



**NOTICE OF REGULAR MEETING AGENDA**  
**LANCASTER CITY COUNCIL**  
**MUNICIPAL CENTER CITY COUNCIL CHAMBERS**



**211 N. HENRY STREET, LANCASTER, TEXAS**

**Monday, April 11, 2011 – 7:00 P.M.**

**CALL TO ORDER**

**INVOCATION: MINISTERIAL ALLIANCE**

**PLEDGE OF ALLEGIANCE: MAYOR PRO TEM JAMES DANIELS**

**CITIZENS' COMMENTS:** (At this time citizens who have pre-registered before the call to order will be allowed to speak on any matter other than personnel matters or matters under litigation, for a length of time not to exceed three minutes. No Council action or discussion may take place on a matter until such matter has been placed on an agenda and posted in accordance with law.)

**CONSENT AGENDA:** (Items listed under the consent agenda are considered routine and are generally enacted in one motion. The exception to this rule is that a Council Member may request one or more items to be removed from the consent agenda for separate discussion and action.)

- 1C. Consider approval of minutes from the City Council Regular Meeting held March 28, 2011.
- 2C. Consider Resolution 2011-04-28 of the City Council of the City of Lancaster, Texas, approving the terms and conditions of the Texas Municipal Retirement System City Portal Use Agreement; authorizing the City Manager to execute said agreement; designating the City Manager as the Portal Use Administrator; providing a repealing clause; providing a severability clause; and providing an effective date.
- 3C. Consider Resolution 2011-04-29 of the City Council of the City of Lancaster, Texas, canceling the regular City Council meeting scheduled for May 9, 2011; and providing an effective date.
- 4C. Consider Resolution 2011-04-30 of the City Council of the City of Lancaster, Texas, authorizing the award of Bid 2011-13 to Northstar Construction, Inc. for construction of the amphitheater in Community Park in an amount not to exceed \$325,351; authorizing the City Manager to execute the agreement pursuant to approval; providing a repealing clause; providing a severability clause; and providing an effective date.
- 5C. Consider Resolution 2011-04-31 of the City Council of the City of Lancaster, Texas, authorizing the award of bid for a custom amphitheater structure to USA Shade & Fabric Structures, Inc. in an amount not to exceed \$96,000; authorizing the City Manager to execute the agreement pursuant to approval; providing a repealing clause; providing a severability clause; and providing an effective date.

- 6C. Consider Resolution 2011-04-32 of the City Council of the City of Lancaster, Texas, authorizing the City Manager to enter into a ten year Interlocal Master Agreement with the County of Dallas for participation in the Major Capital Improvement Program (MCIP) for the purpose of transportation improvements on roads with the City of Lancaster that are inside Dallas County and that are on the North Central Texas Council of Government's (NCTCOG) regional Thoroughfare Plan; providing a repealing clause; providing a severability clause; and providing an effective date.

**ACTION:**

7. Discuss and consider Resolution 2011-04-33 of the City Council of the City of Lancaster, Texas, granting a request for special exceptions pursuant to Section 14.209 (d), of the Lancaster Development Code; to provide a special exception to the masonry requirement to permit the use of stucco on the building; to provide a special exception for increased height and sign area for permanent on site signage to be located on the east side of Interstate Highway 35E approximately 2,350 feet north of the intersection of Interstate Highway 35E and West Beltline Road and being more commonly known as 740 North IH-35E; and providing an effective date.

**ADJOURNMENT**

**EXECUTIVE SESSION:** The Council reserves the right to convene into executive session on any posted agenda item pursuant to Section 551.071(2) of the TEXAS GOVERNMENT CODE to seek legal advice concerning such subject.

**ACCESSIBILITY STATEMENT:** The Municipal Center is wheelchair-accessible. For sign interpretive services, call the City Secretary's office, 972-218-1311, or TDD 1-800-735-2989, at least 72 hours prior to the meeting. Reasonable accommodation will be made to assist your needs.

**Certificate**

I hereby certify the above Notice of Meeting was posted at the Lancaster City Hall on April 7, 2011 @ 5:00pm and copies thereof were hand delivered to the Mayor, Mayor Pro-Tempore, Deputy Mayor Pro-Tempore and Council members.

  
\_\_\_\_\_  
Dolle K. Downe, TRMC  
City Secretary

**LANCASTER CITY COUNCIL**  
Agenda Communication for  
April 11, 2011

**1**

AG11-001

**Consider approval of minutes from the City Council Regular Meeting held March 28, 2011.**

**Background**

Attached for your review and consideration are minutes from the:

- City Council Regular Meeting held March 28, 2011

**Prepared and submitted by:**

**Dolle K. Downe, City Secretary**  
March 31, 2011

## **MINUTES**

### **LANCASTER CITY COUNCIL MEETING OF MARCH 28, 2011**

The City Council of the City of Lancaster, Texas, met in Regular session in the Council Chambers of City Hall on March 28, 2011 at 7:00 p.m. with a quorum present to-wit:

#### **Councilmembers Present:**

Mayor Marcus E. Knight  
Walter Weaver  
Marco Mejia  
Mayor Pro Tem James Daniels  
*Council District 2 vacant*

#### **Councilmembers Absent:**

Clyde Hairston  
Deputy Mayor Pro Tem Nina Morris

#### **City Staff Present:**

Opal Mauldin Robertson, City Manager  
Alicia Oyedele, Assistant to the City Manager  
Larry Flatt, Assistant Police Chief  
Rona Stringfellow Govan, Development Services Director  
Nathaniel Barnett, Senior Planner  
Sean Johnson, Parks and Recreation Director  
Robert E. Hager, City Attorney  
Dolle Downe, City Secretary

#### **Call to Order:**

Mayor Knight called the meeting to order at 7:00 p.m. on March 28, 2011.

#### **Invocation:**

Mayor Marcus E. Knight gave the invocation.

#### **Pledge of Allegiance:**

Mayor Marcus E. Knight led the Pledge of Allegiance.

#### **Citizens Comments:**

There were no citizen comments.

#### **Consent Agenda:**

City Secretary Downe read the consent agenda.

- 1C. Consider approval of minutes from the City Council Regular Meeting held March 14, 2011, Work Session held March 17, 2011 and Special Meeting held March 21, 2011.
- 2C. Consider Resolution 2011-03-23 of the City Council of the City of Lancaster, Texas, accepting the 2010 Racial Profiling Analysis Annual Report; and providing an effective date.

- 3C. Consider Resolution 2011-03-24 of the City Council of the City of Lancaster, Texas, approving the terms and conditions of an agreement with JP Morgan Chase Bank, N.A. for procurement card services through an interlocal agreement with the City of Fort Worth; authorizing the City Manager to execute said agreement; providing a repealing clause; providing a severability clause; and providing an effective date.**
- 4C. Consider Resolution 2011-03-25 of the City Council of the City of Lancaster, Texas, approving the terms and conditions of a Mutual Aid contract for emergency services between the City of Lancaster Police Department and the North Central Texas Regional Telecommunicators Emergency Response Taskforce (NCTR-TERT) to provide telecommunicator mutual aid response to critical incidents requiring rapid response to jurisdictions within the NCTCOG region; authorizing the City Manager to execute said contract; providing a severability clause; and providing an effective date.**
- 5C. Consider Resolution 2011-03-26 of the City Council of the City of Lancaster, Texas, authorizing the City to apply for and to accept a grant award from the Crime Victim Services Division Program administered by the Office of the Attorney General (OAG) for 2011-2013 Crime Victim Coordinator and Liaison Grant (VCLG); authorizing the City Manager or designee to apply for such funds through and with the City of Dallas as the fiscal agent for Dallas County and cities in the area; and providing an effective date.**
- 6C. Consider an ordinance of the City of Lancaster, Texas, amending the Lancaster Code of Ordinances, Chapter 12, Article 12.200, Speed Regulations, Section 12.202 by increasing the maximum prima facie speed limits on that certain portion of West Main Street between Beltline Road and Big Sandy Lane from 35 miles per hour to 40 miles per hour; authorizing the City Manager or designee to erect the appropriate signage; providing a repealing clause; providing a severability clause; providing a savings clause; and providing an effective date.**
- 7C. Consider Resolution 2011-03-27 of the City Council of the City of Lancaster, Texas, amending Resolution No. 2011-02-11, as amended, ordering a general election to be held on Saturday, May 14, 2011, for the election of one councilmember for District 2, one councilmember for District 4, and one councilmember for District 6; to provide for revised branch early voting polling locations; and providing an effective date.**

*2011-03-27 considerar una resolución del Consejo Municipal de la ciudad de Lancaster, Texas, se modifica la Resolución No. 2011-02-11 solicitando a las elecciones generales que se llevara a cabo el sabado, 14 de Mayo 2011, para la eleccion de un concejo de Distrito 2, un concejo de Distrito 4, y un concejo de Distrito 6; prestacion para poder votar temprano revisando lugares de votacion, y porporcorcionar una fecha de vigencia.*

Councilmember Mejia requested that item #5 be pulled from the consent agenda.

**MOTION:** Mayor Pro Tem Daniels made a motion, seconded by Councilmember Weaver, to approve consent items 1C - 4C, 6C and 7C. The vote was cast 4 for, 0 against [Hairston, Morris absent].

Councilmember Mejia asked if the grant provided for hiring additional personnel. City Manager Mauldin Robertson stated that the grant does provide for the addition of a Community Relations Victim Advocate. Councilmember Mejia asked what happens to the personnel if the grant is not approved. City Manager Mauldin Robertson indicated that the grant employees would be separated from City employment but could serve in a volunteer role.

**MOTION:** Councilmember Mejia made a motion, seconded by Mayor Pro Tem Daniels, to approve Resolution 2011-03-26 authorizing the City to apply for and to accept a grant award from the Crime Victim Services Division Program administered by the Office of the Attorney General (OAG) for 2011-2013 Crime Victim Coordinator and Liaison Grant (VCLG). The vote was cast 4 for, 0 against [Hairston, Morris absent].

8. **Conduct a public hearing and consider an ordinance of the City of Lancaster, Texas, amending the Comprehensive Zoning Ordinance and Map of the City of Lancaster, Texas, as heretofore amended, by granting a change in zoning from Retail (R) to Retail – Specific Use Permit (R-SUP) to allow a Specific Use Permit for a tattoo studio facility located approximately 250 feet north of the northeast corner of Dallas Avenue and West Pleasant Run Road and more commonly known as 1326 North Dallas Avenue, Lancaster, Dallas County, Texas; providing for special conditions; providing a savings clause; providing a severability clause; providing a penalty of fine not to exceed the sum of two thousand dollars (\$2,000) for each offense; and providing an effective date.**

Senior Planner Barnett outlined the Specific Use Permit (SUP) request for the expansion of the tattoo studio indicating that the applicant had resubmitted their application for the March 1, 2011 Planning & Zoning Commission meeting. This followed the failure of the item at the City Council meeting on January 24, 2011 due to a lack of a required super majority vote. Senior Planner Barnett noted that the Planning and Zoning Commission voted unanimously to approve the SUP at their March 1, 2011 meeting.

Senior Planner Barnett stated staff recommends a stipulation requiring the applicant to seek reconsideration of the SUP if there is any expansion or substantial alteration that would increase the building occupancy or intensity of use.

Councilmember Mejia asked why that stipulation is recommended. Senior Planner Barnett stated that it would give City Council an opportunity to review an expansion that may impact the neighborhood.

Mayor Knight opened the public hearing.

Speaking in favor of the request were:

William Snowden, 717 Bordner Drive, commented that he is a tattoo artist at the shop and they need more area to work in; stated they are trying to expand their business and asked Council to please favorably consider the request.

Violeta Delgado, 717 Bordner Drive, stated that her and her husband started the business because he needed a job and he was always good at art; commented that customers just kept coming and they would now like to expand the business; stated that they have been in the current location for four years without any problems or complaints; indicated they have talked with people behind the location and addressed the concern about headlights at night, indicating employees would park by backing into the parking space, thus eliminating headlights pointed at those houses when the vehicle is moved; stated they have been paying rent on two buildings for several months and are eager to move into the new, expanded location.

Ariel Bernal, 717 Bordner Drive, stated Council should approve the expansion because it helps not only this business, but other businesses in the area as well; commented that customers and others visiting the shop purchase food and gas in the area; stated that tattoos are a personal preference and a form of expression and people should have an option to choose; urged Council to approve the request.

Frank Mejia, 501 Colgate Drive, stated his family has been in Lancaster thirty seven years and that he supports this family business; commented that they have operated in their current location without any problems; stated that the SUP requirement makes it difficult for this family owned business.

No one spoke in opposition of the SUP request.

Councilmember Mejia asked if it is necessary for a change in use to come back before the Council. Senior Planner Barnett indicated that it gives staff and Council an opportunity to review the use and determine if additional items such as parking and lighting need to be addressed.

**MOTION:** Councilmember Weaver made a motion, seconded by Councilmember Mejia, to close the public hearing. The vote was cast 4 for, 0 against [Hairston, Morris absent].

Mayor Knight stated that an earlier stipulation requiring periodic review of the SUP had been removed and that there are no planting/landscaping requirements in this ordinance.

**MOTION:** Councilmember Mejia made a motion, seconded by Councilmember Weaver, to approve an ordinance granting a change in zoning from Retail (R) to Retail – Specific Use Permit (R-SUP) to allow a Specific Use Permit for a tattoo studio facility located approximately 250 feet north of the northeast corner of Dallas Avenue and West Pleasant Run Road and more commonly known as 1326 North Dallas Avenue and removing the stipulation requiring reconsideration of the SUP if there is any expansion or substantial alteration that would increase the building occupancy or intensity of use.

City Attorney Hager indicated the stipulation could be struck from the ordinance.

The vote was cast 4 for, 0 against [Hairston, Morris absent].

**Executive Session:**

At 7:26 p.m. the City Council convened into closed executive session in the Conference Room pursuant to:

9. **The City Council shall convene into closed executive session pursuant to:**
  - A. **Section § 551.071 (1) of the TEXAS GOVERNMENT CODE to consult with the City Attorney to seek legal advice concerning the application of the Lancaster Municipal Utility District No. 1 for annexation of land before the Texas Commission on Environmental Quality (TCEQ), Docket No. 2010-1851-DIS.**
10. **Reconvene into open session. Consider and take appropriate action(s), if any, on closed/executive session matters.**

The City Council recessed from Executive Session at 7:38 p.m. and reconvened into open session at 7:40 p.m.

No action following executive session was necessary.

