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## County of El Paso Agenda Item Details

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<b>Item Title:</b>	Public Works/Facilities - Downtown Annex Chiller Installation
<b>Submitted By:</b>	Robin Sully, Director
<b>Department:</b>	Facilities Management
<b>Department Phone Number:</b>	915-546-2009
<b>Subject:</b>	Approve and authorize the County Judge to sign the Fixed Price Construction Contract between El Paso County, Texas and Trane US Inc. (the "Contractor") to Purchase and Install a Water Cooled Helical Rotary Chiller at the County of El Paso Downtown County Annex in the amount of \$222,324.20. Funds are available in CP-REPLACE24-FAC-DWTANNX-HVAC. (Contract No. 2024-0582)
<b>Background:</b>	<p>The Facilities Maintenance Department is seeking to hire Trane US Inc to Purchase and Install a Water Cooled Helical Rotary Chiller at the Downtown Annex. The Downtown Annex HVAC system is operated by two chillers (primary and alternate). The purpose of the primary chiller is to maintain a constant air flow within the primary chiller circuit. The primary chiller is currently nonoperational causing less than inadequate air to circulate throughout the facility. It also put a strain on the secondary chiller to keep the facility at a cool operating temperature. A new Chiller will produce a constant supply of chilled water at the set temperature providing a cooler environment to conduct daily operations.</p> <p>Contract Number: 2024-0582 Contract Term Start: 8/25/2024 Contract Term End: 2/27/2025 County Attorney Opinion Number:</p>
<b>Fiscal Impact:</b>	<p>Fiscal Impact Historical</p> <p>Fiscal Impact Projected \$222,324.20 CP-REPLACE24-FAC-DWTANNX-HVAC</p>

COCN-3001-REPLC24-431-10-11160-0257-24107-703002-

Long Account Number: Amount:

Long Account Number: COCP-3001-REPLC24-431-10-11160-0257-24107-703002- Amount: \$222,324.20

**Budget or Unbudgeted Match:**

**Recommendation:**

Approval

**Prior Action:**

Bid Award – CC 5/20/24, Consent “W”

**Strategic Plan:**

Goal:

null

Objective:

**Strategic Plan Information:**

**Estimated Time Needed  
For This Item:**



# COMMISSIONERS COURT CONTRACT FORM

## CONTRACT SUMMARY

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Approve and authorize the County Judge to sign the Fixed Price Construction Contract between El Paso County, Texas and Trane US Inc. (the "Contractor") to Purchase and Install a Water Cooled Helical Rotary Chiller at the County of El Paso Downtown County Annex. Funds are available in CP-REPLACE24-FAC-DWTANNX-HVAC. Contract: 2024-0582.

### ADDITIONAL BACKGROUND:

The Facilities Maintenance Department is seeking to hire Trane US Inc to Purchase and Install a Water Cooled Helical Rotary Chiller at the Downtown Annex. The Downtown Annex HVAC system is operated by two chillers (primary and alternate). The purpose of the primary chiller is to maintain a constant air flow within the primary chiller circuit. The primary chiller is currently nonoperational causing less than inadequate air to circulate throughout the facility. It also put a strain on the secondary chiller to keep the facility at a cool operating temperature. A new Chiller will produce a constant supply of chilled water at the set temperature providing a cooler environment to conduct daily operations.

### FISCAL IMPACT:

\$222,324.20

CP-REPLACE24-FAC-DWTANNX-HVAC

COCP-3001-REPLC24-431-10-11160-0257-24107-703002-

### PRIOR COURT ACTION:

Bid Award - CC 5/20/24, Consent "W"

### RECOMMENDATION:

Approval

## BASIC CONTRACT DETAILS

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CONTRACT NO.: 2024-0582

CONTRACT TITLE: Downtown County Annex / Water Cooled Helical Rotary Chiller (Duplex) / Purchase and Installation / Construction Agreement

SECOND PARTY: Trane U.S. Inc

CONTRACT TYPE: Construction

## TERM AND BUDGET DETAILS

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TERM: One-Time/One-Shot

EXTENSION OPTIONS: N/A - None Available/Remaining

EFFECTIVE DATE: 8/26/2024

MOD EFFECTIVE DATE (If Applicable):

EXPIRATION DATE: 02/28/2025

MOD EXPIRATION DATE (If Applicable):

EXTENSION DEADLINE DATE (If Applicable):

AMOUNT: 222324.20

MOD AMOUNT (If Applicable):

## **APPROVALS**

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### **COUNTY ATTORNEY APPROVAL**

The attached document has been given legal review by the El Paso County Attorney's Office on behalf of the County of El Paso, its officers, and employees. Said legal review should not be relied upon by any person or entity other than the County of El Paso, its officers, and employees.

COUNTY ATTORNEY: Vivian Arroyo

LEGAL REVIEW: Approved as to Form as Submitted

LEGAL REVIEW NOTES (If Applicable):

DATE: 8/12/2024

### **DIRECTOR/DEPARTMENT HEAD APPROVAL**

The undersigned hereby certifies that he/she has read the contract, understands and approves the contract terms and conditions and further certifies that the contract conforms to the bid specification, if any, and acknowledges that he/she is responsible for administering all terms and conditions.

DIRECTOR/DEPARTMENT HEAD/DESIGNEE: Norma Rivera Palacios

DEPARTMENT CONTACT: Viviana Hernandez

DEPARTMENT: Facilities

DATE: 08/13/2024



## **SUPPLEMENTAL CONTRACT BETWEEN OWNER AND CONTRACTOR**

This FIXED PRICE CONSTRUCTION CONTRACT (the "Contract") is made and entered into by El Paso County, Texas, a political subdivision of the State of Texas (the "Owner") and [Trane US Inc.] (the "Contractor"). This Contract is executed under seal, and shall be effective on the date the last party executed it.

This Contract is for the construction of a project identified as **[Purchase and Installation of Water Cooled Helical Rotary Chiller (Duplex) for the County of El Paso Downtown County Annex]**.

The parties agree:

### **1. DOCUMENTS INCORPORATED BY REFERENCE**

This Contract includes the plans and specifications for the Project, plus the following:

- 1.1 A copy of County Bid # \_21-7411\_\_ entitled "[Region 19 Job Order Contract]" all Bid Addendums, insurance requirements, prevailing wages, apprenticeship order, and all technical specifications (if any) and appropriate excerpts (if any) from the Bid Response, attached as **Exhibit 1**;
- 1.2 Contractor's Payment Bond, attached as **Exhibit 2**;
- 1.3 A copy of Contractor's Performance Bond, attached as **Exhibit 3**; and
- 1.4 A copy of the Insurance Certificates, to be attached as **Exhibit 4**;
- 1.5 **NOTE: Some exhibits, for example Contractor's Payment Bond (Exhibit 2), are provided in blank as examples. Contractor agrees to provide executed copies of blank exhibits as part of its performance under this Contract. Executed exhibits will then be incorporated into this Contract by reference. Contractor's failure to provide executed exhibits is a failure of performance under this Contract. In addition, Contractor's insurance certificates shall be attached as Exhibit 4 and incorporated by reference when available and prior to commencement of construction.** Change Orders issued hereafter, and any other amendments executed by the Owner and the Contractor, shall become and be a part of this Contract. Documents not included or expressly contemplated in this Section do not, and shall not, form any part of this Contract.

