amount stated in Paragraph 4.A. Within thirty (30) days after final completion and acceptance by the Director of all Engineer's services under this Contract, final payment of the balance shall be made.

C. Nothing contained in this section shall require City to pay for any work which is unsatisfactory as determined by the Director, or which is not submitted in compliance with the terms of this Contract. City shall not be required to make any payments to Engineer when the Engineer is in default under this Contract, nor shall this paragraph constitute a waiver of any right, at law or in equity, which City may have if the Engineer is in default, including the right to bring legal action for damages or for specific performance of this Contract. Waiver of any default under this Contract shall not be deemed a waiver of any subsequent default.

5. OFFSET

City may, at its option, offset any amounts due and payable under this Contract against any debt (including taxes) lawfully due to City from Engineer, regardless of whether the amount due arises pursuant to the terms of this Contract or otherwise and regardless of whether or not the debt due to City has been reduced to judgment by a court.

6. OWNERSHIP OF DOCUMENTS

All information and other data given to, prepared, or assembled by Engineer under this Contract, and other related items, shall become the sole property of City and shall be delivered to City, without restriction on future use. Engineer may make copies of any and all documents and items for its files and use. Engineer shall have no liability for changes made to or use of the drawings, specifications, and other documents by City or by other engineers subsequent to the completion of the Project. City shall require that any such change or other use shall be sealed by the Engineer making that change or use and shall be appropriately marked to reflect what was changed or modified. By execution of this Contract and in consideration of the fee for services to be paid under the Contract, Engineer hereby conveys, transfers and assigns to City all rights under the Federal Copyright Act of 1976 (or any successor copyright statute), as amended, all common law copyrights and all other intellectual property rights acknowledged by law in the project designs and other project deliverables developed under this Contract.

7. COMPLIANCE WITH ARCHITECTURAL BARRIERS ACT

If the construction budget for this Project is \$50,000 or greater, Engineer shall submit copies of all design development documents to the Texas Department of Licensing and Regulation in Austin, Texas for approval prior to their submission to City.

8. SERVICES BY CITY

City shall provide the following services under this Contract:

A. Provide available criteria and information to the Engineer as to City's requirements for the Project.

B. Provide sample drawings to use as guidelines.

C. Provide all available drawings, maps, and notes relating to the existing facilities within the limits of the Project.

9. COMPLETION SCHEDULE

The provisions of this Paragraph have been agreed to in anticipation of the orderly and continuous progress of the Project. Time is of the essence under this Contract. However, neither Engineer nor City shall be held responsible for delays caused by circumstances beyond their respective control. In such event, notice of delay must be timely given and reasonable efforts undertaken to mitigate effects.

A submission that falls due on Saturday, Sunday or official City holiday shall become due on the next City working day.

The services furnished by Engineer under this Contract will be completed in accordance with the schedule described in Exhibit B, attached to and made a part of this Contract, unless an extension of time, based upon good reasons presented by Engineer, is approved by the Director.

10. COMMENCEMENT OF SERVICES

No work shall be done under this Contract until the Engineer is instructed in writing to proceed.

11. TERMINATION OF CONTRACT

The Director may indefinitely suspend further work under this Contract, or may terminate this Contract or any phase of this Contract for cause or convenience of the City, upon thirty (30) days prior written notice to Engineer with the understanding that upon the receipt of such notice all work and labor being performed under this Contract shall cease immediately. Before the end of the thirty (30) day period, Engineer shall invoice City for all work accomplished by him prior to the date of termination. No amount shall be due for lost or anticipated profits. All plans, field surveys, and other data related to the Project shall become property of City upon termination of the Contract, and shall be promptly delivered to City in a reasonably organized form without restriction on future use except as stated in Paragraph 6. Should City subsequently contract with a new engineer for continuation of services on the Project, Engineer shall cooperate in providing information.

12. RESPONSIBILITY FOR CLAIMS AND LIABILITIES

Approval by City shall not constitute nor be deemed a release of the responsibility and liability of Engineer, its officers, agents, employees, associates, and subconsultants for the accuracy and competency of their designs or other work; nor shall such approval be deemed to

be an assumption of such responsibility by City for any defect in the design, or other work prepared by Engineer, its officers, agents, employees, associates, and subconsultants.