**MOTION:** Mayor Pro Tem Daniels made a motion, seconded by Councilmember Mejia, to adjourn. The vote was cast 4 for, 0 against [Hairston, Morris absent].

The meeting was adjourned at 7:41 p.m.

**ATTEST:**

**APPROVED:**

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Dolle K. Downe, City Secretary

\_\_\_\_\_  
Marcus E. Knight, Mayor

**LANCASTER CITY COUNCIL**  
Agenda Communication for  
April 11, 2011

**2**

AG11-002

**Consider a resolution of the City Council of the City of Lancaster, Texas, approving the terms and conditions of the Texas Municipal Retirement System City Portal Use Agreement; authorizing the City Manager to execute said agreement; designating the City Manager as the Portal Use Administrator; providing a repealing clause; providing a severability clause; and providing an effective date.**

**This request supports the City Council 2010-2011 Policy Agenda.**

**Goal 4: Professional and Committed Workforce**

**Background**

When the City of Lancaster obtains records from the Texas Municipal Retirement System (TMRS), those records are to be kept confidential. Access to such records is restricted. The City Portal Use Agreement with TMRS confirms the security of those records and those who have access to such records. Having the City Portal Use Agreement in place also provides for certain protections with regard to open records requests.

The attached City Portal Use Agreement is a document intended to provide additional security for the members of TMRS and does not alter our plan design under the Texas Municipal Retirement System.

Staff is aware that the City Council desires additional information regarding the overall Texas Municipal Retirement System program and has identified the need to provide such information to City Council at an upcoming work session. Annually TMRS provides rates to the City in late summer. Once the new rates are provided, we anticipate having a member of TMRS attend a work session and provide information directly to City Council.

**Considerations**

- **Operational** – The TMRS City Portal Use Agreement identifies the appropriate person(s) who should have access to records under the Texas Municipal Retirement System. The City Manager will be assigned as the City Portal Administrator who in turn has the authority to designate City Portal Users (i.e. the Director of Human Resources and the Finance Director) access to records under the Texas Municipal Retirement System.

- **Legal** – The resolution and agreement have been reviewed by the City Attorney.
- **Financial** – There are no financial considerations for this item.
- **Public Information** - There are no public information requirements for consideration of this agreement.

### **Options/Alternatives**

1. Council may approve the resolution as presented. The City Portal Use Agreement is not required and is not mandated by TMRS. The City Portal Use Agreement is a recommended document by TMRS as a good faith effort to provide and maintain safe and secure records for the members of the Texas Municipal Retirement System.
2. Council may deny the resolution.

### **Recommendation**

Staff recommends approving the resolution as presented to maintain safe and secure records for members of the Texas Municipal Retirement System.

### **Attachments**

- Resolution
- Texas Municipal Retirement System City Portal Use Agreement

**Prepared and submitted by:**  
Dori Lee, Director of Human Resources

**Date:** March 30, 2011

**RESOLUTION NO. 2011-04-28**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, APPROVING THE TERMS AND CONDITIONS OF THE TEXAS MUNICIPAL RETIREMENT SYSTEM CITY PORTAL USE AGREEMENT; AUTHORIZING THE CITY MANAGER TO EXECUTE SAID AGREEMENT; DESIGNATING THE CITY MANAGER AS THE PORTAL USE ADMINISTRATOR; REPEALING ALL RESOLUTIONS IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS,** the Texas Municipal Retirement System (TMRS) offers access to a web-based, online portal for cities that are participating members of TMRS to access information and provide certain functionality to participating municipalities as necessary for its official governmental functions; and

**WHEREAS,** the City of Lancaster is a municipality that participates in TMRS and desires access to the TMRS City Portal for official City business purposes; and

**WHEREAS,** the City of Lancaster finds that the City Portal Use Agreement is an effective tool for securing retirement information and desires to utilize the Texas Municipal Retirement System City Portal.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, THAT:**

- Section 1. The City Council of the City of Lancaster does hereby approve the City Portal Use Agreement, which is attached hereto and incorporated herein as Exhibit A, with the Texas Municipal Retirement System
- Section 2. The City Manager is designated as the Portal Use Administrator and is hereby authorized to execute said agreement.
- Section 3. Any prior resolution of the City Council in conflict with the provisions contained in this resolution are hereby repealed and revoked.
- Section 4. Should any part of this resolution be held to be invalid for any reason, the remainder shall not be affected thereby, and such remaining portions are hereby declared to be severable.
- Section 5. This resolution shall take effect immediately from and after its passage, and it is duly resolved.

**DULY PASSED** and approved by the City Council of the City of Lancaster, Texas, on this the 11<sup>th</sup> day of April 2011.

**ATTEST:**

**APPROVED:**

\_\_\_\_\_  
Dolle K. Downe, City Secretary

\_\_\_\_\_  
Marcus E. Knight, Mayor

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Robert E. Hager, City Attorney

**Texas Municipal Retirement System  
City Portal Use Agreement**

This City Portal Use Agreement (the "Agreement") is entered into by and among the Texas Municipal Retirement System, the City of Lancaster, and the City Portal Administrator (defined below), to be effective as set forth below.

**RECITALS**

**WHEREAS**, the Texas Municipal Retirement System ("TMRS") is offering access to a web-based, online portal (the "City Portal") for cities that are participating members of TMRS to access information and provide certain functionality to participating municipalities as necessary for its official governmental functions; and

**WHEREAS**, the City of Lancaster (the "City") is a municipality that participates in TMRS and desires access to the TMRS City Portal for official City business purposes; and

**WHEREAS**, Opal Mauldin Robertson is an individual employee of the City, is an authorized contact for the City with the Texas Municipal Retirement System, and will be the main contact and administrator for the purposes of the TMRS City Portal, as further described herein (the "City Portal Administrator"); and

**WHEREAS**, the City Portal Administrator will have the authority to grant access and permissions to the City Portal to other City employees and officers who are TMRS authorized City contacts ("City Portal User(s)", including the City Portal Administrator, where applicable); and

**WHEREAS**, TMRS will grant City Portal Users the authority to access TMRS data relating to City employees and retirees via the City Portal in a form identifiable with a specific individual pursuant to Section 855.115(a)(1)(C) of the Texas Government Code, which information TMRS must protect pursuant to Sections 552.101 and 855.115 of the Texas Government Code (attached as Exhibit B, and incorporated by reference); and

**WHEREAS**, the City, the City Portal Administrator, and the City Portal Users understand that they may violate provisions of and be subject to potential civil and criminal penalties under the Texas Public Information Act for failure to comply with the terms of this Agreement or any applicable provisions of the Texas Public Information Act with respect to any Confidential Information; and

**WHEREAS**, TMRS is willing to disclose such information only upon acknowledgement and agreement of the City and the City Portal Administrator of the terms and conditions required for access to the information:

**AGREEMENTS**

**NOW, THEREFORE**, in consideration of the foregoing premises, the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, TMRS, the City, and the City Portal Administrator hereby agree to the terms and conditions below:

1. The City and City Portal Administrator represent and warrant that all information requested by any City Portal User will be information that is reasonably necessary to the performance of the duties

of the City Portal User requesting such information. The City Portal Administrator hereby attests that he/she has attended and completed training by TMRS on the City Portal. The City Portal Administrator hereby agrees that only persons meeting the following criteria may be trained to become a City Portal User: (i) a contributing TMRS member, and (ii) job duties require access to the Confidential Information. The City and the City Portal Administrator agree that all City Portal Users shall be trained by the City Portal Administrator on the obligations and responsibilities set forth in this Agreement and shall ensure that any City Portal User shall agree in writing to be bound by the same terms and conditions contained in this Agreement prior to such City Portal User's access to the City Portal.

2. The City and the City Portal Administrator each represents, warrants, and covenants that any City Portal User, or any City employee, officer, representative, contractor or agent (collectively, "Representatives") who will receive any Confidential Information (defined below), shall, prior to receiving such information, be given a copy of this Agreement and shall sign an acknowledgement agreement, in the form attached hereto as Exhibit A, in which such person agrees to be bound by all terms and conditions contained in this Agreement regarding the use and protection of the Confidential Information. Each City Portal User is responsible for maintaining the confidentiality of his or her password. City Portal Users shall not share passwords, or allow any unauthorized person or groups of persons to use one password to access the City Portal. The City Portal Administrator shall promptly terminate the access rights of any City Portal User that is no longer employed by the City, or who is no longer authorized by the City to have access or no longer requires access to the City Portal for the performance of such persons' duties, or who violates the terms and conditions set forth in this Agreement. The City and the City Portal Administrator each agrees to use its reasonable best efforts to cause all City Portal Users and any Representatives who receive any Confidential Information to observe the terms and conditions of this Agreement, and agrees that the City will be responsible for any breach of any terms of this Agreement by any of its City Portal Users or Representatives.

3. The City, the City Portal Administrator, the City Portal Users and the Representatives each agree that all Confidential Information (a) shall be maintained in accordance with Section 855.115 of the Texas Government Code, as amended from time to time (a current copy of which is attached hereto as Exhibit B), and in strict confidence except as required by an order of a court of competent jurisdiction or other legal process; (b) shall not be disclosed to any third party other than the authorized employees or agents of the City who have a need to know the information in connection with the performance of their official duties for the City; (c) shall not be used for any purpose other than for the purpose of, and only to the extent it is reasonably necessary to, the performance of his/her official duties for the City, and (d) shall, at the City's option and expense, be returned to TMRS or be destroyed by the City (in either case, including all originals and copies of all Confidential Information) upon completion of the set task for which it is required or at the end of an appropriate record retention period. The City must notify TMRS if it chooses to destroy or return the Confidential Information and will confirm the completion of such destruction to TMRS in writing, if it chooses to destroy the Confidential Information.

4. The City, the City Portal Administrator, the City Portal Users, and the Representatives shall not publish any report, press release, data or other information regarding or derived from such Confidential Information to the extent the report, press release, data or other information includes individual participant or retiree data in a form identifiable with a specific individual and whose release would be prohibited by Section 855.115 of the Texas Government Code, unless otherwise required by applicable law.

5. The parties agree that if a breach of this Agreement occurs with respect to the Confidential Information, TMRS shall suffer irreparable harm and significant injury and loss to a degree which would be difficult to ascertain and which would not be fully compensable by damages alone, and that TMRS shall have the right to invoke the jurisdiction of the courts to seek immediate temporary or permanent

injunctive relief, specific performance or other equitable relief, without bond, and without prejudice to any other rights and remedies available to TMRS. The City shall indemnify and hold harmless TMRS from all damages, losses, expenses and costs whatsoever, including but not limited to attorney's fees, resulting from breach of this Agreement by the City, the City Portal Administrator, a City Portal User.

6. For the purposes of this Agreement, "Confidential Information" shall mean all TMRS data which is subject to Section 855.115 of the Texas Government Code, including, but not limited to, any information concerning an individual member, retiree, annuitant, or beneficiary, whether in electronic or written form, provided by TMRS to the City, the City Portal Administrator or any City Portal User during the term of this Agreement. Confidential Information will not include any information which (i) is or becomes publicly available other than as a result of a disclosure by the City, the City Portal Administrator, a City Portal User, or any Representative, (ii) is already in the City Portal Administrator's or City's possession prior to its disclosure through the use of the City Portal, as demonstrated by written or documented evidence, and not otherwise subject to the confidentiality provisions of Section 855.115 of the Texas Government Code; (iii) is or becomes available to the City Portal Administrator or City on a non-confidential basis from a source other than TMRS, provided that such source is not subject to any legal, contractual, or fiduciary obligation to keep such information confidential, or (iv) is independently developed by the City Portal Administrator on the City's behalf, as demonstrated by written or documented evidence, without violating any of the obligations hereunder.
7. TMRS reserves the right to deny access to the City Portal for any City Portal User for any reason, and may require any City Portal User to change a password for any reason.
8. TMRS, MyTMRS and the TMRS "Star Design" logo are trademarks and service marks of TMRS and are used and registered in the United States. Use of these trademarks and service marks without permission is prohibited, and the City and City Portal Administrator agree that no City Portal User will use any of these trademarks and service marks without the prior written consent of TMRS to the specific intended use.
9. The information and materials contained in the City Portal, and the terms, conditions, and descriptions that appear, are subject to change at any time. Estimates provided through the City Portal are subject to the limitations stated on the City Portal website and the terms and conditions listed thereon. The City, the City Portal Administrator, and the City Portal Users are not agents of TMRS and shall not represent that they have authority to represent or certify information on behalf of TMRS.
10. Unauthorized use of the City Portal or any of the TMRS systems, or misuse of any information posted on the City Portal is strictly prohibited. Use of the City Portal or any Confidential Information (i) for any purpose other than as reasonably necessary for the performance of duties of a City employee or official, (ii) for any illegal activity, or (iii) to engage in conduct that is defamatory, libelous, threatening or harassing or that infringes on a third party's intellectual property or other proprietary rights, is prohibited.
11. This Agreement is to be governed by, construed and interpreted in accordance with the laws of the State of Texas without regard to its conflicts of laws principles. It is agreed that venue shall be in the District Court of Travis County, Texas. Each party hereto hereby irrevocably submits, for itself and its property, to the jurisdiction of the courts of Travis County, Texas in any action, suit, or proceeding brought against it related to or in connection with this Agreement.
12. If any third person or entity requests or seeks to compel the City or any City Portal User to disclose or produce any information provided to the City or any City Portal User by TMRS, through the City Portal or otherwise, under this Agreement which is subject to Section 855.115 of the Texas Government Code, or

claims an entitlement to any such information on the grounds that such information is alleged or claimed to be generally available to the public or to constitute in whole or in part a public record, document or report under applicable law, the City agrees to file a timely request for an opinion of the Texas attorney general seeking to withhold the information under the Texas Public Information Act. In addition, the City agrees to use its best efforts to notify TMRS within two (2) business days of its receipt of such a request, but in no case later than is reasonably necessary to provide TMRS an adequate opportunity to request a legal opinion or to consent to or seek to prevent such disclosure through protective order or other appropriate remedy.

13. Each party agrees that no failure or delay by any party in exercising or enforcing any right, power, privilege or remedy under this Agreement will constitute a waiver thereof, and a waiver under one circumstance will not constitute a waiver under any other circumstance.

14. If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

15. This Agreement may be unilaterally amended by TMRS at any time upon 60 days prior written notice to the City Portal Administrator. No party may assign any of its rights or delegate any of its duties under this Agreement to any other person or entity without the prior written consent of the other parties hereto. A transfer by operation of law, including by merger or consolidation, is an assignment subject to the provisions of this Section.