- 1.6** This contract is the result of a cooperative purchasing arrangement ESC Region 19 has with Owner and Contractor. Contractor's contract with ESC Region 19 is incorporated by reference as Exhibit 5. **If there is an express conflict between this document and Exhibit 5, the terms of Exhibit 5 shall govern.** The terms of Exhibit 5 and this document shall be read in harmony, if possible, in order to give effect to both.



## 2. REPRESENTATIONS OF THE CONTRACTOR

The Contractor makes the following express representations to the Owner:

- 2.1 The Contractor is fully qualified to act as the contractor for the Project and has, and shall maintain, any and all licenses, permits or other authorizations necessary to act as the contractor for, and to construct, the Project. This representation includes all subcontractors who perform services under this Contract.
- 2.2 The Contractor has become familiar with the Project site and the local conditions under which the Project is to be constructed and operated. This representation includes all subcontractors who perform services under this Contract.
- 2.3 The Contractor has received, reviewed and carefully examined all of the documents which make up this Contract, including (without limitation) the plans and specifications, and has found them in all respects to be complete, accurate, adequate, consistent, coordinated and sufficient for construction. This representation includes all subcontractors who perform services under this Contract.
- 2.4 The Contractor shall ensure that it has an adequate number of personnel, and the proper equipment to perform the scope of services required to complete the Project. Failure to do so constitutes a material breach of this Contract.
- 2.5 If performance of this Contract requires entry into the County courthouse, a facility controlled by the County sheriff (e.g. a detention center), or any other secure county facility, the Contractor shall ensure that all employees of the Contractor as well as all subcontractors of the Contractor pass a criminal background check prior to being allowed perform the scope of services required to complete the Project.

## 3. OWNERS REPRESENTATIVE, PROJECT MANAGER(S), & ENGINEERS.

- 3.1 Owner's Representative is the Director of Public Works, Ms. Norma Rivera Palacios or her successor in office. The Project Manager for this Contract is Erick Hernandez, (Facilities Building Manager). (A Project Manager or Engineer may be the same person.) **The Powers and duties of any "project manager" may be carried out by Owner's Representative, a Project Manager appointed by Owner, or an Engineer appointed by Owner.** The office and mailing address is 800 E. Overland, Room 200, El Paso, Texas. The phone number is 915.546.2015; facsimile is 915.546.8194. The Director of Public Works, or her successor, may replace any Project Manager or Engineer of Owner is at any time at her discretion and will provide reasonable written notice

of such change to Contractor. The El Paso County Commissioners Court may replace Owner's Representative at any time and at its discretion. The Court will provide reasonable written notice of any such change to Contractor.

- 3.2 The duties, obligations, and responsibilities of the Project Manager shall include the following:
- 3.2.1 Unless otherwise directed by the Owner in writing, the Project Manager shall act as the Owner's agent from the effective date of this Contract until final payment has been made, to the extent expressly set forth in this Contract.
  - 3.2.2 Unless otherwise directed by the Owner in writing, the Owner and the Contractor shall communicate with each other in the first instance through the Project Manager.
  - 3.2.3 When requested by the Contractor in writing, the Project Manager shall render interpretations necessary for the proper execution or progress of the work.
  - 3.2.4 The Project Manager shall draft proposed Change Orders.
  - 3.2.5 The Project Manager shall approve, or respond otherwise as necessary concerning shop drawings or other submittals received from the Contractor.
  - 3.2.6 The Project Manager shall be authorized to refuse to accept work which is defective or otherwise fails to comply with the requirements of this Contract. If the Project Manager deems it appropriate, the Project Manager shall be authorized to call for extra inspection or testing of the work for compliance with the requirements of this Contract.
  - 3.2.7 The Project Manager shall review the Contractor's Payment Requests and shall approve in writing those amounts which, in the opinion of the Project Manager, are properly owing to the Contractor as provided in this Contract.
  - 3.2.8 The Project Manager shall, upon written request from the Contractor, perform those inspections required in this Contract (unless a statute requires that they be performed by an engineer).
  - 3.2.9 The Project Manager shall be authorized to require the Contractor to make changes which do not involve a change in the Contract Price or in

the time for the Contractor's performance of this Contract consistent with the intent of this Contract.

- 3.3 THE DUTIES, OBLIGATIONS AND RESPONSIBILITIES OF THE CONTRACTOR UNDER THIS CONTRACT SHALL NOT BE CHANGED, ALTERED, DISCHARGED, RELEASED, OR SATISFIED BY ANY DUTY, OBLIGATION OR RESPONSIBILITY OF THE PROJECT MANAGER (OR ENGINEER). THE CONTRACTOR IS NOT A THIRD-PARTY BENEFICIARY OF ANY CONTRACT BETWEEN THE OWNER AND THE PROJECT MANAGER (OR ENGINEER). THE PARTIES EXPRESSLY ACKNOWLEDGE AND AGREE THAT THE DUTIES OF THE CONTRACTOR TO THE OWNER ARE INDEPENDENT OF, AND ARE NOT DIMINISHED BY, ANY DUTIES OF THE PROJECT MANAGER (OR ENGINEER) TO THE OWNER.
- 3.4. From time to time, Owner may also appoint an engineer to manage the project by designating an engineer in writing. If the Owner should find it necessary or convenient to replace the Engineer, the Owner shall retain a replacement Engineer, and the role of the replacement Engineer shall be the same as the role of the Engineer. If Owner does not designate an engineer, then Owner's representative may fulfill the duties of the engineer to the extent permitted by law. The Engineer (if any) shall have the following duties, obligations, and responsibilities (without limitation):
- 3.4.1 The engineer (if any) shall have all the powers and duties of a Project Manager under this Contract. The engineer shall also have all the powers and duties allocated to an engineer under any Texas statute as long as the exercise of those powers and duties is consistent with the Owner's purposes and interests under this Contract.
- 3.4.2 If a project manager is not a licensed engineer, project manager may not perform the duties of an engineer.
- 3.5 If a dispute arises as to the respective powers and duties of the Engineer and Project Manager, those disputes shall be resolved by the Owner, or Owner's Representative, in her (or its) discretion.

### **3A. CONTRACTOR'S REPRESENTATIVE**

Contractor's representative is Mr. Jorge Polanco, Project Manager. If Contractor elects to replace Mr. Polanco as project manager, it shall notify owner within seven calendar days, in writing.