13. EQUAL EMPLOYMENT OPPORTUNITY

A. Engineer shall not discriminate against any employee or applicant for employment because of race, age, color, religion, sex, ancestry, national origin, handicap unrelated to job performance or place of birth. Engineer shall take affirmative action to insure that applicants are employed and that employees are treated during their employment without regard to their race, age, color, religion, sex, ancestry, national origin, handicap unrelated to job performance or place of birth. This 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 of training, including apprenticeship. Engineer shall also comply with all applicable requirements of the Americans with Disabilities Act, 42 U.S.C.A. §§12101-12213, as amended. Engineer agrees to post in conspicuous places, available to employees and applicants, notices to be provided by City setting forth the provisions of this non-discrimination clause.

B. Engineer shall, in all solicitations or advertisements for employees placed by or on behalf of Engineer, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, ancestry, national origin, handicap unrelated to job performance or place of birth.

C. Engineer shall furnish all information and reports required by the City Manager or his designee and shall permit the City Manager or his designee to investigate his payrolls and personnel records which pertain to current professional services contracts with City for purposes of ascertaining compliance with this equal employment opportunity clause.

D. Engineer shall file compliance reports with City as may be required by the City Manager or his designee. Compliance reports must be filed within the time, must contain information as to the employment practices, policies, programs, and statistics of Engineer, and must be in the form that the City Manager or his designee prescribes.

E. If Engineer fails to comply with the equal employment opportunity provisions of this Contract, it is agreed that City at its option may do either or both of the following:

- (1) Cancel, terminate or suspend this Contract in whole or in part;
- (2) Declare Engineer ineligible for further City contracts until he is determined to be in compliance.

14. AMENDMENTS

This Contract may be amended or supplemented in any particular only by written instrument, and only as approved by resolution of the City Council or, where applicable, by duly

authorized administrative action signed by the City Manager and approved as to form by the City Attorney.

15. MINORITY BUSINESS ENTERPRISE PARTICIPATION

Engineer will be required to complete the schedule of MBE participation in accordance with the forms provided in Exhibit C, which exhibit is attached to and made a part of this Contract.

16. COMPLIANCE WITH LAWS AND REGULATIONS

This Contract is entered into subject to and controlled by the Charter and ordinances of the City of Dallas, as amended, and all applicable laws, rules, and regulations of the State of Texas and the Government of the United States of America. Engineer shall, during the course of performance of this Contract, comply with all applicable City codes and ordinances, as amended, all applicable State and Federal laws, as amended, and with all applicable rules and regulations promulgated by all local, State, and national boards, bureaus, and agencies.

17. RIGHT OF REVIEW AND AUDIT

Engineer agrees that City may review any and all of the work performed by Engineer under this Contract. City is granted the right to audit, at City's election, all of Engineer's records and billings related to performance of this Contract. Engineer agrees to retain such records for a minimum of three (3) years following completion of this Contract. Any payment, settlement, satisfaction, or release provided under this Contract shall be subject to City's rights as may be disclosed by such audit.

18. CONFLICT OF INTEREST

The following section of the Charter of the City of Dallas shall be one of the conditions of, and a part of the consideration of this Contract, to wit:

“CHAPTER XXII. Sec. 11. FINANCIAL INTEREST OF EMPLOYEE OR OFFICER PROHIBITED -- No officer or employee shall have any financial interest, direct or indirect, in any contract with the City or be financially interested, directly or indirectly, in the sale to the City of any land, materials, supplies or services, except on behalf of the City as an officer or employee. Any violation of this section shall constitute malfeasance in office, and any officer or employee guilty thereof shall thereby forfeit the officer's or employee's office or position with the City. Any violation of this section, with knowledge, express or implied, of the person or corporation contracting with the City shall render the contract involved voidable by the City Manager or the City Council.

The alleged violations of this section shall be matters to be determined either by the Trial Board in the case of employees who have the right to appeal to the Trial Board, and by the City Council in the case of other employees.