16. This Agreement may be terminated by either TMRS or the City, for any reason, upon 30 days prior written notice of termination to the other party. Any provision of this Agreement which, by its nature, may become performable by a party after termination of this Agreement will survive termination of this Agreement.

17. In the event of any suit, action, or arbitration proceedings (whether based on contract, tort, or any other theory of liability) to enforce any provision of this Agreement, to recover damages for a breach hereof, or to secure or preserve the rights of any party against any other party to any property which is the subject of this Agreement, the prevailing party will be entitled to recover reasonable attorney fees (other than fees computed on a contingency fee basis), court costs, and expenses of arbitration and litigation expended in the prosecution or defense thereof.

18. The City and the City Portal Administrator each represent and warrant that the City Portal Administrator has the requisite right and authority to execute this Agreement on behalf of the City and to bind the City, the City Portal Administrator, and the City Portal Users to the provisions hereof. The parties further agree that this Agreement contains the entire understanding of the parties with respect to the subject matter hereof and that there are no other agreements or understandings with respect to the subject matter. No party will be liable or bound to any party in any manner by any warranties, representations, or covenants other than those set forth in this Agreement. Nothing in this Agreement, express or implied, is intended to confer upon any third party any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

19. This Agreement may be executed by the parties in multiple original counterparts, and each such counterpart will constitute an original hereof.

**IN WITNESS WHEREOF**, this TMRS City Portal Use Agreement shall be effective for all purposes on the date fully executed, as evidenced by the signatures below.

**CITY:**

**(CITY OF)** LANCASTER

**BY:** \_\_\_\_\_  
**(SIGNATURE)**

**PRINTED NAME:** Opal Mauldin Robertson

**TITLE:** City Manager

**DATE:** \_\_\_\_\_

**CITY PORTAL ADMINISTRATOR:**

**SIGNATURE:** \_\_\_\_\_

**PRINTED NAME:** Opal Mauldin Robertson

**TITLE:** City Manager

**CITY OF** Lancaster

**DATE:** \_\_\_\_\_

**TMRS:**

**TEXAS MUNICIPAL RETIREMENT SYSTEM:**

**BY:** \_\_\_\_\_  
**(SIGNATURE)**

**PRINTED NAME:** **ERIC DAVIS**  
**TITLE:** **DEPUTY EXECUTIVE DIRECTOR**

**DATE:** \_\_\_\_\_

**EXHIBIT A**

**ACKNOWLEDGEMENT AGREEMENT  
TO TMRS CITY PORTAL USE AGREEMENT**

I, Opal Mauldin Robertson, for the purpose of being designated as a City Portal User under the terms and conditions of that certain Texas Municipal Retirement System City Portal Use Agreement, as amended from time to time (the "Agreement") by and among the Texas Municipal Retirement System ("TMRS"), the City of Lancaster (the "City"), and the City Portal Administrator (as defined in the Agreement), hereby represent, warrant, acknowledge and agree that (i) I have received and read a full and complete copy of the Agreement, and (ii) I agree to comply with and be bound by all terms and conditions of the Agreement, including but not limited to the use and protection of Confidential Information (as defined in the Agreement).

I understand that I may violate provisions of and be subject to potential civil and criminal penalties under the Texas Public Information Act if I fail to comply with the terms of this Agreement or any applicable provisions of the Texas Public Information Act with respect to any Confidential Information.

\_\_\_\_\_  
(Signature)

Name: Opal Mauldin Robertson, City Manager

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

**[CITY PORTAL ADMINISTRATOR: RETAIN THIS AGREEMENT WITH YOUR FILES]**

**EXHIBIT A**

**ACKNOWLEDGEMENT AGREEMENT  
TO TMRS CITY PORTAL USE AGREEMENT**

I, Dori Lee, for the purpose of being designated as a City Portal User under the terms and conditions of that certain Texas Municipal Retirement System City Portal Use Agreement, as amended from time to time (the "Agreement") by and among the Texas Municipal Retirement System ("TMRS"), the City of Lancaster (the City"), and the City Portal Administrator (as defined in the Agreement), hereby represent, warrant, acknowledge and agree that (i) I have received and read a full and complete copy of the Agreement, and (ii) I agree to comply with and be bound by all terms and conditions of the Agreement, including but not limited to the use and protection of Confidential Information (as defined in the Agreement).

I understand that I may violate provisions of and be subject to potential civil and criminal penalties under the Texas Public Information Act if I fail to comply with the terms of this Agreement or any applicable provisions of the Texas Public Information Act with respect to any Confidential Information.

\_\_\_\_\_  
(Signature)

Name: Dori Lee, Human Resources Director

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

**[CITY PORTAL ADMINISTRATOR: RETAIN THIS AGREEMENT WITH YOUR FILES]**

**EXHIBIT A**

**ACKNOWLEDGEMENT AGREEMENT  
TO TMRS CITY PORTAL USE AGREEMENT**

I, Judy Tedesco, for the purpose of being designated as a City Portal User under the terms and conditions of that certain Texas Municipal Retirement System City Portal Use Agreement, as amended from time to time (the "Agreement") by and among the Texas Municipal Retirement System ("TMRS"), the City of Lancaster (the City"), and the City Portal Administrator (as defined in the Agreement), hereby represent, warrant, acknowledge and agree that (i) I have received and read a full and complete copy of the Agreement, and (ii) I agree to comply with and be bound by all terms and conditions of the Agreement, including but not limited to the use and protection of Confidential Information (as defined in the Agreement).

I understand that I may violate provisions of and be subject to potential civil and criminal penalties under the Texas Public Information Act if I fail to comply with the terms of this Agreement or any applicable provisions of the Texas Public Information Act with respect to any Confidential Information.

\_\_\_\_\_  
(Signature)

Name: Judy Tedesco, Interim Finance Director

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

**[CITY PORTAL ADMINISTRATOR: RETAIN THIS AGREEMENT WITH YOUR FILES]**

Exhibit B  
Section 855.115 of the Texas Government Code

**Sec. 855.115. CONFIDENTIALITY OF INFORMATION ABOUT MEMBERS, RETIREES, ANNUITANTS, OR BENEFICIARIES.** (a) Information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary is confidential under Section 552.101, and may not be disclosed in a form identifiable with a specific individual unless:

(1) the information is disclosed to:

(A) the individual or the individual's attorney, guardian, executor, administrator, conservator, or other person who the director determines is acting in the interest of the individual or the individual's estate;

(B) a spouse or former spouse of the individual after the director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;

(C) a governmental official or employee after the director determines that disclosure of the information requested is reasonably necessary to the performance of the duties of the official or employee; or

(D) a person authorized by the individual in writing to receive the information;

or

(2) the information is disclosed pursuant to a subpoena and the director determines that the individual will have a reasonable opportunity to contest the subpoena.

(b) This section does not prevent the disclosure of the status or identity of an individual as a member, former member, retiree, deceased member or retiree, or beneficiary of the retirement system.

(c) The director may designate other employees of the retirement system to make the necessary determinations under Subsection (a).

(d) A determination and disclosure under Subsection (a) may be made without notice to the individual member, retiree, annuitant, or beneficiary.

**LANCASTER CITY COUNCIL**  
Agenda Communication for  
April 11, 2011

**3**

AG11-003

**Consider a resolution of the City Council of the City of Lancaster, Texas, canceling the regular City Council meeting scheduled for May 9, 2011; and providing an effective date.**

**This request supports the City Council 2010-2011 Policy Agenda.**

**Goal 6: Civic Engagement**

**Background**

The City Council generally meets on the second and fourth Mondays of each month. Section 3.10 (A) of the City Charter requires the City Council to meet at least once a month. The first regular meeting of May falls on May 9, which immediately precedes the City's May 14, 2011 general election. The official canvass for the election is tentatively scheduled for the fourth Monday (May 23, 2011), a regular meeting day for City Council.

**Considerations**

Essential City business can be completed at the regularly scheduled meeting on April 25, 2011 and if necessary, following the canvass on May 23, 2011. Setting the meeting schedule now allows sufficient time for public notice of the revised meeting schedule and is helpful to staff for planning purposes.

**Options**

1. Approve the resolution as presented, canceling the May 9, 2011 meeting.
2. Reject the resolution. The May 9, 2011 meeting will remain scheduled.

**Recommendation**

Staff recommends that the City Council approve the resolution canceling the regular City Council meeting of May 9, 2011.

**Attachments**

- Resolution

Agenda Communication  
April 11, 2011  
Page 2

**Prepared and submitted by:**  
Dolle K. Downe, City Secretary

**Date:** March 30, 2011

**RESOLUTION NO. 2011-04-29**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, CANCELING THE REGULAR CITY COUNCIL MEETING SCHEDULED FOR MAY 9, 2011; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS**, the City of Lancaster Home Rule Charter, Section 3.10 (A) requires the City Council to hold at least one regular meeting each month; and

**WHEREAS**, the regular meeting of May 9, 2011 is just prior to the May 14, 2011 General Municipal Election and the official canvass for said election returns will not have been conducted; and

**WHEREAS**, the Lancaster City Council may conduct its business at the regular meetings of April 25, 2011 and May 23, 2011;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, THAT:**

- Section 1. The regularly scheduled meeting of the City Council set for May 9, 2011 is hereby canceled.
- Section 2. This Resolution shall take effect immediately from and after its adoption and it is so resolved.

**DULY PASSED** and approved by the City Council of the City of Lancaster, Texas, on this the 11<sup>th</sup> day of April 2011.

**ATTEST:**

**APPROVED:**

\_\_\_\_\_  
Dolle K. Downe, City Secretary

\_\_\_\_\_  
Marcus E. Knight, Mayor

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Robert E. Hager, City Attorney

**LANCASTER CITY COUNCIL**  
Agenda Communication for  
April 11, 2011

**4**

AG11-004

**Consider a resolution of the City Council of the City of Lancaster, Texas, authorizing the award of Bid 2011-13 to Northstar Construction, Inc. for construction of the amphitheater in Community Park in an amount not to exceed \$325,351.00; authorizing the City Manager to execute the agreement pursuant to approval; repealing all resolutions in conflict; providing a severability clause; and providing an effective date.**

**This request supports the City Council 2010-2011 Policy Agenda.**

**Goal 2: Quality Development**

**Background**

At the request of State Representative Helen Giddings, the Texas Legislature included a special appropriation (\$200,000) for park development in the City of Lancaster as a part of the annual funding of the 2008 Texas Parks and Wildlife Department (TPWD) Grants Program. In April 2008, City Council authorized the reimbursement (Resolution 2008-04-36) of matching grant funds to the Texas Parks and Wildlife Department for an amphitheater in Community Park in an amount not to exceed \$200,000 by the City. The project elements included expansion of the amphitheater, a walking trail with exercise equipment and benches, signs and landscaping. At this time, the amphitheater has not formally been through the naming process. The agreement at the time of the grant award was to call it the Helen Giddings Amphitheater.

On May 28, 2009 the Outdoor Recreation Grant was approved by TPWD. Parks staff negotiated a contract with Halff & Associates for professional services, which included the design of the project. City Council approved the contract with Halff & Associates on December 14, 2009. The Park Advisory Board reviewed the initial design.

When Community Park was originally developed in 2001, the population of Lancaster was approximately 18,000. In 2010, the population had increased to 36,625. During the past ten years, the City has not had the resources to construct additional facilities or trails to address the growing needs of new residents.

The lack of an adequate size amphitheater has impacted the City's ability to meet the needs of residents for a venue to host local talent to provide outdoor concerts, plays or public meetings. The City hosts many outdoor events that are limited by the lack of a permanent stage area or the necessary electrical, seating or other amenities that encourage outdoor performances. Such a facility would enhance citizen enjoyment of local talent and provide opportunities to showcase visual, static and performing arts. Rising fuel costs make local facilities more important to its residents.

These improvements were chosen to improve the environmental quality of this park and to expand the park's use by our residents. The improvements will improve citizen access and consequently, usage of the park. Amphitheaters encourage both family and community celebrations such as Juneteenth, Cinco de Mayo, Kwanzaa, July 4th, Arbor Day, etc. Our experience with such facilities indicates these types of amenities encourage park guests to return and utilize pre-existing park amenities such as our fishing pond, athletic facilities, picnic pavilions and wildlife interaction opportunities.

This project will expand the park's use because of the typical time of day of use of such amenities. Typically most park usage ends at dusk; however, this amenity will provide additional hours of park use and enjoyment well into the evening and night, which is not currently available to residents.

### **Considerations**

- **Operational** – The City of Lancaster will be solely responsible to operate and maintain the facilities constructed with these grant funds.
- **Legal** – This bid was processed in accordance with all local and state purchasing statutes. Nine bids were received. Two of the bids received were M/WBE certified. Contract documents were reviewed by the City Attorney.
- **Financial** – Funding for construction of the amphitheater will be reimbursable through the TPWD grant up to \$200,000 and the remaining balance, up to \$241,000 from remaining bond funds in account 43-0605-57-217. The actual expenditures for the construction portion are \$162,675.50 from both the grant and City.

<b>Construction Expense</b>	<b>Grant Reimbursement</b>	<b>City Expense</b>
\$ 325,351.00	162,675.50	162,675.50
<u>\$ 96,000.00</u>	<u>\$ 37,324.50</u>	<u>\$ 48,000.00</u>
\$ 421,351.00	\$ 200,000.00	\$ 221,351.00

- **Public Information** - Bids were posted Nationwide on the State of Texas website and the City's e-procurement system on November 9, 16, and 23, 2010. A pre-bid meeting was held on December 2, 2010 and bids were opened on January 11, 2011.

**Options/Alternatives**

1. City Council may award the bid as presented.
2. City Council may reject the bid and direct staff.

**Recommendation**

Staff recommends awarding bid 2011-13 to Northstar Construction, Inc. and authorizing the City Manager to execute the agreement in an amount not to exceed \$325,351.00.