#### **4. INTENT AND INTERPRETATION**

With respect to the intent and interpretation of this Contract, the Owner and the Contractor agree as follows:

- 4.1 This Contract, together with exhibits constitutes the entire and exclusive agreement between the parties with reference to the Project. This Contract supersedes all prior discussions, communications, representations, understandings, negotiations, or agreements.
- 4.2 Anything that may be required, implied or inferred by the documents which make up this Contract, or any one or more of them, shall be provided by the Contractor for the Contract Price.
- 4.3 Nothing contained in this Contract shall create, nor be interpreted to create, privity or any other relationship whatsoever between the Owner and any person except the Contractor.
- 4.4 When a word, term, or phrase is used in this Contract, it shall be interpreted or construed first, as defined in this Contract; second, if not defined, according to its generally accepted meaning in the construction industry; and third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage.
- 4.5 **THE WORDS "INCLUDE", "INCLUDES", OR "INCLUDING", AS USED IN THIS CONTRACT, SHALL BE DEEMED TO BE FOLLOWED BY THE PHRASE, "WITHOUT LIMITATION."**
- 4.6 The specification of any act, failure, refusal, omission, event, occurrence, or condition as constituting a material breach of this Contract shall not imply that any other (non-specified) act, failure, refusal, omission, event, occurrence, or condition is not a material breach of this Contract.
- 4.7 The Contractor shall have a continuing duty to read, examine, review, compare and contrast each of the documents which make up this Contract, shop drawings, and other submittals and shall give written notice to the Owner, Engineer (if any), and the Project Manager (if any) of any conflict, ambiguity, error or omission which the Contractor may find with respect to these documents before proceeding with the affected work. The express or implied approval by the Owner, the Project Manager, or Engineer (if any) of any shop drawings or other submittals shall not relieve the Contractor of the continuing duties imposed by this Contract, nor shall any such approval be evidence of the Contractor's compliance with this Contract. The Owner has requested the Project Manager to only prepare documents for the Project, including the plans

and specifications for the Project, which are accurate, adequate, consistent, coordinated, and sufficient for construction. **HOWEVER, THE OWNER MAKES NO REPRESENTATION OR WARRANTY OF ANY NATURE WHATSOEVER TO THE CONTRACTOR CONCERNING SUCH DOCUMENTS.** The Contractor again hereby acknowledges and represents that it has received, reviewed and carefully examined such documents, has found them to be complete, accurate, adequate, consistent, coordinated and sufficient for construction, and that the Contractor has not, does not, and will not rely upon any representations or warranties by the Owner concerning such documents, as no such representations or warranties have been, are, or will be made.

4.8 In the event of any conflict, discrepancy, or inconsistency among any of the documents which make up this Contract, the following shall control:

4.8.1 As between figures given on plans and scaled measurements, the figures shall govern.

4.8.2 As between large-scale plans and small-scale plans, the large-scale plans shall govern.

4.8.3 As between plans and specifications, the requirements of the specifications shall govern.

4.8.4 As between this document and the plans or specifications, this document shall govern.

## **5. OWNERSHIP OF THE DOCUMENTS WHICH MAKE UP THE CONTRACT**

5.1 The documents which make up this Contract, as well as any other documents furnished by the Owner, shall remain the property of the Owner. The Contractor shall have the right to keep one copy of the Contract upon completion of the Project. However, the Contractor may not use, or permit to be used, any portion of the documents which make up this Contract on other projects without the Owner's prior written authorization.

## **6. CONTRACTOR'S PERFORMANCE**

6.1 The Contractor shall perform all of the work required, implied, or reasonably inferable from this Contract including the following:

6.1.1 Construction of the Project;

6.1.2 The furnishing of a performance and payment bond in the full amount of the Contract and insurance;

6.1.3 The provision or furnishing, and prompt payment therefore, of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, fuel, heat, light, cooling, or other utilities, required for construction and all necessary building permits and other permits required for the construction of the Project. **CONTRACTOR SHALL LAWFULLY DISPOSE OF ALL CONSTRUCTION MATERIALS, CHEMICALS, AND DEBRIS AND SHALL INDEMNIFY AND HOLD OWNER HARMLESS FOR THE UNLAWFUL DISPOSAL OF ALL CONSTRUCTION MATERIALS, CHEMICALS, AND DEBRIS DONE BY CONTRACTOR OR ITS SUBCONTRACTOR IN FURTHERANCE OF THIS CONTRACT.**

6.1.4 The creation and submission to the Owner of detailed and comprehensive as-built drawings depicting all as-built construction. As-built drawings shall be submitted to the Owner upon final completion of the Project and receipt of same by the Owner shall be a condition precedent to final payment to the Contractor.

## **7. TIME FOR CONTRACTOR'S PERFORMANCE**

- 7.1 The Contractor shall commence the performance of this Contract on the date authorized by Owner/Owner's Representative in a written Notice to Proceed and shall diligently continue its performance to and until final completion of the Project. The Contractor shall accomplish Substantial Completion of the Project on or before [180] consecutive calendar days from the receipt of the Notice to Proceed.
- 7.2 The Contractor shall pay the Owner the sum of \$500.00 per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth in this Contract for Substantial Completion. Any sums due and payable under this Contract by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at the time of executing this Contract. These liquidated damages are based on a reasonable estimate of owner's cost of delay and include the cost of [project management oversight and to cover the rental of HVAC equipment and manual climate control]. When the Owner reasonably believes that Substantial Completion will be inexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving Substantial Completion, or any part thereof, for which the Owner has withheld payment, the Owner shall

promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages.

- 7.3 **"Substantial Completion"** means that point at which, as certified in writing by the Project Manager, the Project is at a level of completion, in strict compliance with this Contract, such that the Owner or its designee can enjoy beneficial use or occupancy and can use or operate it in all respects, for its intended purpose. Partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion.
- 7.4 When Substantial Completion has been achieved, the Contractor shall notify the Owner and the Project Manager in writing and shall furnish to the Project Manager a listing of those matters yet to be finished. The Project Manager will then conduct an inspection to confirm that the work is in fact substantially complete. Upon its confirmation that the Contractor's work is substantially complete, the Project Manager will so notify the Owner and Contractor in writing and note the date of Substantial Completion. If the Project Manager, through its inspection, fails to find that the Contractor's work is substantially complete, and is required to repeat all, or any portion, of its Substantial Completion inspection, the Contractor shall bear the cost of such repeat inspection(s) which cost may be deducted by the Owner from any payment then or thereafter due to the Contractor. Guarantees and equipment warranties required by this Contract shall commence on the date of Substantial Completion. Upon Substantial Completion, the Owner shall pay the Contractor an amount sufficient to increase total payments to the Contractor to 100% of the Contract Price. Owner may, however, deduct any amounts attributable to liquidated damages and 100% of the reasonable costs, as determined by the Owner, for completing all incomplete work, correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims.
- 7.5 When the Project is **finally complete** and the Contractor is ready for a final inspection, it shall notify the Owner and the Project Manager in writing. The Project Manager will perform a final inspection of the Project. If the Project Manager confirms that the Project is complete in full accordance with this Contract and that the Contractor has performed all of its obligations to the Owner under this Contract, the Project Manager will furnish a final Approval for Payment to the Owner certifying to the Owner that the Project is complete and the Contractor is entitled to the remainder of the unpaid Contract Price, less any amount withheld under to this Contract. If the Project Manager is unable to issue its final Approval for Payment and is required to repeat its final inspection of the Project, the Contractor shall bear the cost of such repeat inspection(s), which costs may be deducted by the Owner from the Contractor's final payment.