The prohibitions of this section shall not apply to the participation by City employees in federally-funded housing programs, to the extent permitted by applicable federal or state law.”

19. GIFT TO PUBLIC SERVANT

City may terminate this Contract immediately if Engineer has offered, or agreed to confer any benefit upon a City employee or official that the City employee or official is prohibited by law from accepting.

For purposes of this Paragraph, “benefit” means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct or substantial interest, but does not include a contribution or expenditure made and reported in accordance with law.

Notwithstanding any other legal remedies, City may require Engineer to remove any employee of Engineer from the Project who has violated the restrictions of this section or any similar state or federal law, and obtain reimbursement for any expenditures made as a result of the improper offer, agreement to confer, or conferring of a benefit to a City employee or official.

20. NOTICE OF CONTRACT CLAIM

This Contract is subject to the provisions of Section 2-86 of the Dallas City Code, as amended, relating to requirements for filing a notice of a breach of contract claim against City. Section 2-86 of the Dallas City Code, as amended, is expressly incorporated by reference and made a part of this Contract as if written word for word in this Contract. Engineer is expected to fully comply with the requirements of this ordinance as a precondition of any claim relating to this Contract, in addition to all other requirements in this Contract related to claims and notice of claims.

21. ASSIGNMENT

This Contract provides for unique professional services. Engineer, therefore, shall not assign this Contract, in whole or in part, without the prior written consent of City, acting through the Director.

22. NOTICES

Except as otherwise provided in Section 20, all notices, communications, and reports required or permitted under this Contract shall be personally delivered or mailed to the respective parties by depositing same in the United States mail at the addresses shown below, unless and until either party is otherwise notified in writing by the other party at the following addresses. Mailed notices shall be deemed communicated as of five days mailing.

If intended for City, to:

If Intended for Engineer, to:

23. INDEPENDENT CONTRACTOR

In performing services under this Contract, the relationship between City and Engineer is that of independent contractor, and Engineer and City by the execution of this Contract do not change the independent status of Engineer. Engineer shall exercise independent judgment in performing duties under this Contract and is solely responsible for setting working hours, scheduling or prioritizing the work flow and determining how the work is to be performed. No term or provision of this Contract or act of Engineer in the performance of this Contract shall be construed as making Engineer the agent, servant or employee of City, or making Engineer or any of its employees eligible for the fringe benefits, such as retirement, insurance and worker’s compensation, which City provides its employees.

24. INDEMNITY

Engineer agrees to defend, indemnify and hold City, its officers, agents and employees, harmless against any and all claims, lawsuits, judgments, costs and expenses for personal injury (including death), property damage or other harm for which recovery of damages is sought, suffered by any person or persons, that may arise out of or be occasioned by Engineer’s breach of any of the terms or provisions of this Contract, or by any negligent act or omission of Engineer, its officers, agents, associates, employees or subconsultants, in the performance of this Contract; except that the indemnity provided for in this Paragraph shall not apply to any liability resulting from the sole negligence or fault of City, its officers, agents, employees or separate contractors, and in the event of joint and concurrent negligence of both Engineer and City, responsibility and indemnity, if any, shall be apportioned in accordance with the laws of the State of Texas, without, however, waiving any governmental immunity available to the City under Texas law and without waiving any defense of the parties under Texas law. The provisions of this Paragraph are solely for the benefit of the parties to this Contract and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

25. PATENT AND COPYRIGHT INDEMNITY

A. Engineer agrees to completely defend and indemnify City, its officers, agents and employees, against a claim that any of the designs, plans or specifications prepared by Engineer, its employees, associates or subconsultants, pursuant to this Contract infringe a U.S. patent or copyright directly, indirectly or contributorily, regardless of whether or not

City is proven to have actively induced or contributed to the infringement. Engineer will pay any and all resulting costs, damages and attorney's fees finally awarded, provided that:

- (1) City promptly notifies Engineer in writing of the claim; and
- (2) Engineer has sole control of the defense and all related settlement negotiations.