**Attachments**

- Resolution
- Contract
- Tab Sheet

**Prepared and submitted by:**  
Dawn Berry, Purchasing Agent

**Date:** March 31, 2011

**RESOLUTION NO. 2011-04-30**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, AUTHORIZING THE AWARD OF BID 2011-13 TO NORTHSTAR CONSTRUCTION, INC. FOR CONSTRUCTION OF THE AMPHITHEATER IN COMMUNITY PARK IN AN AMOUNT NOT TO EXCEED \$325,351.00; AUTHORIZING THE CITY MANAGER TO EXECUTE THE CONTRACT PURSUANT TO APPROVAL; REPEALING ALL RESOLUTIONS IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE.**

- WHEREAS,** in 2008, State Representative Helen Giddings secured a special appropriation for park development in the City of Lancaster as part of the annual funding of the 2008 Texas Parks and Wildlife Department (TPWD) Grants Program; and,
- WHEREAS,** the construction of the amphitheater to be called the "Helen Giddings Amphitheater" is partially funded through the Texas Parks and Wildlife Department Grant Project #50-000413; and,
- WHEREAS,** the City Council of the City of Lancaster desires to contract for construction services.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, THAT:**

- Section 1. The City Council hereby authorizes the award of bid 2011-13 to Northstar Construction, Inc., for the construction of the amphitheater in Community Park in an amount not to exceed three hundred twenty-five thousand three hundred fifty-one dollars (\$325,351.00) pursuant to the contract attached hereto and incorporated herein by reference as Exhibit "A".
- Section 2. The City Manager of the City of Lancaster, Texas, is hereby authorized to execute the contract.
- Section 3. Any prior Resolution of the City Council in conflict with the provisions contained in this Resolution are hereby repealed and revoked.
- Section 4. Should any part of this Resolution be held to be invalid for any reason, the remainder shall not be affected thereby, and such remaining portions are hereby declared to be severable.
- Section 5. This Resolution shall take effect immediately from and after its passage, and it is duly resolved.

**DULY PASSED AND APPROVED** by the City Council of the City of Lancaster, Texas, on this the 11<sup>th</sup> day of April, 2011.

**ATTEST:**

**APPROVED:**

\_\_\_\_\_  
Dolle K. Downe, City Secretary

\_\_\_\_\_  
Marcus E. Knight, Mayor

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Robert E. Hager, City Attorney

# City of Lancaster, Texas

## Standard Fixed Price Construction Agreement

This Agreement is made by and between the City of Lancaster, Texas, a home-rule municipality (hereinafter referred to as the "Owner") and Northstar Construction, Inc., (hereinafter referred to as the "Contractor") for construction of Lancaster Community Park Amphitheater(Bid 2011-13), (hereinafter referred to as the "Project"), the Owner and the Contractor hereby agree as follows:

---

### ARTICLE I: CONTRACT & CONTRACT DOCUMENTS

#### 1.1 THE CONTRACT

1.1.1 The Contract between the Owner and the Contractor, of which this Agreement is a part, consists of the Contract Documents. It shall be effective on the date this Agreement is executed by the last party to execute it.

#### 1.2. THE CONTRACT DOCUMENTS

1.2.1 The Contract Documents consist of this Agreement, the Invitation to Bid, Requirements and Instructions to Bidders, the Specifications, the Drawings, the Project Manual, all Change Orders and Field Orders issued hereafter, any other amendments hereto executed by the parties hereafter, together with the following (if any):

Documents not enumerated in this Paragraph 1.2.1 are not Contract Documents and do not form part of this Contract.

#### 1.3 ENTIRE AGREEMENT

1.3.1 This Contract, together with the Contractor's performance, maintenance, and payment bonds for the Project, all General Conditions, Special Conditions, Plans and Specifications, and Addenda attached thereto, constitute the entire and exclusive agreement between the Owner and the Contractor with reference to the Project. Specifically, but without limitation, this Contract supersedes any bid documents and all prior written or oral communications, representations and negotiations, if any, between the Owner and Contractor not expressly made a part hereof.

#### 1.4 No PRIVACY WITH OTHERS

1.4.1 Nothing contained in this Contract shall create, or be interpreted to create, privity or any other contractual agreement between the Owner and any person or entity other than the Contractor.

#### 1.5 INTENT AND INTERPRETATION

1.5.1 The intent of this Contract is to require complete, correct and timely execution of the Work. Any Work that may be required, implied or inferred by the Contract Documents, or any one or more of them, as necessary to produce the intended result shall be provided by the Contractor for the Contract Price.

1.5.2 This Contract is intended to be an integral whole and shall be interpreted as internally consistent. What is required by any one Contract Document shall be considered as required by the Contract.

1.5.3 When a word, term or phrase is used in this Contract, it shall be interpreted or construed, first, as defined herein; 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.

1.5.4 The words "include", "includes", or "including", as used in this Contract, shall be deemed to be followed by the phrase, "without limitation".

1.5.5 The specification herein 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 shall be deemed not to constitute a material breach of this Contract.

1.5.6 Words or terms used as nouns in this Contract shall be inclusive of their singular and plural forms, unless the context of their usage clearly requires a contrary meaning.

1.5.7 The Contractor shall have a continuing duty to read, carefully study and compare each of the Contract Documents, the Shop Drawings, the Product Data, and any Plans and Specifications, and shall give written notice to the Owner of any inconsistency, ambiguity, error or omission which the Contractor may discover with respect to these documents before proceeding with the affected Work. The issuance or the express or implied approval by the Owner or the Architect of the Contract Documents, Shop Drawings, or Product Data shall not relieve the Contractor of the continuing duties imposed hereby, nor shall any such approval be evidence of the Contractor's compliance with this Contract. The Owner has requested the Architect to only prepare documents for the Project, including the Drawings 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.** By the execution hereof, the Contractor 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 representation or warranties by the Owner concerning such documents as no such representation or warranties have been or are hereby made. Further, the Contractor represents and warrants that it has had a sufficient opportunity to inspect the Project site and assumes any

and all responsibility for inadequacies or ambiguities in the plans, drawings or specifications as well as for latent conditions of the site where the work is to be performed.

1.5.8 As between numbers and scaled measurements on the Drawings and in the Design, the numbers shall govern, as between larger scale and smaller scale drawings, the larger scale shall govern.

1.5.9 Neither the organization of any of the Contract Documents into divisions, sections, paragraphs, articles, (or other categories), nor the organization or arrangement of the Design, shall control the Contractor in dividing the Work or in establishing the extent or scope of the Work to be performed by Subcontractors.

## 1.6 OWNERSHIP OF CONTRACT DOCUMENTS

1.6.1 The Contract Documents, and each of them, shall remain the property of the Owner. The Contractor shall have the right to keep one record set of the Contract Documents upon completion of the Project; provided, however, that in no event shall Contractor use, or permit to be used, any or all of such Contract Documents on other projects without the Owner's prior written authorization.

## ARTICLE II: THE WORK

2.1 The Contractor shall perform all of the Work required, implied or reasonably inferable from, this Contract.

### 2.2 WORK

2.2.1 The term "Work" shall mean whatever is done by or required of the Contractor to perform and complete its duties under this Contract, including the following: construction of the whole or a designated part of the Project; furnishing of any required surety bonds and insurance, and the provision or furnishing of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, permits and licenses required of the Contractor, fuel, heat, light, cooling and all other utilities as required by this Contract. The Work to be performed by the Contractor is generally described as follows:

***Bid # 2010-13***

***Lancaster Community Park Amphitheater***

The project consists of the construction of an amphitheater at Community Park

2.2.2 The Contractor shall be responsible for paying for and procuring all materials and labor and furnishing all services necessary or appropriate for the full performance of the Work and the for the full completion of the Project. All materials shall be new and materials and workmanship shall be of good quality. Upon request, the Contractor shall furnish satisfactory proof of the type, kind, and quality of materials.

## ARTICLE III: CONTRACT TIME

### 3.1 TIME AND LIQUIDATED DAMAGES

3.1.1 The Contractor shall commence the Work within 10 days of receipt of a written Notice to Proceed, and shall achieve Substantial Completion of the Work no later than forty-five (45) working days from the date specified in the Notice to Proceed. The parties acknowledge that time is of the essence in the performance of the terms of this Contract. The term "calendar days" shall mean any and all days of the week or month, no days being excepted. It is contemplated by the parties that the progress of the Work may be delayed by certain conditions beyond the control of the parties; these delays have been contemplated by the parties and considered in the time allotted for performance specified herein and includes, but is not limited to delays occasioned on account of adverse weather, temporary unavailability of materials, shipment delays, and the presence and potential interference of other contractors who may be performing work at the Project site unrelated to this agreement.

The number of calendar days from the date on which the Work is permitted to proceed, through the date set forth for Substantial Completion, shall constitute the "Contract Time".

3.1.2 The Contractor shall pay the Owner the sum of \$120.00 per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth herein for Substantial Completion of the Work. Any sums due and payable hereunder 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. 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.

3.1.3 In the event that the Contractor achieves certification of substantial completion prior to the scheduled completion date, the Owner shall pay to the Contractor the sum of \$0.00 per day for each calendar day that substantial completion is certified in advance of the scheduled completion date.

3.1.4 No claim shall be made by the Contractor to the Owner, and no damages, costs or extra compensation shall be allowed or paid by the Owner to the Contractor for any delay or hindrance from any cause in the progress or completion of the Work or this Contract. The Contractor's sole remedy in the event of any delay or

hindrance shall be to request time extensions by written change orders as provided for hereinafter. Should the Contractor be delayed by an act of the Owner, or should the Owner order a stoppage of the Work for sufficient cause, an extension of time shall be granted by the Owner by written authorization upon written application, which extension shall not be unreasonably denied, to compensate for the delay.

3.1.5 The Owner shall have the authority to suspend the Work wholly or in part for such period or periods of time as it may deem appropriate due to unsuitable conditions considered unfavorable for the proper prosecution of the Work or for the failure of the Contractor to carry out instructions from the Owner or Owner's representative. During any period in which the Work is stopped or during which any of the Work is not actively in progress for any reason, Contractor shall properly protect the site and the Work from damage, loss or harm.

### **3.2 SUBSTANTIAL COMPLETION**

3.2.1 "Substantial Completion" shall mean that stage in the progression of the Work when the Work is sufficiently complete in accordance with this Contract that the Owner can enjoy beneficial use or occupancy of the Work and can utilize the Work for its intended purpose, even though minor miscellaneous work and/or adjustment may be required.

### **3.3 TIME IS OF THE ESSENCE**

3.3.1 All limitations of time set forth in the Contract Documents are of the essence of this Contract.

## **ARTICLE IV: CONTRACT PRICE**

### **4.1 THE CONTRACT PRICE**

4.1.1 The Owner shall pay, and the Contractor shall accept, as full and complete payment for all of the Work required herein, the fixed sum of \$325,351.00.

The sum set forth in this Paragraph 4.1 shall constitute the Contract Price which shall not be modified except by written Change Order as provided in this Contract.

## **ARTICLE V: PAYMENT OF THE CONTRACT PRICE**

### **5.1 SCHEDULE OF VALUES**

5.1.1 Within ten (10) calendar days of the effective date hereof, the Contractor shall submit to the Owner and/or to the Architect a Schedule of Values allocating the Contract Price to the various portions of the Work. The Contractor's Schedule of Values shall be prepared in such form, with such detail, and supported by such data as the Architect or the Owner may require to substantiate its accuracy. The Contractor shall not imbalance the Schedule of Values nor artificially inflate any element thereof. The violation of this provision by the Contractor shall constitute a material breach of this Contract. The Schedule of Values shall be used only as a basis for the Contractor's Applications for Payment and shall only constitute such basis after it has been

acknowledged and accepted in writing by the Architect and the Owner.

### **5.2 PAYMENT PROCEDURE**

5.2.1 The Owner shall pay the Contract Price to the Contractor as provided below.

5.2.2 **PROGRESS PAYMENTS** - Based upon the Contractor's Applications for Payment submitted to the Architect and upon Certificates for Payment subsequently issued to the Owner by the Architect, the Owner shall make progress payments to the Contractor on account of the Contract Price.

5.2.3 On or before the 25th day of each month after commencement of the Work, the Contractor shall submit an Application for Payment for the period ending the 15th day of the month to the Architect in such form and manner, and with such supporting data and content, as the Owner or the Architect may require. Therein, the Contractor may request payment for ninety percent (90%) of that portion of the Contract Price properly allocable to Contract requirements properly provided, labor, materials and equipment properly incorporated in the Work, less the total amount of previous payments received from the Owner. Such Application for Payment shall be signed by the Contractor and shall constitute the Contractor's representation that the Work has progressed to the level for which payment is requested in accordance with the Schedule of Values, that the Work has been properly installed or performed in full compliance with this Contract, and that the Contractor knows of no reason why payment should not be made as requested. Thereafter, the Architect will review the Application for Payment 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 Application for Payment and is as required by this Contract. The Architect shall determine and certify to the Owner the amount properly owing to the Contractor. The Owner shall make partial payments on account of the Contract Price to the Contractor within thirty (30) days following the Architect's receipt and approval of each Application for Payment. The amount of each partial payment shall be the amount certified for payment by the Architect 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 Architect's certification of the Contractor's Application for Payment shall not preclude the Owner from the exercise of any of its rights as set forth in Paragraph 5.3 below.

5.2.4 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment, all Work for which payments have been received from the Owner shall be free and clear of liens, claims, security interest or other encumbrances in favor of the Contractor or any other person or entity whatsoever.

5.2.5 The Contractor shall promptly pay each Subcontractor out of the amount paid to the Contractor on account of such Subcontractor's Work, the amount to which such Subcontractor is entitled. In the event the Owner becomes informed that the Contractor has not paid a Subcontractor as herein provided, the Owner shall have the right, but not the duty, to issue future checks in payment to the Contractor of amounts otherwise due hereunder naming the Contractor and such Subcontractor as joint payees. Such joint check procedure, if employed by the Owner, 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.

5.2.6 No progress payment, nor any use or occupancy of the Project by the owner, shall be interpreted to constitute an acceptance of any Work not in strict accordance with this Contract.

### **5.3 WITHHELD PAYMENT**

5.3.1 The Owner may decline to make payment, may withhold funds, and, if necessary, may demand the return of some or all of the amounts previously paid to the Contractor, to protect the Owner from loss because of:

- (a) defective Work not remedied by the Contractor nor, in the opinion of the Owner, likely to be remedied by the Contractor;
- (b) claims of third parties against the Owner or the Owner's property;
- (c) failure by the Contractor to pay Subcontractors or others in a prompt and proper fashion;
- (d) evidence that the balance of the Work cannot be completed in accordance with the Contract for the unpaid balance of the Contract Price,
- (e) evidence that the Work will not be completed in the time required for substantial or final completion;
- (f) persistent failure to carry out the Work in accordance with the Contract;
- (g) damage to the Owner or a third party to whom the Owner is, or may be, liable.