- 7.6 If the Contractor fails to achieve final completion within **30** days of the date of Substantial Completion, the Contractor shall pay the Owner the sum of \$500.00 per day for each and every calendar day of unexcused delay in achieving final completion beyond the date set for final completion of the work. Any sums due and payable by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at or before the time of executing this Contract. These liquidated damages are based on a reasonable estimate of owner's cost of delay and include the cost of [project management oversight and to cover the rental of HVAC equipment and manual climate control]. When the Owner reasonably believes that final completion will be inexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If the Contractor overcomes the delay in achieving final completion (or any part thereof) for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages.
- 7.7 **All limitations of time in this Contract are material and are of the essence of this Contract.**

## **8. PRICE AND CONTRACT PAYMENTS**

- 8.1 The Owner shall pay, and the Contractor shall accept, as full and complete payment for the Contractor's timely performance of its obligations under this Contract the fixed price \$222,324.20. This fixed price constitutes the Contract Price, which shall not be modified except by Change Order as provided in this Contract.
- 8.2 Prior to beginning construction, the contractor shall provide a Schedule of Values to the Project Manager which shall be adhered to by Contractor. The Schedule of Values shall apportion the Contract Price among the different elements of the Project for purposes of partial payments. The violation of this provision by the Contractor shall constitute a material breach of this Contract. The Project Manager's Schedule of Values will be utilized for the Contractor's Payment Requests but shall only be so utilized after it has been acknowledged in writing by the Project Manager and the Owner.
- 8.3 The Owner shall pay the Contract Price to the Contractor in accordance with the procedures set forth in this Paragraph. After the commencement of performance, the Contractor may submit a payment request for that portion of the work which has been completed, subject to the retainage described below. Contractor may submit subsequent payment requests no more often than once



per 30 calendar days. A payment request shall be in such format and include whatever supporting information as may be required by the Project Manager. In any payment request, the Contractor may request payment for **95%** of that part of work that is complete, less the total amount of previous payments received from the Owner. Any payment on account of stored materials or equipment will be subject to the Contractor providing written proof that the Owner has title to such materials or equipment and that they are fully insured against loss or damage. Each such Payment Request shall be signed by the Contractor and shall constitute the Contractor's representation: that the quantity of work has reached the level for which payment is requested; that the work has been properly installed or performed in strict compliance with this Contract; and, that the Contractor knows of no reason why payment should not be made as requested. Thereafter, the Project Manager shall review the Payment Request and may also review the work at the Project site or elsewhere to determine whether the quantity and quality of the work is as represented in the Payment Request and is as required by this Contract. The Project Manager shall approve in writing the amount which, in the opinion of the Project Manager, is properly owing to the Contractor. **The Owner shall make payment to the Contractor within 30 days following the Project Manager's written approval of each Payment Request.** The amount of each such payment shall be the amount approved for payment by the Project Manager less such amounts, if any, otherwise owing by the Contractor to the Owner or which the Owner shall have the right to withhold as authorized by this Contract. The Project Manager's approval of the Contractor's Payment Requests shall not preclude the Owner from the exercise of any of its rights as set forth in this Contract. The submission by the Contractor of a Payment Request also constitutes an affirmative representation and warranty that all work for which the Owner has previously paid is free and clear of any lien, claim, or other encumbrance of any person whatsoever. As a condition precedent to payment, the Contractor shall, if required by the Owner, also furnish to the Owner properly executed waivers of lien, in a form acceptable to the Owner, from all subcontractors, materialmen, suppliers or others having lien rights. The waiver shall acknowledge receipt of all sums due under all prior Payment Requests and waive and relinquish any liens, lien rights or other claims relating to the Project site. Furthermore, the Contractor warrants and represents that, upon payment of the Payment Request submitted, title to all work included in such payment shall be vested in the Owner.

- 8.4 When payment is received from the Owner, the Contractor shall immediately pay all subcontractors, materialmen, laborers, and suppliers the amounts they are due for the work covered by such payment. If the Owner becomes informed that the Contractor has not paid a subcontractor, materialman, laborer, or supplier as provided in this Contract, the Owner shall have the right (but not the duty) to: (1) issue future payment checks to the Contractor that name the

Contractor and any such subcontractor, materialman, laborer, or supplier as joint payees; or (2) make direct payments to any unpaid subcontractor, materialmen, laborers, or suppliers that are due for performance of the Contract and make appropriate deductions from future payments to Contractor. If utilized by Owner, these remedies shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit the Owner to repeat the procedure in the future.

- 8.5 Neither payment to the Contractor, utilization of the Project for any purpose by the Owner, nor any other act or omission by the Owner shall be interpreted or construed as an acceptance of any work of the Contractor not strictly in compliance with this Contract.
- 8.6 The Owner shall have the right to refuse to make payment and, if necessary, may demand the return of a portion of or the entire amount previously paid to the Contractor due to:
  - 8.6.1 The quality of a portion, or all, of the Contractor's work not being in accordance with the requirements of this Contract;
  - 8.6.2 The quantity of the Contractor's work not being as represented in the Contractor's Payment Request, or otherwise;
  - 8.6.3 The Contractor's rate of progress being such that, in the Owner's opinion, Substantial Completion or final completion, or both, may be inexcusably delayed;
  - 8.6.4 The Contractor's failure to use Contract funds, previously paid the Contractor by the Owner, to pay Contractor's Project-related obligations including, but not limited to, subcontractors, laborers and material and equipment suppliers;
  - 8.6.5 Claims made, or likely to be made, against the Owner or its property;
  - 8.6.6 Loss caused by the Contractor; or,
  - 8.6.7 The Contractor's failure or refusal to perform any of its obligations to the Owner.
  - 8.6.8 If the Owner makes written demand upon the Contractor for amounts previously paid by the Owner as contemplated in this section, the Contractor shall promptly comply with such demand;

- 8.7 If within **30** days from the date payment to the Contractor is due, the Owner, without cause, fails to pay the Contractor any amounts then due and payable to the Contractor, the Contractor shall have the right to cease work until receipt of proper payment after first providing **30** days' written notice of its intent to cease work to the Owner. **Any payment not made within 30 days after the date due shall bear interest at rates provided under the Texas Prompt Pay Act, Tex. Gov't Code Ch. 2251.**
- 8.8 Prior to being entitled to receive final payment and as a condition precedent to final payment, the Contractor shall furnish the Owner, in the form and manner required by Owner, if any, with a copy to the Project Manager:
- 8.8.1 An affidavit that all of the Contractor's obligations to subcontractors, laborers, equipment or material suppliers, or other third parties in connection with the Project, have been paid or otherwise satisfied;
- 8.8.2 If required by the Owner, separate releases of lien or lien waivers from each subcontractor, lower tier subcontractor, laborer, supplier or other person or entity who has, or might have a claim against the Owner or the Owner's property;
- 8.8.3 If applicable, consent(s) of surety to final payment;
- 8.8.4 All product warranties, operating manuals, instruction manuals and other record documents, drawings and things customarily required of the Contractor, or expressly required in this Contract, as a part of or prior to Project closeout;
- 8.9 The Owner shall, subject to its rights set forth in this Contract, make final payment of all sums due the Contractor within **10** days of the Project Manager's execution of a final Approval for Payment.

## **9. INFORMATION AND MATERIAL SUPPLIED BY THE OWNER**

- 9.1 Contractor shall be responsible for obtaining any and all written and tangible material concerning conditions below ground at the site of the Project. Owner shall cooperate to assist (upon request) Contractor with obtaining such material concerning below ground conditions at the project site. If such materials are furnished to the Contractor by the owner, they are only furnished to make complete disclosure of such material as being in the possession of the Owner and for no other purpose. By furnishing such material, the Owner does not represent, warrant, or guarantee its accuracy either in whole, in part, implicitly or explicitly, or at all, and shall have no liability therefore. The Owner shall also

furnish, if appropriate, the legal description of the Project site, and any required survey;

- 9.2 The Contractor shall obtain all required permits, authorizations, approvals, easements, and the like.
- 9.3 The Owner will provide the Contractor one electronic copy of the complete Contract. The Contractor will be charged, and shall pay the Owner, a reasonable fee per paper copy of the Contract.