B. If Engineer defends City against such claims, the City Attorney of City shall be kept informed of settlement negotiations, and shall execute any settlement agreement reached by Engineer on City's behalf.

C. Engineer's defense and indemnification under this Section is conditioned on City's agreement that if any of the designs, plans or specifications, become, or in Engineer's opinion are likely to become, the subject of such a claim, City will permit Engineer, at Engineer's option and expense, either to procure the right for City to continue using the designs, plans or specifications or to replace or modify the same so that they become non-infringing; and if neither of the foregoing alternatives is available on terms which are reasonable in Engineer's judgment, City, to the extent City is legally able to do so, will cease using the designs, plans or specifications on written request of Engineer, in which instance City has the sole option to either require Engineer to perform new design work at Engineer's sole expense, or to terminate this Contract.

D. Engineer has no liability under this Section for any claim of infringement based upon the modification or alteration of the designs, plans or specifications prepared under this Contract subsequent to the Project by City, or by any engineering consultant subsequently employed by City.

E. The foregoing states the entire obligation of Engineer with respect to infringement of patents and copyrights.

26. INSURANCE

A. Engineer shall procure, pay for, and maintain during the term of this Contract, with a company authorized to do business in the State of Texas and otherwise acceptable to CITY, the minimum insurance coverage contained in Exhibit D, attached to and made a part of this Contract.

B. Approval, disapproval or failure to act by City regarding any insurance supplied by Engineer or its subconsultants shall not relieve Engineer of full responsibility or liability for damages, errors, omissions or accidents as set forth in this Contract. The bankruptcy or insolvency of Engineer's insurer or any denial of liability by Engineer's insurer shall not exonerate Engineer from the liability or responsibility of Engineer set forth in this Contract.

27. VENUE

The obligations of the parties to this Contract shall be performable in Dallas County, Texas, and if legal action is necessary to enforce it, exclusive venue shall lie in Dallas County, Texas.

28. GOVERNING LAW

This Contract shall be governed by and construed in accordance with the laws and court decisions of the State of Texas, without regard to conflict of law or choice of law principles of Texas or of any other state.

29. LEGAL CONSTRUCTION

In case any one or more of the provisions contained in this Contract 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 of this Contract, and this Contract shall be considered as if such invalid, illegal, or unenforceable provision had never been contained in this Contract.

30. COUNTERPARTS

This Contract may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument. If this Contract is executed in counterparts, then it shall become fully executed only as of the execution of the last such counterpart called for by the terms of this Contract to be executed.

31. PUBLISHED MATERIAL

Engineer agrees that the Director shall review and approve any written material about City projects or activities prior to being published by Engineer.

32. CAPTIONS

The captions to the various clauses of this Contract are for informational purposes only and shall not alter any substance of the terms and conditions of this Contract.

33. SUCCESSORS AND ASSIGNS

This Contract shall be binding upon and inure to the benefit of the parties and their respective successors and, except as otherwise provided in this Contract, their assigns.

34. ENTIRE AGREEMENT; NO ORAL MODIFICATIONS

This Contract (with all referenced Exhibits, attachments, and provisions incorporated by reference) embodies the entire agreement of both parties, superseding all oral or written previous and contemporary agreements between the parties relating to matters set forth in this Contract. Except as otherwise provided elsewhere in this Contract, this Contract cannot be modified without written supplemental agreement executed by both parties.

EXECUTED this the ___ day of _____, 20__, by City, signing by and through its City Manager, duly authorized to execute same by Resolution No. _____, adopted by the City Council on _____, 20__, and by Engineer, acting through its duly authorized officials.

APPROVED AS TO FORM:
THOMAS P. PERKINS, JR.
City Attorney

CITY OF DALLAS
MARY K. SUHM
City Manager

BY _____
Assistant City Attorney

BY _____
Assistant City Manager

ATTEST:

PARK AND RECREATION BOARD
CITY OF DALLAS, TEXAS

BY _____
Secretary

BY _____
President

ATTEST:

ENGINEER:

BY _____
Engineer's Corporate Secretary

BY _____
President