In the event that the Owner makes written demand upon the Contractor for amounts previously paid by the Owner as contemplated in this Subparagraph 5.3.1, the Contractor shall promptly comply with such demand. The Owner shall have no duty to third parties to withhold payment to the Contractor and shall incur no liability for a failure to withhold funds.

### **5.4 UNEXCUSED FAILURE TO PAY**

5.4.1 If within fifteen (15) days after the date established herein for payment to the Contractor by the

Owner, the Owner, without cause or basis hereunder, fails to pay the Contractor any amount then due and payable to the Contractor, then the Contractor may after ten (10) additional days' written notice to the Owner and the Architect, and without prejudice to any other available rights or remedies it may have, stop the Work until payment of those amounts due from the Owner have been received. Late payments shall not accrue interest or other late charges.

### **5.5 SUBSTANTIAL COMPLETION**

5.5.1 When the Contractor believes that the Work is substantially complete, the Contractor shall submit to the Architect a list of items to be completed or corrected. When the Architect on the basis of an inspection determines that the Work is in fact substantially complete, it will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall state the responsibilities of the Owner and the Contractor for Project security, maintenance, heat, utilities, damage to the Work, and insurance, and shall fix the time within which the Contractor shall complete the items listed therein. Guarantees required by the Contract shall commence on the date of Substantial Completion of the Work. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such certificate.

Upon Substantial Completion of the Work, and execution by both the Owner and the Contractor of the Certificate of Substantial Completion, the Owner shall pay the Contractor an amount sufficient to increase total payments to the Contractor to one hundred percent (100%) of the Contract Price less three hundred percent (300%) of the reasonable cost as determined by the Owner and the Architect for completing all incomplete Work, correcting and bringing into conformance all defective and nonconforming Work, and handling all unsettled claims.

### **5.6 COMPLETION AND FINAL PAYMENT**

5.6.1 When all of the Work is finally complete and the Contractor is ready for a final inspection, it shall notify the Owner and the Architect thereof in writing. Thereupon, the Architect will make final inspection of the Work and, if the Work is complete in full accordance with this Contract and this Contract has been fully performed, the Architect will promptly issue a final Certificate for Payment 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 pursuant to this Contract. If the Architect is unable to issue its final Certificate for Payment and is required to repeat its final inspection of the Work, the Contractor shall bear the cost of such repeat final inspection(s) which cost may be deducted by the Owner from the Contractor's final payment.

5.6.1.1 If the Contractor fails to achieve final completion within the time fixed by the Architect in its Certificate of Substantial Completion, the Contractor shall pay the

Owner the sum set forth hereinabove as liquidated damages per day for each and every calendar day of unexcused delay in achieving final completion beyond the date set forth herein for final completion of the Work. Any sums due and payable hereunder 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. 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 and when 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.

5.6.2 The Contractor shall not be entitled to final payment unless and until it submits to the Architect its affidavit that all payrolls, invoices for materials and equipment, and other liabilities connected with the Work for which the Owner, or the Owner's property might be responsible, have been fully paid or otherwise satisfied; releases and waivers of lien from all Subcontractors of the Contractor and of any and all other parties required by the Architect or the Owner; consent of Surety, if any, to final payment. If any third party fails or refuses to provide a release of claim or waiver of lien as required by the Owner, the Contractor shall furnish a bond satisfactory to the Owner to discharge any such lien or indemnify the Owner from liability.

5.6.3 The Owner shall make final payment of all sums due the Contractor within ten (10) days of the Architect's execution of a final Certificate for Payment.

5.6.4 Acceptance of final payment shall constitute a waiver of all claims against the Owner by the Contractor except for those claims previously made in writing against the Owner by the Contractor, pending at the time of final payment, and identified in writing by the Contractor as unsettled at the time of its request for final payment.

5.6.5 Under no circumstance shall Contractor be entitled to receive interest on any payments or monies due Contractor by the Owner, whether the amount on which the interest may accrue is timely, late, wrongfully withheld, or an assessment of damages of any kind.

## **ARTICLE VI: THE OWNER**

### **6.1 INFORMATION, SERVICES AND THINGS REQUIRED FROM OWNER**

6.1.1 The Owner shall furnish to the Contractor, at the time of executing this Contract, any and all written and tangible material in its possession concerning conditions below ground at the site of the Project.

Such written and tangible material is furnished to the Contractor only in order to make complete disclosure of such material 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 surveys, legal limitations and utility locations (if known), and a legal description of the Project site.

6.1.2 Excluding permits and fees normally the responsibility of the Contractor, the Owner shall obtain all approvals, easements, and the like required for construction and shall pay for necessary assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

6.1.3 The Owner shall furnish the Contractor, free of charge, one copy of the Contract Documents for execution of the Work.

### **6.2 RIGHT TO STOP WORK**

6.2.1 If the Contractor persistently fails or refuses to perform the Work in accordance with this Contract, or if the best interests of the public health, safety or welfare so require, the Owner may order the Contractor to stop the Work, or any described portion thereof, until the cause for stoppage has been corrected, no longer exists, or the Owner orders that Work be resumed. In such event, the Contractor shall immediately obey such order.

### **6.3 OWNER'S RIGHT TO PERFORM WORK**

6.3.1 If the Contractor's Work is stopped by the Owner under Paragraph 6.2, and the Contractor fails within seven (7) days of such stoppage to provide adequate assurance to the Owner that the cause of such stoppage will be eliminated or corrected, then the Owner may, without prejudice to any other rights or remedies the Owner may have against the Contractor, proceed to carry out the subject Work. In such a situation, an appropriate Change Order shall be issued deducting from the Contract Price the cost of correcting the subject deficiencies, plus compensation for the Architect's additional services and expenses necessitated thereby, if any. If the unpaid portion of the Contract Price is insufficient to cover the amount due the Owner, the Contractor shall pay the difference to the Owner.

## **ARTICLE VII: THE CONTRACTOR**

7.1 The Contractor is again reminded of its continuing duty set forth in Subparagraph 1.5.7. The Contractor shall perform no part of the Work at any time without adequate Contract Documents or, as appropriate, approved Shop Drawings, Product Data or Samples for such portion of the Work. If the Contractor performs any of the Work knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Architect, the Contractor shall bear responsibility for such performance and shall bear the cost of correction.

7.2 The Contractor shall perform the Work strictly in accordance with this Contract.

7.3 The Contractor shall supervise and direct the Work using the Contractor's best skill, effort and attention. The Contractor shall be responsible to the Owner for any and all acts or omissions of the Contractor, its employees and others engaged in the Work on behalf of the Contractor.

7.3.1 The Contractor shall give adequate attention to the faithful prosecution of the Work and the timely completion of this Contract, with authority to determine the manner and means of performing such Work, so long as such methods insure timely completion and proper performance.

7.3.2 The Contractor shall exercise all appropriate means and measures to insure a safe and secure jobsite in order to avoid and prevent injury, damage or loss to persons or property.

**7.4 WARRANTY**

7.4.1 The Contractor warrants to the Owner that all labor furnished to progress the Work under this Contract will be competent to perform the tasks undertaken, that the product of such labor will yield only first-class results, that materials and equipment furnished will be of good quality and new unless otherwise permitted by this Contract, and that the Work will be of good quality, free from faults and defects and in strict conformance with this Contract. All Work not conforming to these requirements may be considered defective.

7.5 The Contractor shall obtain and pay for all permits, fees and licenses necessary and ordinary for the Work. The Contractor shall comply with all lawful requirements applicable to the Work and shall give and maintain any and all notices required by applicable law pertaining to the Work.

**7.6 SUPERVISION**

7.6.1 The Contractor shall employ and maintain at the Project site only competent supervisory personnel. Absent written instruction from the Contractor to the contrary, the superintendent shall be deemed the Contractor's authorized representative at the site and shall be authorized to receive and accept any and all communications from the Owner or the Architect.

7.6.2 Key supervisory personnel assigned by the Contractor to this Project are as follows:

NAME	FUNCTION
_____	_____
_____	_____
_____	_____
_____	_____

So long as the individuals named above remain actively employed or retained by the Contractor, they shall

perform the functions indicated next to their names unless the Owner agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assume one or more of those functions listed above, the Contractor shall be bound by the provisions of this Subparagraph 7.6.2 as though such individuals had been listed above.

7.7 The Contractor, within fifteen (15) days of commencing the Work, shall submit to the Owner and the Architect for their information, the Contractor's schedule for completing the Work. The Contractor's schedule shall be revised no less frequently than monthly (unless the parties otherwise agree in writing) and shall be revised to reflect conditions encountered from time to time and shall be related to the entire Project. Each such revision shall be furnished to the Owner and the Architect. Failure by the Contractor to strictly comply with the provisions of this Paragraph 7.7 shall constitute a material breach of this Contract.

7.8 The Contractor shall continuously maintain at the site, for the benefit of the owner and the Architect, one record copy of this Contract marked to record on a current basis changes, selections and modifications made during construction. Additionally, the Contractor shall maintain at the site for the Owner and Architect the approved Shop Drawings, Product Data, Samples and other similar required submittals. Upon final completion of the Work, all of these record documents shall be delivered to the Owner.

**7.9 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

7.9.1 Shop Drawings, Product Data, Samples and other submittals from the Contractor do not constitute Contract Documents. Their purpose is merely to demonstrate the manner in which the Contractor intends to implement the Work in conformance with information received from the Contract Documents.

7.9.2 The Contractor shall not perform any portion of the Work requiring submittal and review of Shop Drawings, Product Data or Samples unless and until such submittal shall have been approved by the Architect. Approval by the Architect, however, shall not be evidence that Work installed pursuant thereto conforms with the requirements of this Contract.

**7.10 CLEANING THE SITE AND THE PROJECT**

7.10.1 The Contractor shall keep the site reasonably clean during performance of the Work. Upon final completion of the Work, the Contractor shall clean the site and the Project and remove all waste, rubbish, temporary structures, and other materials together with all of the Contractor's property therefrom. Contractor shall dispose of all refuse at a Texas Natural Resource Conservation Commission approved landfill. The Contractor shall further restore all property damaged during the prosecution of the Work and shall leave the site in a clean and presentable condition. No additional payment shall be made by the Owner for this work, the compensation having been considered and included in the contract price.

## **7.11 ACCESS TO WORK AND INSPECTIONS**

7.11.1 The Owner and the Architect shall have access to the Work at all times from commencement of the Work through final completion. The Contractor shall take whatever steps necessary to provide access when requested. When reasonably requested by the Owner or the Architect, the Contractor shall perform or cause to be performed such testing as may be necessary or appropriate to insure suitability of the jobsite or the Work's compliance with the Contract requirements.

## **7.12 INDEMNITY AND DISCLAIMER**

7.12.1 **OWNER SHALL NOT BE LIABLE OR RESPONSIBLE FOR, AND SHALL BE INDEMNIFIED, DEFENDED, HELD HARMLESS AND RELEASED BY CONTRACTOR FROM AND AGAINST ANY AND ALL SUITS, ACTIONS, LOSSES, DAMAGES, CLAIMS, OR LIABILITY OF ANY CHARACTER, TYPE, OR DESCRIPTION, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES FOR INJURY OR DEATH TO ANY PERSON, OR INJURY OR LOSS TO ANY PROPERTY, RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS, INCLUDING THE CONTRACTOR, OR PROPERTY, ARISING OUT OF, OR OCCASIONED BY, DIRECTLY OR INDIRECTLY, THE PERFORMANCE OF CONTRACTOR UNDER THIS AGREEMENT, INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF OWNER, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE OWNER UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. THE PROVISIONS OF THIS INDEMNIFICATION ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY. IT IS THE EXPRESSED INTENT OF THE PARTIES TO THIS AGREEMENT THAT THE INDEMNITY PROVIDED FOR IN THIS CONTRACT IS AN INDEMNITY EXTENDED BY CONTRACTOR TO INDEMNIFY AND PROTECT OWNER FROM THE CONSEQUENCES OF THE CONTRACTOR'S AS WELL AS THE OWNER'S NEGLIGENCE, WHETHER SUCH NEGLIGENCE IS THE SOLE OR PARTIAL CAUSE OF ANY SUCH INJURY, DEATH, OR DAMAGE.**

7.12.2 The Contractor will secure and maintain Contractual Liability insurance to cover this indemnification agreement that will be primary and non-contributory as to any insurance maintained by the Owner for its own benefit, including self-insurance. In addition, Contractor shall obtain and file with Owner a Standard Certificate of Insurance evidencing the required coverage.

7.12.3 In claims against any person or entity indemnified under this Paragraph 7.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 7.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

## **7.13 NONDISCRIMINATION**

7.13.1 The Contractor shall not discriminate in any way against any person, employee or job applicant on the basis of race, color, creed, national origin, religion, age, sex, or disability where reasonable accommodations can be effected to enable the person to perform the essential functions of the job. The Contractor shall further insure that the foregoing nondiscrimination requirement shall be made a part and requirement of each subcontract on this Project.

## **7.14 PREVAILING WAGE RATES**

7.14.1 The Contractor shall comply in all respects with all requirements imposed by any laws, ordinances or resolutions applicable to the Project with regard to the minimum prevailing wage rates for all classes of employees, laborers, subcontractors, mechanics, workmen and persons furnishing labor and services to the Project. The City of Lancaster has adopted US Department of Labor's Davis Bacon Wage Determinations as the Prevailing Wage Rate Schedule, available to the Contractor by request, which specifies the classes and wage rates to be paid to all persons. The Contractor shall pay not less than the minimum wage rates established thereby for each class, craft or type of labor, workman, or mechanic employed in the execution of this Contract. The failure of the Contractor to comply with this requirement shall result in the forfeiture to the City of \$10.00 of a sum of not less than Sixty Dollars (\$60.00) for each person per day, or portion thereof, that such person is paid less than the prevailing rate. Upon request by the Owner, Contractor shall make available for inspection and copying its books and records, including but not limited to its payroll records, account information and other documents as may be required by the Owner to insure compliance with this provision.

## **7.15 JOB SITE SAFETY PRECAUTIONS**

7.15.1 The Contractor shall at all times exercise reasonable precautions for the safety of its employees, laborers, subcontractors, mechanics, workmen and others on and near the jobsite and shall comply with all laws, ordinances, regulations, and standards of federal, state and local safety laws and regulations. The Contractor shall provide such machinery guards, safe walk-ways, ladders, bridges, and other safety devices as may be necessary or appropriate to insure a safe and secure jobsite and shall require its subcontractors to comply with this requirement. The Contractor shall immediately comply with any and all safety requirements imposed by the Architect during the progress of the Work.