## **10. CEASE AND DESIST ORDER**

- 10.1 If the Contractor fails or refuses to perform the work as required under this Contract, the Owner may instruct the Contractor to cease and desist from performing further work in whole or in part. Upon receipt of such instruction, the Contractor shall immediately cease and desist as instructed by the Owner and shall not proceed further until the cause for the Owner's instructions has been corrected, no longer exists, or the Owner instructs that the work may resume. If the Owner issues such instructions to cease and desist, and if the Contractor fails and refuses, within **seven** days of receipt of same, to provide adequate assurance to the Owner that the cause of such instructions will be eliminated or corrected, then the Owner shall have the right, but not the obligation, to carry out the work with its own forces, or with the forces of another contractor, and the Contractor shall be fully responsible and liable for the costs of performing such work by the Owner. The rights set forth this paragraph are in addition to, and without prejudice to, any other rights or remedies the Owner may have against the Contractor.

## **11. DUTIES, OBLIGATIONS, AND RESPONSIBILITIES OF THE CONTRACTOR**

- 11.1 In addition to any and all other duties, obligations and responsibilities of the Contractor set forth in this Contract, the Contractor shall have and perform the following duties, obligations, and responsibilities:
  - 11.1.1 The Contractor shall not perform work without adequate plans and specifications, or, as appropriate, approved shop drawings, or other submittals. If the Contractor performs work knowing or believing it involves an error, inconsistency or omission in the Contract without first providing written notice to the Project Manager and Owner, the Contractor shall be responsible for such work and pay the cost of correcting same.
  - 11.1.2 All work shall strictly conform to the requirements of this Contract.

- 11.1.3 The work shall be strictly supervised, the Contractor bearing full responsibility for any and all acts or omissions of those engaged in the work on behalf of the Contractor.
- 11.1.4 The Contractor warrants that all labor furnished under this Contract shall be competent to perform the tasks undertaken; that the product of such labor shall yield only first-class results; that all materials and equipment provided shall be new and of high quality; and that the completed work will be of high quality, without defects, and that all work strictly complies with the requirements of this Contract. Any work not strictly complying with the requirements of this Section constitutes a breach of the Contractor's warranty.
- 11.1.5 The Contractor shall obtain and pay for all required permits, fees, and licenses customarily obtained by the Contractor. The Contractor shall comply with all legal requirements applicable to the work.  
**CONTRACTOR SHALL LAWFULLY DISPOSE OF ALL CONSTRUCTION MATERIALS, CHEMICALS, AND DEBRIS AND SHALL INDEMNIFY AND HOLD OWNER HARMLESS FOR THE UNLAWFUL DISPOSAL OF ALL CONSTRUCTION MATERIALS, CHEMICALS, AND DEBRIS DONE BY CONTRACTOR OR ITS SUBCONTRACTOR(S) IN FURTHERANCE OF THIS CONTRACT.**
- 11.1.6 The Contractor shall comply with, the schedule (as prepared by Contractor, and approved by Owner) for completing the work. The schedule shall be updated no less frequently than monthly (unless the parties otherwise agree in writing) and shall be updated to reflect conditions encountered from time to time and shall apply to the total Project. Each such revision shall be furnished to the Owner by the Contractor. Strict compliance with the requirements of this Section shall be a condition precedent to payment to the Contractor, and failure by the Contractor to strictly comply with these requirements shall constitute a material breach of this Contract.
- 11.1.7 The Contractor shall keep an updated copy of this Contract at the site. Additionally, the Contractor shall keep a copy of approved shop drawings and other submittals. All of these items shall be available to the Owner and the Project Manager at all regular business hours. Upon final completion of the work, all of these items shall be finally updated and provided to the Owner and shall become the property of the Owner.
- 11.1.8 Shop drawings and other submittals from the Contractor do not constitute a part of the Contract. The Contractor shall not do any work

requiring shop drawings or other submittals unless such shall have been approved in writing by the Project Manager. All work requiring approved shop drawings or other submittals shall be done in strict compliance with such approved documents. However, approval by the Project Manager or the Owner shall not be evidence that work installed under shop drawings or submittals conforms to the requirements of this Contract. The Owner and the Project Manager shall have no duty to review partial submittals or incomplete submittals. The Contractor shall maintain a submittal log which shall include, at a minimum, the date of each submittal, the date of any resubmittal, the date of any approval or rejection, and the reason for any approval or rejection. The Contractor shall have the duty to carefully review, inspect, and examine all submittals before submission of same to the Owner or the Project Manager.

11.1.9 The Contractor shall maintain the Project site in a reasonably clean condition during performance of the work. Upon final completion, the Contractor shall thoroughly clean the Project site of all debris, trash and excess materials or equipment.

11.1.10 At all times relevant to this Contract, the Contractor shall permit the Owner and the Project Manager to enter upon the Project site and to review or inspect the work without formality or other procedure.

## **12. INDEMNITY**

**12.1 THE CONTRACTOR SHALL INDEMNIFY AND HOLD THE OWNER FROM ANY AND ALL CLAIMS, LIABILITY, DAMAGES, LOSSES, COSTS AND EXPENSES OF EVERY TYPE ARISING FROM CONTRACTOR'S PERFORMANCE OF THIS CONTRACT. THE PARTIES AGREE THAT THIS INDEMNITY WILL BE INTERPRETED BROADLY. THIS INDEMNITY INCLUDES (WITHOUT LIMITATION) ATTORNEYS' FEES AND EXPENSES, LIABILITY, DAMAGE, LOSSES, COSTS OR EXPENSES DUE (WITHOUT LIMITATION) TO SICKNESS, PERSONAL INJURY, DISEASE OR DEATH, AND/OR THE UNLAWFUL DISPOSAL OF CONSTRUCTION MATERIALS, CHEMICALS, OR DEBRIS. THIS INDEMNITY ALSO INCLUDES (WITHOUT LIMITATION) LOSS OR DESTRUCTION OF TANGIBLE PROPERTY, INCLUDING LOSS OF USE RESULTING THEREFROM. THIS INDEMNITY APPLIES WHETHER IT STEMS FROM ACTIONS OF THE CONTRACTOR OR ANYONE FOR WHOSE ACTS THE CONTRACTOR MAY BE LIABLE, REGARDLESS OF WHETHER SUCH LIABILITY, CLAIM, DAMAGE, LOSSES, COSTS, OR EXPENSE IS CAUSED IN PART BY THE OWNER.**

### 13. MISCELLANEOUS TERMS

- 13.1 Owner is a tax-exempt political subdivision of the State of Texas. Owner shall not be liable for any taxes from which it is exempt. Owner's Tax Identification Number is 746000762.
- 13.2 Nothing in any of the terms and conditions which comprise the Contract modifies or waives any governmental or official immunity or limitation of liability enjoyed by Owner, its elected officials, or employees at common law or under other Texas law. **Any indemnity or hold harmless provisions imposed on Owner in any of the Contractor's terms and conditions are deleted and invalid.** The Parties understand and agree that neither a tax nor interest and sinking fund has been set, adopted, or established for the payment of any such obligation as to Owner under this Contract.
- 13.3 The Parties understand and acknowledge Owner is subject to the Texas Open Meetings Act and Public Information Act, Chapters 551 and 552 of the Texas Government Code, respectively, which may require the disclosure of information despite any confidentiality, proprietary, or other provisions to the contrary in the Contract terms and conditions between the parties.
- 13.4 For any and all disputes arising out of the Contract, both parties retain all rights and remedies available to them under Federal and State law.
- 13.5 The Contract terms and conditions may not be amended or modified except in writing and executed by both parties to the Contract and authorized by their respective governing bodies.
- 13.6 If applicable, pursuant to Texas Government Code Section 2271.002, Contractor verifies it does not boycott Israel and will not boycott Israel as defined in Section 2271.001(1), for the duration of the Contract. **This provision is applicable if contractor employs at least 10 full-time employees and this contract has a value of at least \$100,000.**
- 13.7 **If applicable, pursuant to Texas Government Code Section 2274.002, Contractor verifies that it does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association and will not, during the term of this contract, discriminate against a firearm entity or firearm trade association. This provision is applicable if contractor employs at least 10 full-time employees and this contract has a value of at least \$100,000.**

## **14. CLAIMS BY THE CONTRACTOR**

Claims by the Contractor against the Owner are subject to the following:

- 14.1 All Contractor claims against the Owner shall be initiated by a written claim submitted to the Owner and the Project Manager. Such claim shall be received by the Owner and the Project Manager no later than **7** calendar days after the event, or the first appearance of the circumstances, causing the claim. The written claim must detail all known facts and circumstances supporting the claim.
- 14.2 The Contractor and the Owner shall continue their performance regardless of the existence of any claims submitted by the Contractor.
- 14.3 If the Contractor discovers previously concealed and unknown site conditions which are materially at variance from those typically and ordinarily encountered in the general geographical location of the Project, the Contract Price shall be modified, either upward or downward, upon the written claim made by either party within **10** calendar days after the first appearance to such party of the circumstances. As a condition precedent to the Owner having any liability to the Contractor due to concealed and unknown conditions, the Contractor must give the Owner and the Project Manager written notice of, and an opportunity to observe, such condition prior to disturbing it. The failure by the Contractor to give the written notice and make the claim as provided by this Section shall constitute a waiver by the Contractor of any rights arising out of or relating to such concealed and unknown condition.
- 14.4 If the Contractor seeks to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the Owner, the Contractor shall strictly comply with the notice requirements above and such claim shall be made by the Contractor before proceeding to execute any additional or changed work. Failure of the condition precedent to occur shall constitute a waiver by the Contractor of any claim for additional compensation.
- 14.5 In connection with any claim by the Contractor against the Owner for compensation in excess of the Contract Price, any liability of the Owner for the Contractor's cost shall be strictly limited to direct cost incurred by the Contractor and shall not include indirect cost or consequential damages of the Contractor. The Owner shall not be liable to the Contractor for claims of third-parties including subcontractors, unless and until liability of the Contractor has been established therefore in a court of competent jurisdiction and subject to Owner's Indemnity protection under this Contract.



- 14.6 If the Contractor is delayed in performing any task which at the time of the delay is then critical (or which during the delay becomes critical) as the sole result of any act or omission by the Owner or someone acting in the Owner's behalf; by Owner-authorized Change Orders; by unusually bad weather not reasonably anticipatable; or by fire or other Acts of God, then the date for achieving Substantial Completion, or, (as applicable) final completion, shall be appropriately adjusted by the Owner upon the written claim of the Contractor to the Owner and the Project Manager. A task is critical within the meaning of this Section if, and only if, the task is on the critical path of the Project schedule so that a delay in performing such task will delay the ultimate completion of the Project. Any claim for an extension of time by the Contractor shall strictly comply with the notice requirements above. If the Contractor fails to make such claim as required in this Section, any claim for an extension of time shall be waived.

## **15. SUBCONTRACTORS**

- 15.1 Upon execution of this Contract, the Contractor shall identify to the Owner and the Project Manager, in writing, those parties intended as subcontractors on the Project. The Owner shall, in writing, state any objections the Owner may have to one or more of such subcontractors. The Contractor shall not enter into a subcontract with an intended subcontractor with reference to whom the Owner objects. All subcontracts shall afford the Contractor rights against the subcontractor which correspond to those rights afforded to the Owner against the Contractor in this Contract, including those rights of contract termination as set forth in this Contract.

## **16. CHANGE ORDERS**

- 16.1 One or more changes to the work within the general scope of this Contract may be ordered by Change Order. The Contractor shall proceed with any such changes, and same shall be accomplished in strict accordance with the following terms and conditions:

16.1.1 "Change Order" shall mean a written order to the Contractor executed by the Owner and the Project Manager after execution of this Contract, directing a change in the work and may include a change in the Contract Price or the time for the Contractor's performance, or any combination thereof.

16.1.2 Any change in the Contract Price resulting from a Change Order shall be determined as follows:

16.1.2.1 By mutual agreement between the Owner and the Contractor as evidenced by the change in the Contract Price being set forth in the Change Order and executed by the Parties, or,

16.1.2.2 If no mutual agreement occurs between the Owner and the Contractor, the change in the Contract Price, if any, shall be derived by determining the reasonable actual costs incurred or savings achieved, resulting from revisions in the work. Such reasonable actual costs or savings shall include a component for direct jobsite overhead and profit but may not include home-office overhead or other indirect costs or components. Any such costs or savings shall be documented in the format and with such content and detail as the Owner or the Project Manager requires.

16.2 The execution of a Change Order by the Contractor shall constitute conclusive evidence of the Contractor's agreement to the ordered changes in the work; this Contract as thus amended; and the Contract Price and the time for performance by the Contractor. The Contractor, by executing the Change Order, waives and forever releases any claim against the Owner for additional time or compensation for matters relating to or arising out of or resulting from the work included within, or affected by, the executed Change Order.

16.3 The Contractor shall notify and obtain the consent and approval of the Contractor's surety with reference to all Change Orders if such notice, consent, or approval is required by the Owner, the Project Manager, the Contractor's surety, or by law. The Contractor's execution of the Change Order shall constitute the Contractor's warranty to the Owner that the surety has been notified of, and consents to, such Change Order and the surety shall be conclusively deemed to have been notified of such Change Order and to have expressly consented thereto.

## **17. DISCOVERING AND CORRECTING DEFECTIVE OR INCOMPLETE WORK**

17.1 If the Contractor covers, conceals or obscures its work in violation of this Contract or in violation of a directive from the Owner or the Project Manager, such work shall be uncovered and displayed for the Owner's or Project Manager's inspection upon request, and shall be reworked at no cost in time or money to the Owner.

17.2 If any of the work is covered, concealed or obscured in a manner not covered by the paragraph above, it shall, if directed by the Owner or the Project Manager, be uncovered and displayed for the Owner's or Project Manager's inspection. If the uncovered work conforms strictly to this Contract, the costs incurred by the Contractor to uncover and subsequently replace such work shall be borne by the Owner. Otherwise, such costs shall be borne by the Contractor.

17.3 The Contractor shall, at no cost in time or money to the Owner, correct work rejected by the Owner or by the Project Manager as defective or failing to conform to this Contract. Additionally, the Contractor shall reimburse the Owner for all testing, inspections, and other expenses incurred as a result of the rejected work.

17.4 In addition to its warranty obligations set forth elsewhere in this Contract, the Contractor shall be specifically obligated to correct all defective or nonconforming work for a period of **12 months** following final completion upon written direction from the Owner.