## **7.16 WARNING DEVICES AND BARRICADES**

7.16.1 The Contractor shall furnish and maintain such warning devices, barricades, lights, signs, pavement markings, and other devices as may be necessary or appropriate or required by the Architect to protect persons or property in, near or adjacent to the jobsite, including . No separate compensation shall be paid to

the Contractor for such measures. Where the Work is being conducted in, upon or near streets, alleys, sidewalks, or other rights-of-way, the Contractor shall insure the placement, maintenance and operation of any and all such warning devices as may be required by the City of Lancaster and shall do so until no longer required by the City. Such devices shall be in compliance with and conform to the manual and specifications for the uniform system of traffic control devices adopted by the Texas Department of Transportation.

#### **7.17 PROTECTION OF UTILITIES & OTHER CONTRACTORS**

7.17.1 The Contractor shall use best efforts to leave undisturbed and uninterrupted all utilities and utility services provided to the jobsite or which presently exists at, above or beneath the location where the Work is to be performed. In the event that any utility or utility service is disturbed or damaged during the progress of the Work, the Contractor shall forthwith repair, remedy or restore the utility at Contractor's sole expense.

7.17.2 The Contractor understands and acknowledges that other contractors of the Owner or of other entities may be present at the jobsite performing other work unrelated to the Project. The Contractor shall use best efforts to work around other contractors without impeding the work of others while still adhering to the completion date established herein. In the event that the Contractor's work is or may be delayed by any other person, the Contractor shall immediately give notice thereof to the Architect and shall request a written Change Order in accordance with the procedures set forth by this Contract. The Contractor's failure to provide such notice and to request such Change Order shall constitute a waiver of any and all claims associated therewith.

### **ARTICLE VIII: CONTRACT ADMINISTRATION**

#### **8.1 THE ARCHITECT**

8.1.1 When used in this Contract the term "Architect" does not necessarily denote a duly licensed, trained or certified architect; as used herein, the term shall be used interchangeably and shall mean a designated Architect, Engineer, or Contract Administrator (who may not be an architect or engineer) for the Owner, said person to be designated or redesignated by the Owner prior to or at any time during the Work hereunder. The Architect may be an employee of the Owner or may be retained by the Owner as an independent contractor but, in either event, the Architect's duties and authority shall be as set forth hereinafter. The Contractor understands and agrees that it shall abide by the decisions and instructions of the Architect notwithstanding the contractual relationship between the Owner and Architect. All of the Owner's instructions to the Contractor shall be through the Architect.

In the event the Owner should find it necessary or convenient to replace the Architect, the Owner shall retain a replacement Architect and the status of the replacement Architect shall be that of the former Architect.

#### **8.2 ARCHITECT'S ADMINISTRATION**

8.2.1 The Architect, unless otherwise directed by the Owner in writing, will perform those duties and discharge those responsibilities allocated to the Architect as set forth in this Contract. The Architect shall be the Owner's representative from the effective date of this Contract until final payment has been made.

8.2.2 The Owner and the Contractor shall communicate with each other in the first instance through the Architect.

8.2.3 The Architect shall be the initial interpreter of the requirements of the drawings and specifications and the judge of the performance thereunder by the Contractor. The Architect shall render written or graphic interpretations necessary for the proper execution or progress of the Work with reasonable promptness on request of the Contractor.

8.2.4 The Architect will review the Contractor's Applications for Payment and will certify to the Owner for payment to the Contractor, those amounts then due the Contractor as provided in this Contract.

8.2.5 The Architect shall have authority to reject Work which is defective or does not conform to the requirements of this Contract. If the Architect deems it necessary or advisable, the Architect shall have authority to require additional inspection or testing of the Work for compliance with Contract requirements.

8.2.6 The Architect will review and approve, or take other appropriate action as necessary, concerning the Contractor's submittals including Shop Drawings, Product Data and Samples. Such review, approval or other action shall be for the sole purpose of determining conformance with the design concept and information given through the Contract Documents.

8.2.7 The Architect will prepare Change Orders and may authorize minor changes in the Work by Field Order as provided elsewhere herein.

8.2.8 The Architect shall, upon written request from the Contractor, conduct inspections to determine the date of Substantial Completion and the date of final completion, will receive and forward to the Owner for the Owner's review and records, written warranties and related documents required by this Contract and will issue a final Certificate for Payment upon compliance with the requirements of this Contract.

8.2.9 The Architect's decisions in matters relating to aesthetic effect shall be final if consistent with the intent of this Contract.

#### **8.3 CLAIMS BY THE CONTRACTOR**

8.3.1 The Architect shall determine all claims and matters in dispute between the Contractor and Owner with regard to the execution, progress, or sufficiency of the Work or the interpretation of the Contract Documents, including but not limited to the plans and specifications. Any dispute shall be submitted in writing to the Architect within seven (7) days of the event or

occurrence or the first appearance of the condition giving rise to the claim or dispute who shall render a written decision within a reasonable time thereafter. The Architect's decisions shall be final and binding on the parties. In the event that either party objects to the Architect's determination as to any submitted dispute, that party shall submit a written objection to the Architect and the opposing party within ten (10) days of receipt of the Architect's written determination in order to preserve the objection. Failure to so object shall constitute a waiver of the objection for all purposes.

8.3.2 Pending final resolution of any claim of the Contractor, the Contractor shall diligently proceed with performance of this Contract and the Owner shall continue to make payments to the Contractor in accordance with this Contract.

**8.3.3 CLAIMS FOR CONCEALED, LATENT OR UNKNOWN CONDITIONS** - The Contractor expressly represents that it has been provided with an adequate opportunity to inspect the Project site and thoroughly review the Contract Documents and plans and specifications prior to submission of its bid and the Owner's acceptance of the bid. Subject to the conditions hereof, Contractor assumes full responsibility and risk for any concealed, latent or unknown condition which may affect the Work. No claims for extra work or additional compensation shall be made by Contractor in connection with concealed, latent or unknown conditions except as expressly provided herein. Should concealed, latent or unknown conditions encountered in the performance of the Work (a) below the surface of the ground or (b) in an existing structure be at variance with the conditions indicated by this Contract, or should unknown conditions of an unusual nature differing materially from those ordinarily encountered in the area and generally recognized as inherent in Work of the character provided for in this Contract, be encountered, the Contract Price shall be equitably adjusted by Change Order upon the written notice and claim by either party made within seven (7) days after the first observance of the condition. As a condition precedent to the Owner having any liability to the Contractor for concealed or unknown conditions, the Contractor must give the Owner and the Architect written notice of, and an opportunity to observe, the condition prior to disturbing it. The failure by the Contractor to make the written notice and claim as provided in this Subparagraph shall constitute a waiver by the Contractor of any claim arising out of or relating to such concealed, latent or unknown condition and the Contractor thereby assumes all risks and additional costs associated therewith.

**8.3.4 CLAIMS FOR ADDITIONAL COSTS** - If the Contractor wishes to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the Owner therefore, the Contractor shall give the Architect written notice of such claim within seven (7) days after the occurrence of the event, or the first appearance of the condition, giving rise to such claim. Such notice shall be given by the Contractor before proceeding to execute any additional or changed Work.

The failure by the Contractor to give such notice and to give such notice prior to executing the Work shall constitute a waiver of any claim for additional compensation.

8.3.4.1 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 costs shall be strictly limited to direct costs incurred by the Contractor and shall in no event include indirect costs or consequential damages of the Contractor. The Owner shall not be liable to the Contractor for claims of third parties, including Subcontractors. The Owner shall not be liable to the Contractor for any claims based upon delay to the Contractor for any reason whatsoever including any act or neglect on the part of the Owner.

**8.3.5 CLAIMS FOR ADDITIONAL TIME** - If the Contractor is delayed in progressing 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 neglect to act by the Owner or someone acting in the Owner's behalf, or by changes ordered in the Work, unusual delay in transportation, unusually adverse weather conditions not reasonably anticipated, fire or any causes beyond the Contractor's control, then the date for achieving Substantial Completion of the Work shall be extended upon the written notice and claim of the Contractor to the Owner and the Architect, for such reasonable time as the Architect may determine. Any notice and claim for an extension of time by the Contractor shall be made not more than seven (7) days after the occurrence of the event or the first appearance of the condition giving rise to the claim and shall set forth in detail the Contractor's basis for requiring additional time in which to complete the Project. In the event the delay to the Contractor is a continuing one, only one notice and claim for additional time shall be necessary. If the Contractor fails to make such claim as required in this Subparagraph, any claim for an extension of time shall be waived. The procedures and remedies provided by this provision shall be the sole remedy of Contractor and Contractor shall not assert nor be entitled to any additional delays or damages associated therewith.

#### **8.4 FIELD ORDERS**

8.4.1 The Architect shall have authority to order minor changes in the Work not involving a change in the Contract Price or in Contract Time and not inconsistent with the intent of the Contract. Such changes shall be effected by Field Order and shall be binding upon the Contractor. The Contractor shall carry out such Field Orders promptly.

#### **8.5 MEDIATION**

8.5.1 In the event that a dispute arises under the terms of this Contract, following an adverse determination by the Architect and proper preservation of the issue as required herein, the parties agree to submit to mediation. In such event, the parties shall agree to a designated person to serve as mediator and

each party shall be responsible for payment of one-half of the total mediation fees. The parties shall submit the dispute to mediation as soon as practical and in no event later than one (1) year after the Architect's written decision on the matter. At least one designated representative of each party must attend and participate in good faith in an effort to resolve the matters in dispute.

8.5.2 In no event shall the foregoing provision justify or authorize any delay in the progress of the Work; the parties shall abide by the decision of the Architect in accomplishing the timely completion of the Project.

## **ARTICLE IX: SUBCONTRACTORS**

### **9.1 DEFINITION**

9.1.1 A Subcontractor is an entity which has a direct contract with the Contractor to perform a portion of the Work. No Subcontractor shall be in privity with the Owner.

### **9.2 AWARD OF SUBCONTRACTS**

9.2.1 Upon execution of the Contract, the Contractor shall furnish the Owner, in writing, the names of persons or entities proposed by the Contractor to act as a Subcontractor on the Project. The Owner shall promptly reply to the Contractor, in writing, stating any objections the Owner may have to such proposed Subcontractor. The Contractor shall not enter into a subcontract with a proposed Subcontractor with reference to whom the Owner has made timely objection. The Contractor shall not be required to subcontract with any party to whom the Contractor has objection.

9.2.2 All subcontracts shall afford the Contractor rights against the Subcontractor which correspond to those rights afforded to the Owner against the Contractor herein, including those rights afforded to the Owner by Subparagraph 12.2.1 below. All subcontracts shall incorporate by reference the provisions hereof and shall provide that no claims, causes or demands shall be made by any Subcontractor against the Owner.

9.2.3 The Contractor shall indemnify, defend and hold harmless the Owner from and against any and all claims, demands, causes of action, damage, and liability asserted or made against the Owner by or on behalf of any Subcontractor.

## **ARTICLE X: CHANGES IN THE WORK**

### **10.1 CHANGES PERMITTED**

10.1.1 Changes in the Work within the general scope of this Contract, consisting of additions, deletions, revisions, or any combination thereof, may be ordered without invalidating this Contract, by Change Order or by Field Order.

10.1.2 Changes in the Work shall be performed under applicable provisions of this Contract and the Contractor shall proceed promptly with such changes.

### **10.2 CHANGE ORDER DEFINED**

10.2.1 Change Order shall mean a written order to the Contractor executed by the Owner and the Architect, issued after execution of this Contract, authorizing and directing a change in the Work or an adjustment in the Contract Price or the Contract Time, or any combination thereof. The Contract Price and the Contract Time may be changed only by written Change Order.

### **10.3 CHANGES IN THE CONTRACT PRICE**

10.3.1 Any change in the Contract Price resulting from a Change Order shall be determined as follows: (a) by mutual agreement between the Owner and the Contractor as evidenced by (1) the change in the Contract Price being set forth in the Change Order, (2) such change in the Contract Price, together with any conditions or requirements related thereto, being initialed by both parties and (3) the Contractor's execution of the Change Order, or (b) if no mutual agreement occurs between the Owner and the Contractor, then, as provided in Subparagraph 10.3.2 below.

10.3.2 If no mutual agreement occurs between the Owner and the Contractor as contemplated in Subparagraph 10.3.1 above, the change in the Contract Price, if any, shall then be determined by the Architect on the basis of the reasonable expenditures or savings of those performing, deleting or revising the Work attributable to the change, including, in the case of an increase or decrease in the Contract Price, a reasonable allowance for direct job site overhead and profit. In such case, the Contractor shall present, in such form and with such content as the Owner or the Architect requires an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order. Reasonable expenditures or savings shall be limited to the following: reasonable costs of materials, supplies, or equipment including delivery costs, reasonable costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance, reasonable rental costs of machinery and equipment exclusive of hand tools whether rented from the Contractor or others, reasonable costs of premiums for all bonds and insurance, permit fees, and sales, use or other taxes related to the Work, and reasonable cost of direct supervision and jobsite field office overhead directly attributable to the change. In no event shall any expenditure or savings associated with the Contractor's home office or other non-jobsite overhead expense be included in any change in the Contract Price. Pending final determination of reasonable expenditures or savings to the Owner, payments on account shall be made to the Contractor on the Architect's Certificate for Payment.

10.3.3 If unit prices are provided in the Contract, and if the quantities contemplated are so changed in a proposed Change Order that application of such unit prices to the quantities of Work proposed will cause

substantial inequity to the Owner or to the Contractor, the applicable unit prices shall be equitably adjusted.

#### **10.4 MINOR CHANGES**

10.4.1 The Architect shall have authority to order minor changes in the Work not involving a change in the Contract Price or an extension of the Contract Time and not inconsistent with the intent of this Contract. Such minor changes shall be made by written Field Order, and shall be binding upon the owner and the Contractor. The Contractor shall promptly carry out such written Field Orders.

#### **10.5 EFFECT OF EXECUTED CHANGE ORDER**

10.5.1 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, the Contract Price and the Contract Time. 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.

#### **10.6 NOTICE TO SURETY; CONSENT**

10.6.1 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 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.

### **ARTICLE XI: UNCOVERING & CORRECTING WORK**

#### **11.1 UNCOVERING WORK**

11.1.1 If any of the Work is covered contrary to the Architect's request or to any provisions of this Contract, it shall, if required by the Architect or the Owner, be uncovered for the Architect's inspection and shall be properly replaced at the Contractor's expense without change in the Contract Time.

11.1.2 If any of the Work is covered in a manner not inconsistent with Subparagraph 11.1.1 above, it shall, if required by the Architect or Owner, be uncovered for the Architect's inspection. If such Work conforms strictly with this Contract, costs of uncovering and proper replacement shall by Change Order be charged to the Owner. If such Work does not strictly conform with this Contract, the Contractor shall pay the costs of uncovering and proper replacement.

#### **11.2 CORRECTING WORK**

11.2.1 The Contractor shall immediately proceed to correct Work rejected by the Architect as defective or failing to conform to this Contract. The Contractor shall pay all costs and expenses associated with correcting

such rejected Work, including any additional testing and inspections, and reimbursement to the Owner for the Architect's services and expenses made necessary thereby.

11.2.2 If within one (1) year after Substantial Completion of the Work any of the Work is found to be defective or not in accordance with this Contract, the Contractor shall correct it promptly upon receipt of written notice from the Owner. This obligation shall survive final payment by the Owner and termination of this Contract. With respect to Work first performed and completed after Substantial Completion, this one year obligation to specifically correct defective and nonconforming Work shall be extended by the period of time which elapses between Substantial Completion and completion of the subject Work.

11.2.3 Nothing contained in this Paragraph 11.2 shall establish any period of limitation with respect to other obligations which the Contractor has under this Contract. Establishment of the one year time period in Subparagraph 11.2.2 relates only to the duty of the Contractor to specifically correct the Work.

#### **11.3 OWNER MAY ACCEPT DEFECTIVE OR NONCONFORMING WORK**

11.3.1 If the Owner chooses to accept defective or nonconforming Work, the Owner may do so. In such event, the Contract Price shall be reduced by the greater of (a) the reasonable cost of removing and correcting the defective or nonconforming Work, and (b) 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 its 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.

### **ARTICLE XII: CONTRACT TERMINATION**

#### **12.1 TERMINATION BY THE CONTRACTOR**

12.1.1 If the Work is stopped for a period of ninety (90) days by an order of any court or other public authority, or as a result of an act of the Government, through no fault of the Contractor or any person or entity working directly or indirectly for the Contractor, the Contractor may, upon ten (10) days' written notice to the Owner and the Architect, terminate performance under this Contract and recover from the Owner payment for the actual reasonable expenditures of the Contractor (as limited in Subparagraph 10.3.2 above) for all Work executed and for materials, equipment, tools, construction equipment and machinery actually purchased or rented solely for the Work, less any salvage value of any such items.

12.1.2 If the Owner shall persistently or repeatedly fail to perform any material obligation to the Contractor for a period of fifteen (15) days after receiving written notice

from the Contractor of its intent to terminate hereunder, the Contractor may terminate performance under this Contract by written notice to the Architect and the Owner. 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 pursuant to Subparagraph 12.2.1 hereunder.

## **12.2 TERMINATION BY THE OWNER**

### **12.2.1 FOR CONVENIENCE**

12.2.1.1 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.

12.2.1.2 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 terminated orders or subcontracts to the Owner or its designee.

12.2.1.3 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.

#### **12.2.1.4**

(a) The Contractor shall submit a termination claim to the Owner and the Architect specifying the amounts due because of the termination for convenience together with costs, pricing or other data required by the Architect. If the Contractor fails to file a termination claim within one (1) year from the effective date of termination, the Owner shall pay the Contractor, an amount derived in accordance with subparagraph (c) below.

(b) The Owner and the Contractor may agree to the compensation, if any, due to the Contractor hereunder.

(c) Absent agreement to the amount due to the Contractor, the Owner shall pay the Contractor the following amounts:

(i) Contract prices for labor, materials, equipment and other services accepted under this Contract;

(ii) 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 overhead and profit thereon (such profit shall not include anticipated profit or consequential damages), provided however, that 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;

(iii) Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Subparagraph 12.2.1.2 of this Paragraph. These costs shall not include amounts paid in accordance with other provisions hereof.

The total sum to be paid the Contractor under this Subparagraph 12.2.1 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.

### **12.2.2 FOR CAUSE**

12.2.2.1 If the Contractor persistently or repeatedly refuses or fails to prosecute the Work in a timely manner, abandons the jobsite and fails to resume work within five (5) days of written notice thereof by the Owner, fails to grant or allow access to the jobsite by the Owner or Architect, fails to supply enough properly skilled workers, supervisory personnel or proper equipment or materials, fails to make prompt payment to Subcontractors or for materials or labor, persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a violation of a material provision of this Contract, then the Owner may by written notice to the Contractor, without prejudice to any other right or remedy, terminate the employment of the Contractor and take possession of the site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever methods it may deem expedient. In such case, the Contractor shall not be entitled to receive any further payment until the Work is finished.

12.2.2.2 If the unpaid balance of the Contract Price does not exceed the cost of finishing the work, including compensation for the Architect's additional services and expenses made necessary thereby, such difference shall be paid by the Contractor to the Owner. This obligation for payment shall survive the termination of the Contract.

12.2.2.3 In the event the employment of the Contractor is terminated by the Owner for cause pursuant to Subparagraph 12.2.2 and it is subsequently determined by a Court of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Subparagraph 12.2.1 and the provisions of Subparagraph 12.2.1 shall apply.

## **ARTICLE XIII: INSURANCE**

### **13.1 CONTRACTOR SHALL MAINTAIN INSURANCE**

13.1.1 The Contractor at his own expense shall purchase, maintain and keep in force during the life of this contract, adequate insurance that will protect the Contractor and/or any Additional Insured from claims

which may arise out of or result from operations under this contract. The insurance required shall provide adequate protections from all claims, whether such operations be by the Contractor or by any Additional Insured or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone whose acts of any of them may be liable and from any special hazards, such as blasting, which may be encountered in the performance of this contract in the amounts as shown below in Paragraph 13.2.1.

13.1.2 The Contractor shall not commence work on any Contract in the City of Lancaster until the Contractor has obtained all the insurance required under this paragraph and such insurance has been approved by the City.

### **13.2 TYPES AND AMOUNTS OF INSURANCE**

13.2.1. The Contractor shall furnish and maintain during the life of the contract adequate Insurance in such amounts as follows:

<u>Type of Insurance</u>	<u>Amount</u>
Worker's Compensation as set forth in the Worker's Compensation Act.	
Commercial General Liability	
\$1,000,000 Each Accident/Occurrence. The policy shall have no coverage removed by exclusions.	
Limit of Insurance per Project or Owner's and Contractor's Protective Liability Insurance for the Project.	
Automobile Liability	
\$500,000 Combined single limit per occurrence.	

### **13.2 INSTALLATION FLOATER**

This insurance shall protect the Contractor and the Owner from all insurable risks of physical loss or damage to materials and equipment not otherwise covered under builder's risk insurance, while in warehouse or storage areas, during installation, during testing, and after the work is completed. Installation floater insurance shall be of the "all risks" type, with coverage's designed for the circumstances which may occur in the particular work included in this contract. The coverage shall be for an amount not less than the insurable value of the work at completion, less the value of the materials and equipment insured under builder's risk insurance. The value shall include the aggregate value of the Owner furnished equipment and materials to be erected or installed by the Contractor not otherwise insured under builder's risk insurance.

### **13.3 Builders Risk**

This insurance shall be written in completed value form and shall protect the Contractor and the Owner against risks of damage to buildings, structures, and materials and equipment not otherwise covered under installation floater insurance, from the perils of fire and lightning, the perils included in the standard extended coverage endorsement, and the perils of vandalism and malicious mischief. The amount of such insurance shall not be

less than the insurable value of the work at completion less the value of the materials and equipment insured under installation floater insurance.

**Equipment Installed under this contract shall be Insured under Installation floater Insurance when the aggregate value of the equipment exceeds \$10,000.00.**

**If the work does not include the construction of building structures, builder's risk Insurance may be omitted providing the installation floater Insurance fully covers all work.**

Builder's risk insurance shall provide for losses to be payable to the Contractor and the Owner as their interests may appear and shall contain a waiver of subrogation rights against the insured parties.

### **13.4 ADDITIONAL INSURED / PROJECT INFORMATION**

The Owner shall be named as an additional insured on the Commercial General Liability (Public), Policies furnished by the Contractor.

The project name and bid/contract number shall be listed on the certificate.

### **13.5 WRITTEN NOTIFICATION**

Each insurance policy shall contain a provision requiring that thirty (30) days prior to expiration, cancellation, non-renewal or any material change in coverage, a notice there of shall be given by certified mail to the Purchasing Agent, City of Lancaster, PO Box 940, Lancaster, Texas, 75146.

### **13.6 PREMIUMS AND ASSESSMENTS**

Companies issuing the insurance policies shall have no recourse against the City for payment of any premiums or assessments for any deductibles which are at the sole responsibility and risk of the Contractor.

### **13.7 CERTIFICATE OF INSURANCE**

Proof that the insurance is in force shall be furnished to the City of Lancaster on a Standard Certificate of Insurance Form. In the event any insurance policy shown on the Certificate of Insurance has an expiration date that is prior to the completion and final acceptance of the project by the City of Lancaster, the contractor shall furnish the City proof of identical continued coverage no later than thirty (30) days prior to the expiration date shown on the Certificate of Insurance.

### **13.8 PRIMARY COVERAGE**

The coverage's provided herein shall be primary and noncontributory with any other insurance maintained by the City of Lancaster, Texas, for its benefit, including self insurance.

### **13.9 WORKER'S COMPENSATION INSURANCE COVERAGE**

13.9.1 The Contractor shall:

1) provide coverage for its employees providing services on a project, for the duration of the

project based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements;

2) provide a certificate of coverage showing workers' compensation coverage to the governmental entity prior to beginning work on the project;

3) provide the governmental entity prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the contractor's current certificate of coverage ends during the duration of the project;

4) obtain from each person providing services on a project, and provide to the governmental entity:

(A) a certificate of coverage, prior to that person beginning work on the project, so the governmental entity will have on file certificates of coverage showing coverage for all persons providing services on the project; and

(B) no later than seven days after receipt by the contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

5) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

6) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the contractor knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project;

7) post a notice on each project site informing all persons providing services on the project that they are required to be covered, and stating how a person may verify current coverage and report failure to provide coverage. This notice does not satisfy other posting requirements imposed by the Act or other commission rules. This notice must be printed with a title in at least 30 point bold type and text in at least 19 point normal type, and shall be in both English and Spanish and any other language common to the worker population. The text for the notices shall be the following text provided by the Texas Worker's Compensation Commission on the sample notice, without any additional words or changes:

**Required Workers' Compensation Coverage**

*"The law requires that each person working on this site or providing services related to this construction project must be covered by workers' compensation insurance. This includes persons providing, hauling, or delivering equipment or materials, or providing labor or transportation or other service related to the project,*

*regardless of the identity of their employer or status as an employee."*

*"Call the Texas Workers' Compensation Commission at 512-440-3789 to receive information on the legal requirement for coverage, to verify whether your employer has provided the required coverage, or to report an employer's failure to provide coverage."*

and

(8) contractually require each person with whom it contracts to provide services on a project, to:

(A) provide coverage based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements for all of its employees providing services on the project, for the duration of the project;

(B) provide a certificate of coverage to the contractor prior to that person beginning work on the project;

(C) include in all contracts to provide services on the project the language in subsection (e) (3) of this rule;

(D) provide the Contractor, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(E) obtain from each other person with whom it contracts, and provide to the Contractor:

(i) a certificate of coverage, prior to the other person beginning work on the project; and

(ii) prior to the end of the coverage period, a new certificate of coverage showing extension of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(F) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(G) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project; and

(H) contractually require each other person with whom it contracts, to perform as required by sub-paragraphs (A) - (H) of this paragraph, with the certificate of coverage to be provided to the person for whom they are providing services.

**ARTICLE XIV: MISCELLANEOUS**

**14.1 LAWS AND ORDINANCES**

14.1.1 The Contractor shall at all times and in all respects observe and comply with all federal, state and local laws, ordinances, and regulations applicable to the Project and Work. The Contractor shall further insure that all Subcontractors observe and comply with said laws, ordinances and regulations.

**14.2 GOVERNING LAW**

14.2.1 The Contract shall be governed by the laws of the State of Texas. Venue for any causes of action arising under the terms or provisions of this Contract or the Work to be performed hereunder shall be in the courts of Dallas County, Texas.

**14.3 SUCCESSORS AND ASSIGNS**

14.3.1 The Owner and Contractor bind themselves, their successors, assigns and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in this Contract. The Contractor shall not assign this Contract without written consent of the Owner.

**14.4 SURETY BONDS**

14.4.1 If the Contract Price exceeds the sum of \$25,000.00, the Contractor shall furnish separate performance and payment bonds to the Owner, according to the requirements set out in the bid documents and state statutes to guaranty full and faithful performance of the Contract and the full and final payment of all persons supplying labor or materials to the Project. Each bond required by the bid documents or state statute 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 form suitable to the Owner and shall be executed by a surety, or sureties, reasonably suitable to the Owner and

authorized to do business in the State of Texas by the State Board of Insurance.

14.4.2 If the Contract Price exceeds the sum of \$25,000.00, the Contractor, upon execution of the Contract and prior to commencement of the Work, shall furnish to the Owner a two-year maintenance bond in the amount of one hundred percent (100%) of the Contract Price covering the guaranty and maintenance prescribed herein, written by an approved surety authorized and duly licensed to conduct business in the State of Texas. The cost of said maintenance bond shall be included in the Contractor's unit bid prices and shall be paid by the Contractor.

**14.5 SEVERABILITY**

14.5.1 The provisions of this Contract are herein declared to be severable; in the event that any term, provision or part hereof is determined to be invalid, void or unenforceable, such determination shall not affect the validity or enforceability of the remaining terms, provisions and parts, and this Contract shall be read as if the invalid, void or unenforceable portion had not been included herein.

**14.6 AMENDMENTS**

14.6.1 This Contract may be amended by the parties only by a written agreement duly executed by both parties. The failure of the Owner to object to any nonperformance or nonconforming work or to enforce any provision hereof shall in no event be regarded as or construed to be a waiver, release or modification of any term or provision in this Contract, nor shall such failure to object or enforce stop the Owner from insisting on strict compliance with this Contract or from recovering damages, costs or expenses arising as a result of such nonperformance or nonconforming work.