17.5 The Owner may, but shall not be required to, choose to accept defective or nonconforming work. In such event, the Contract Price shall be reduced by the

greater of (1) the reasonable costs of removing and correcting the defective or nonconforming work, and (2) the difference between the fair market value of the Project as constructed and the fair market value of the Project had it not been constructed in such a manner as to include defective or nonconforming work. If the remaining portion of the unpaid Contract Price, if any, is insufficient to compensate the Owner for the acceptance of defective or nonconforming work, the Contractor shall, upon written demand from the Owner, pay the Owner such remaining compensation for accepting defective or nonconforming work.

## **18. TERMINATION BY THE CONTRACTOR**

- 18.1 If the Owner repeatedly fails to perform its material obligations to the Contractor for a period of **30** days after receiving written notice from the Contractor of its intent to terminate, the Contractor may terminate performance under this Contract by written notice to the Owner and the Project Manager. In such event, the Contractor shall be entitled to recover from the Owner as though the Owner had terminated the Contractor's performance under this Contract for convenience.

## **19. OWNER'S RIGHT TO SUSPEND CONTRACTOR'S PERFORMANCE**

- 19.1 The Owner shall have the right at any time to direct the Contractor to suspend its performance, or any designated part thereof, for any reason whatsoever, or without reason, for a cumulative period of up to **3** calendar days. If any such suspension is directed by the Owner, the Contractor shall immediately comply.
- 19.2 In the event the Owner directs a suspension of performance under this Paragraph, through no fault of the Contractor, the Owner shall pay the Contractor as full compensation for such suspension the Contractor's reasonable costs, actually incurred and paid, of:
- 19.2.1 Demobilization and remobilization, including such costs paid to subcontractors;
  - 19.2.2 Preserving and protecting work in place;
  - 19.2.3 Storage of materials or equipment purchased for the Project, including insurance; and,
  - 19.2.4 Performing in a later, or during a longer time frame than that contemplated by this Contract.

## **20. TERMINATION BY THE OWNER**

20.1 The Owner may, for any reason whatsoever, terminate performance under this Contract by the Contractor for convenience. The Owner shall give written notice of such termination to the Contractor specifying when termination becomes effective. The Contractor shall incur no further obligations in connection with the work and the Contractor shall stop work when such termination becomes effective. The Contractor shall also terminate outstanding orders and subcontracts. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders. The Owner may direct the Contractor to assign the Contractor's right, title, and interest under termination orders or subcontracts to the Owner or its designee. The Contractor shall transfer title and deliver to the Owner such completed or partially completed work and materials, equipment, parts, fixtures, information and Contract rights as the Contractor has. When terminated for convenience, the Contractor shall be compensated as follows:

20.1.1 The Owner and the Contractor may agree to the compensation, if any, due to the Contractor under this paragraph;

20.1.2 The Contractor shall submit a termination claim to the Owner and the Project Manager specifying the amounts due because of the termination for convenience together with costs, pricing or other data required by the Owner or the Project Manager. If the Contractor fails to file a termination claim within **1** year from the effective date of termination, the Owner shall pay the Contractor, an amount derived in accordance with the next subsection:

20.1.3 Absent agreement to the amount due to the Contractor, the Owner shall pay the Contractor the following amounts:

20.1.3.1 Contract prices for labor, materials, equipment, and other services accepted under this Contract;

20.1.3.2 Reasonable costs incurred in preparing to perform and in performing the terminated portion of the work, and in terminating the Contractor's performance, plus a fair and reasonable allowance for direct jobsite overhead and profit thereon (such profit shall not include anticipated profit or consequential damages). However, if it appears that the Contractor would have not profited or would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of

compensation shall be reduced to reflect the anticipated rate of loss, if any; and,

20.1.3.3 Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders under this Section. These costs shall not include amounts paid in accordance with other provisions of this Contract.

20.1.4 The total sum to be paid the Contractor under this Section shall not exceed the total Contract Price, as properly adjusted, reduced by the amount of payments otherwise made, and shall in no event include duplication of payment.

20.2 If the Contractor does not perform the work in a timely manner; supply adequate labor, supervisory personnel or proper equipment or materials; timely discharge its obligations for labor, equipment and materials; proceeds to disobey applicable law; or otherwise commits a violation of a material provision of this Contract, then the Owner (in addition to any other rights it may have against the Contractor or others) may terminate the performance of the Contractor and assume possession of the Project site and of all materials and equipment at the site and may complete the work. In such case, the Contractor shall not be paid further until the work is complete. After final completion has been achieved, if any portion of the Contract Price, as it may be modified under this Contract, remains after all costs to the Owner of completing the work have been deducted by the Owner, such remainder shall belong to the Contractor. Otherwise, the Contractor shall pay and make whole the Owner for such costs. This obligation for payment shall survive the termination of the Contract. If the employment of the Contractor is terminated by the Owner for cause under to this Contract, and it is subsequently determined by a Court of competent jurisdiction that such termination was without cause, such termination shall be deemed a Termination for Convenience under this Contract.

## **21. INSURANCE**

21.1 The Contractor shall have and maintain insurance under the requirements stated in the bid attached and incorporated by reference.

## **22. SURETY BONDS**

22.1 The Contractor shall furnish separate performance and payment bonds to the Owner prior to commencement of the Project. Each bond shall set forth a penal sum in an amount not less than the Contract Price. Each bond furnished by the Contractor shall incorporate by reference the terms of this Contract as fully as though they were set forth verbatim in such bonds. In the event the Contract

Price is adjusted by Change Order executed by the Contractor, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by the Contractor shall be in a form suitable to the Owner and shall be executed by a surety, or sureties, reasonably acceptable to the Owner.

## **23. PROJECT RECORDS**

- 23.1 All documents relating to the Project, or any designated portion of the Project, which are in the possession of the Contractor, or any subcontractor, shall be made available to the Owner or the Project Manager for inspection and copying upon written request by the Owner. Furthermore, these documents shall be made available, upon request by the Owner, to any state, federal or other regulatory authority and any such authority may review, inspect, and copy such records. These records include, all drawings, plans, specifications, submittals, correspondence, minutes, memoranda, audio recordings, videos, and all other writings or things which document the Project, its design, and construction. These records expressly include those documents reflecting the cost of construction to the Contractor. The Contractor shall maintain and protect these documents for at least **4** years after final completion of the Project, or for any longer period of time as may be required by law or good construction practice.

## **24. APPLICABLE LAW**

- 24.1 The law applicable to this Contract is agreed to be the law of the State of Texas and venue in any dispute shall lie exclusively in El Paso County.

## **25. SUCCESSORS AND ASSIGNS**

- 25.1 Each party binds itself, its successors, assigns, executors, administrators or other representatives to all terms and conditions of this Contract. The Contractor shall not assign this Contract without prior written consent of the Owner.

## **26. PREVAILING WAGE RATES AND APPRENTICESHIP PROGRAM**

- 26.1 The Contractor is aware that and hereby agrees that not less than the prevailing wage rates included in the bid specifications, which have been adopted by the El Paso County Commissioners Court for Highway/Heavy Construction and for Building Construction Trades, shall be paid to all workers on the Project. Further, if this project is funded by federal funds, the applicable rates under the Davis Bacon Act shall be paid if they exceed the prevailing wage rates. If it is unclear whether this project is funded (in whole or in part) by federal money, it is the Contractor's

responsibility to ascertain and clarify whether this project is funded by federal money. Owner's failure to explicitly disclose the use of federal money shall not relieve Contractor of its responsibilities under the Davis Bacon Act or the Texas Government Code. A copy of the prevailing wage rates is attached as part of **Exhibit 1** and incorporated as part of this Contract.

- 26.2 Contractor agrees to comply with Tex. Gov't Code Sections 2258.001 through 2258.058 and acknowledges that it understands that it will pay to the Owner the sum of \$60.00 per day or part of a day, per worker, that a worker is paid less than the prevailing wage rates described in this Contract.
- 26.3 The Contractor agrees to keep records showing the name and occupation of each worker employed by the Contractor or subcontractor in the construction of the public work and the actual per diem wages paid to each worker. The Contractor further agrees that such records shall be open at all reasonable hours to inspection by the County (Owner) through its officers and agents.
- 26.4 Throughout the duration of the project, the Contractor shall post the prevailing wage rate schedules at each work site in a prominent location readily accessible to the workers. In addition, the Contractor shall post a notice to be provided by the County Director of Public Works regarding Prevailing Wage Rates and the County Apprenticeship Program, in English and Spanish, which shall be posted nearby the prevailing wage rate schedules.
- 26.5 Upon a determination by the County (Owner) that there is good cause to believe that Contractor or a subcontractor has violated Chapter 2258 of the Texas Government Code, the County may withhold any amount due under this Contract, up to and including the entire contract price, which the Commissioners Court or its agent, in the exercise of reasonable discretion, determines is sufficient to: 1) cover the costs to pay the worker the difference between the amount the worker received in wages for labor on the public work at the rate paid by the Contractor or subcontractor and the amount the worker would have received at the prevailing wage rate; 2) cover the costs of penalties under Section 2258.023; and, 3) ensure compliance with Chapter 2258 for the duration of the project.
- 26.6 **At the time the Contractor submits its applications for progress payments to the Project Manager, the Contractor shall provide a certified payroll for all employees during the period of that pay request.**
- 26.7 No worker shall be discharged by the Contractor or any Subcontractor or in any other manner discriminated against because such worker has filed an inquiry or complaint or instituted, or caused to be instituted, any legal or equitable



proceeding or has testified, or is about to testify, in any such proceeding under or relating to the prevailing wage rate laws, the apprenticeship program, or the provisions of this Contract.

- 26.8 The Contractor and subcontractors shall allow expeditious jobsite entry by the County Director of Public Works and her agents and representatives displaying and presenting proper identification credentials to the jobsite superintendent or her representative. While on the jobsite, the County Director of Public Works and her agents and representatives shall observe all jobsite rules and regulations concerning safety, internal security, and fire prevention. The Contractor and subcontractors shall allow the County Director of Public works to interview project employees at random to facilitate compliance determinations regarding the prevailing wage rate payment provisions and apprenticeship program provisions of this Contract.
- 26.9 In the event a particular work element of the project calls for a certain employee classification and skill that is not listed in the prevailing wage rate schedules in the Contract, the Contractor shall notify the Executive Director of Public Works who shall investigate the matter and make a recommendation to the Commissioners Court to make a special wage rate determination as required.
- 26.10 In accordance with the Order of the Commissioners Court of El Paso County Regarding Apprenticeship Program Requirements adopted on June 23, 2008, the Contractor and all subcontractors must:
- 26.10.1 Sponsor or participate in a DOL certified apprenticeship program for all job classifications utilized on the project and which are "apprenticeable occupations" as defined by DOL regulations;
  - 26.10.2 Hire registered apprentices enrolled in a DOL certified apprenticeship program. **No helpers are permitted;**
  - 26.10.3 **Not substitute helpers or unregistered apprentices to perform apprentice level work in place of registered apprentices;**
  - 26.10.4 Pay wage rates and benefits package for apprentices as determined by the apprenticeship program/DOL;
  - 26.10.5 Comply with DOL requirements for the ratio of apprentices to journeymen;
  - 26.10.6 **Hire apprentices in all job classifications utilized on the project and which are "apprenticeable occupations" as**

**defined by DOL regulations, unless such placement would not be approved by the apprenticeship program.**

- 26.11 The Contractor shall provide the names of all apprentices on the project, verification of their status as registered apprentices, and documentation as to their proper wage rates and journeyman to apprentice ratios as determined by the apprenticeship program.
- 26.12 The County (Owner) reserves the right to terminate this Contract for cause if the Contractor and/or subcontractors breach any of these provisions regarding the payment of prevailing wages or the apprenticeship program.
- 26.13 **The Contractor shall cause these and any other appropriate prevailing wage rate and apprenticeship program provisions to be inserted in all subcontracts relative to the work to bind the subcontractors to the same prevailing wage rate and apprenticeship program provisions as are applicable to the Contractor.**

**27. FORCE MAJEURE CLAUSE**

- 27.1 A Force Majeure Event is an unpredictable or unanticipated event that makes a Party's further performance under this agreement impossible. A Force Majeure Event means an Act of God; an epidemic, pandemic, or other natural disaster declared by a governmental authority with appropriate jurisdiction over the matter; governmental rules, regulations, or orders issued in response to an epidemic, pandemic, or natural disaster; civil disorder, disturbances, riots, or war; utility-related closings; or any similar event beyond the reasonable control of such Party. **Contractor acknowledges the County Judge's authority to issue a disaster declaration under Texas law and waives any conflict of interest.**
- 27.2 The non-performing Party must give reasonably prompt written notice, to the other Party, of its inability to perform due to a Force Majeure Event, and such notice shall state the event and reason for such non-performance. Notwithstanding any provision to the contrary in this Contract, when an inability to perform has been declared under this paragraph, Contractor shall immediately cease performance of the Project and take steps to ensure public safety by improving the worksite(s) to reasonably similar or better condition than when the Project began. Each Party is responsible for its own demobilization and storage costs under this provision. The County (Owner) is only liable for payment for Contractor's satisfactory performance completed up to the date of written notice and the reasonable amount necessary to secure the site(s) for public safety. This paragraph 27 shall survive termination of the Contract.

27.3 CONTRACTOR ACKNOWLEDGES AND AGREES THAT IT HAS READ THIS ENTIRE CONTRACT, INCLUDING (WITHOUT LIMITATION) THIS PROVISION, AND HAS TAKEN APPROPRIATE MEASURES, AT ITS OWN EXPENSE, TO MITIGATE ITS OWN FINANCIAL RISKS UNDER THIS CONTRACT. SUCH MITIGATION MAY INCLUDE (BY WAY OF EXAMPLE ONLY) THE PROCUREMENT OF A POLICY OF INSURANCE THAT MITIGATES CONTRACTOR'S RISK OF A FORCE MAJEURE EVENT AS DEFINED ABOVE.

IN WITNESS WHEREOF THE PARTIES EXECUTE THIS CONTRACT:

THE COUNTY OF EL PASO, TEXAS - OWNER

\_\_\_\_\_  
Ricardo A. Samaniego,  
El Paso County Judge  
Date: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
Norma Rivera Palacios  
Director of Public Works

CONTRACTOR

\_\_\_\_\_  
(Signor must have authority to bind corporation or entity)

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

Date: \_\_\_\_\_

For: \_\_\_\_\_  
(Name of entity)