**14.7 NOTICES**

14.6.1 All notices required by this Contract shall be presumed received when deposited in the mail properly addressed to the other party or Architect at the address set forth herein or set forth in a written designation of change of address delivered to all parties and the Architect.

**EXECUTED in single or multiple originals, this 11th day of April, 2011.**

CITY OF LANCASTER

Northstar Construction Inc.

\_\_\_\_\_  
Opal Mauldin-Robertson, City Manager

\_\_\_\_\_  
Type/Print Name and Title

ATTEST:

3210 Joyce Drive  
Fort Worth, TX 76116

\_\_\_\_\_  
Dolle K. Downe, City Secretary

**Bid Request Number** 2011-13 Addendum 2  
**Title** Lancaster Community Park Amphitheater  
**Description** Although we are legally required to accept per Email  
**Bid Type** ITB  
**Issue Date** 11/8/2010 8:00:01 AM Central  
**Close Date** 1/11/2011 2:00:00 PM Central

**Organization**  
**Bid Creator**  
**Email**  
**Phone**  
**Fax**

Lancaster Purchasing  
 Dawn Berry Purchasing Agent  
 dberry@lancaster-tx.com  
 (972) 218-1329  
 (972) 218-3621

Responding Suppliers

Name	City	State	Response Submitted	Lines Responded	Response Total
Northstar Construction, Inc.	Fort Worth	TX	1/11/2011 1:48:03 PM CST	39	\$384,700.00
Corbet Group, Inc.	Dallas	TX	1/11/2011 1:21:36 PM CST	39	\$426,010.54
JDC CONSTRUCTION COMP wylie		TX	1/11/2011 1:29:21 PM CST	39	\$450,205.00
SCM Construction Inc	DeSoto	TX	1/11/2011 1:53:48 PM CST	39	\$451,285.37
MDI Inc. General Contractors	Coppell	TX	1/11/2011 1:47:02 PM CST	39	\$491,427.00
Green Scaping	Ft. Worth	TX	1/11/2011 1:47:21 PM CST	39	\$504,784.70
Bluebay Construction	Houston	TX	1/11/2011 1:00:00 PM CST	39	\$505,514.10
ENCINO LANDSCAPE, INC	CLEVELAND	TX	1/11/2011 10:10:54 AM CST	39	\$511,932.00
3i Construction	Dallas	TX	1/11/2011 1:59:51 PM CST	39	\$541,167.61

**LANCASTER CITY COUNCIL**  
**Agenda Communication for**  
**April 11, 2011**

**5**

AG11-005

**Consider a resolution of the City Council of the City of Lancaster, Texas, authorizing the award of bid for a custom amphitheater structure to USA Shade & Fabric Structures, Inc. in an amount not to exceed \$96,000.00; authorizing the City Manager to execute the agreement pursuant to approval; repealing all resolutions in conflict; providing a severability clause; and providing an effective date.**

**This request supports the City Council 2010-2011 Policy Agenda.**

**Goal 2: Quality Development**

**Background**

This is a companion item to the previous item regarding the award of bid for the construction of the amphitheater. The shade structure is part of the amphitheater package. If the bid is awarded to Northstar Construction, Inc., the contractor will install the piers/footings as designed for this structure. USA Shade & Fabric Structures, Inc. will be assembling and installing the shade structure upon completion of the construction phase.

**Considerations**

- **Operational** – The City of Lancaster will be solely responsible to operate and maintain the facilities constructed with these grant funds.
- **Legal** – The City maintains an executed Interlocal Agreement with BuyBoard. Texas law authorizes cooperative agreements to help save time developing specifications and duplication during the bid process. The City Attorney has reviewed the contract documents and resolution.
- **Financial** – Funding for the shade structure will be reimbursable through the TPWD grant up to \$200,000 and the remaining balance, up to \$241,000 from remaining bond funds in account 43-0605-57-217.

<b>Construction Expense</b>	<b>Grant Reimbursement</b>	<b>City Expense</b>
\$ 325,351.00	162,675.50	162,675.50
<u>\$ 96,000.00</u>	<u>\$ 37,324.50</u>	<u>\$ 48,000.00</u>
\$ 421,351.00	\$ 200,000.00	\$ 221,351.00

- **Public Information** - There are no public information requirements.

**Options/Alternatives**

1. City Council may award the purchase and authorize execution of the agreement as presented.
2. City Council may reject the purchase and direct staff.

**Recommendation**

Staff recommends authorizing the purchase with USA Shade & Fabric Structures, Inc., and authorizing the City Manager to execute the agreement in an amount not to exceed \$96,000.00.

**Attachments**

- Resolution
- Contract

**Prepared and submitted by:**  
Dawn Berry, Purchasing Agent

**Date:** March 31, 2011

**RESOLUTION NO. 2011-04-31**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, AUTHORIZING THE AWARD OF BID FOR A CUSTOM AMPHITHEATER STRUCTURE TO USA SHADE & FABRIC STRUCTURES, INC., IN AN AMOUNT NOT TO EXCEED \$96,000.00; AUTHORIZING THE CITY MANAGER TO EXECUTE THE CONTRACT PURSUANT TO APPROVAL; REPEALING ALL RESOLUTIONS IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE.**

- WHEREAS,** the purchase and installation is partially funded through the Texas Parks and Wildlife Department (TPWD) Grant Project #50-000413; and,
- WHEREAS,** the City Council of the City of Lancaster desires to utilize an Interlocal Agreement to purchase a custom amphitheater structure through the BuyBoard Contract # 346-10; and,
- WHEREAS,** the City Council of the City of Lancaster desires to contract for a shade structure at the Community Park Amphitheater.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, THAT:**

- Section 1. The City Council hereby authorizes the award of bid of a custom amphitheater structure to USA Shade & Fabric Structures, Inc., in an amount not to exceed \$96,000.00; pursuant to the contract attached hereto and incorporated herein by reference as Exhibit "A".
- Section 2. The City Manager of the City of Lancaster, Texas, is hereby authorized to execute the contract.
- Section 3. Any prior Resolution of the City Council in conflict with the provisions contained in this Resolution are hereby repealed and revoked.
- Section 4. Should any part of this Resolution be held to be invalid for any reason, the remainder shall not be affected thereby, and such remaining portions are hereby declared to be severable.
- Section 5. This Resolution shall take effect immediately from and after its passage, and it is duly resolved.

**DULY PASSED AND APPROVED** by the City Council of the City of Lancaster, Texas, on this the 11<sup>th</sup> day of April 2011.

**ATTEST:**

**APPROVED:**

\_\_\_\_\_  
Dolle K. Downe, City Secretary

\_\_\_\_\_  
Marcus E. Knight, Mayor

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Robert E. Hager, City Attorney

# City of Lancaster, Texas

## Standard Fixed Price Construction Agreement

This Agreement is made by and between the City of Lancaster, Texas, a home-rule municipality (hereinafter referred to as the "Owner") and USA Shade & Fabric Structures, Inc., (hereinafter referred to as the "Contractor") for construction of Lancaster Community Park Amphitheater Shade Structure (hereinafter referred to as the "Project"), the Owner and the Contractor hereby agree as follows:

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### ARTICLE I: CONTRACT & CONTRACT DOCUMENTS

#### 1.1 THE CONTRACT

1.1.1 The Contract between the Owner and the Contractor, of which this Agreement is a part, consists of the Contract Documents. It shall be effective on the date this Agreement is executed by the last party to execute it.

#### 1.2. THE CONTRACT DOCUMENTS

1.2.1 The Contract Documents consist of this Agreement, the Invitation to Bid, Requirements and Instructions to Bidders, the Specifications, the Drawings, the Project Manual, all Change Orders and Field Orders issued hereafter, any other amendments hereto executed by the parties hereafter, together with the following (if any):

Documents not enumerated in this Paragraph 1.2.1 are not Contract Documents and do not form part of this Contract.

#### 1.3 ENTIRE AGREEMENT

1.3.1 This Contract, together with the Contractor's performance, maintenance, and payment bonds for the Project, all General Conditions, Special Conditions, Plans and Specifications, and Addenda attached thereto, constitute the entire and exclusive agreement between the Owner and the Contractor with reference to the Project. Specifically, but without limitation, this Contract supersedes any bid documents and all prior written or oral communications, representations and negotiations, if any, between the Owner and Contractor not expressly made a part hereof.

#### 1.4 NO PRIVACY WITH OTHERS

1.4.1 Nothing contained in this Contract shall create, or be interpreted to create, privity or any other contractual agreement between the Owner and any person or entity other than the Contractor.

#### 1.5 INTENT AND INTERPRETATION

1.5.1 The intent of this Contract is to require complete, correct and timely execution of the Work. Any Work that may be required, implied or inferred by the Contract Documents, or any one or more of them, as necessary to produce the intended result shall be provided by the Contractor for the Contract Price.

1.5.2 This Contract is intended to be an integral whole and shall be interpreted as internally consistent. What is required by any one Contract Document shall be considered as required by the Contract.

1.5.3 When a word, term or phrase is used in this Contract, it shall be interpreted or construed, first, as defined herein; 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.

1.5.4 The words "include", "includes", or "including", as used in this Contract, shall be deemed to be followed by the phrase, "without limitation".

1.5.5 The specification herein 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 shall be deemed not to constitute a material breach of this Contract.

1.5.6 Words or terms used as nouns in this Contract shall be inclusive of their singular and plural forms, unless the context of their usage clearly requires a contrary meaning.

1.5.7 The Contractor shall have a continuing duty to read, carefully study and compare each of the Contract Documents, the Shop Drawings, the Product Data, and any Plans and Specifications, and shall give written notice to the Owner of any inconsistency, ambiguity, error or omission which the Contractor may discover with respect to these documents before proceeding with the affected Work. The issuance or the express or implied approval by the Owner or the Architect of the Contract Documents, Shop Drawings, or Product Data shall not relieve the Contractor of the continuing duties imposed hereby, nor shall any such approval be evidence of the Contractor's compliance with this Contract. The Owner has requested the Architect to only prepare documents for the Project, including the Drawings 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.** By the execution hereof, the Contractor 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 representation or warranties by the Owner concerning such documents as no such representation or warranties have been or are hereby made. Further, the Contractor represents and warrants that it has had a sufficient opportunity to inspect the Project site and assumes any

and all responsibility for inadequacies or ambiguities in the plans, drawings or specifications as well as for latent conditions of the site where the work is to be performed.

1.5.8 As between numbers and scaled measurements on the Drawings and in the Design, the numbers shall govern, as between larger scale and smaller scale drawings, the larger scale shall govern.

1.5.9 Neither the organization of any of the Contract Documents into divisions, sections, paragraphs, articles, (or other categories), nor the organization or arrangement of the Design, shall control the Contractor in dividing the Work or in establishing the extent or scope of the Work to be performed by Subcontractors.

## 1.6 OWNERSHIP OF CONTRACT DOCUMENTS

1.6.1 The Contract Documents, and each of them, shall remain the property of the Owner. The Contractor shall have the right to keep one record set of the Contract Documents upon completion of the Project; provided, however, that in no event shall Contractor use, or permit to be used, any or all of such Contract Documents on other projects without the Owner's prior written authorization.

## ARTICLE II: THE WORK

2.1 The Contractor shall perform all of the Work required, implied or reasonably inferable from, this Contract.

### 2.2 WORK

2.2.1 The term "Work" shall mean whatever is done by or required of the Contractor to perform and complete its duties under this Contract, including the following: construction of the whole or a designated part of the Project; furnishing of any required surety bonds and insurance, and the provision or furnishing of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, permits and licenses required of the Contractor, fuel, heat, light, cooling and all other utilities as required by this Contract. The Work to be performed by the Contractor is generally described as follows:

#### ***Lancaster Community Park Amphitheater Shade Structure***

The project consists of the construction of a shade structure over the amphitheater at Community Park

2.2.2 The Contractor shall be responsible for paying for and procuring all materials and labor and furnishing all services necessary or appropriate for the full performance of the Work and the for the full completion of the Project. All materials shall be new and materials and workmanship shall be of good quality. Upon request, the Contractor shall furnish satisfactory proof of the type, kind, and quality of materials.

## ARTICLE III: CONTRACT TIME

### 3.1 TIME AND LIQUIDATED DAMAGES

3.1.1 The Contractor shall commence the Work within 10 days of receipt of a written Notice to Proceed, and shall achieve Substantial Completion of the Work no later than forty-five (45) working days from the date specified in the Notice to Proceed. The parties acknowledge that time is of the essence in the performance of the terms of this Contract. The term "calendar days" shall mean any and all days of the week or month, no days being excepted. It is contemplated by the parties that the progress of the Work may be delayed by certain conditions beyond the control of the parties; these delays have been contemplated by the parties and considered in the time allotted for performance specified herein and includes, but is not limited to delays occasioned on account of adverse weather, temporary unavailability of materials, shipment delays, and the presence and potential interference of other contractors who may be performing work at the Project site unrelated to this agreement.

The number of calendar days from the date on which the Work is permitted to proceed, through the date set forth for Substantial Completion, shall constitute the "Contract Time".

3.1.2 The Contractor shall pay the Owner the sum of \$120.00 per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth herein for Substantial Completion of the Work. Any sums due and payable hereunder 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. 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.

3.1.3 In the event that the Contractor achieves certification of substantial completion prior to the scheduled completion date, the Owner shall pay to the Contractor the sum of \$0.00 per day for each calendar day that substantial completion is certified in advance of the scheduled completion date.

3.1.4 No claim shall be made by the Contractor to the Owner, and no damages, costs or extra compensation shall be allowed or paid by the Owner to the Contractor for any delay or hindrance from any cause in the progress or completion of the Work or this Contract. The Contractor's sole remedy in the event of any delay or

hindrance shall be to request time extensions by written change orders as provided for hereinafter. Should the Contractor be delayed by an act of the Owner, or should the Owner order a stoppage of the Work for sufficient cause, an extension of time shall be granted by the Owner by written authorization upon written application, which extension shall not be unreasonably denied, to compensate for the delay.

3.1.5 The Owner shall have the authority to suspend the Work wholly or in part for such period or periods of time as it may deem appropriate due to unsuitable conditions considered unfavorable for the proper prosecution of the Work or for the failure of the Contractor to carry out instructions from the Owner or Owner's representative. During any period in which the Work is stopped or during which any of the Work is not actively in progress for any reason, Contractor shall properly protect the site and the Work from damage, loss or harm.

### **3.2 SUBSTANTIAL COMPLETION**

3.2.1 "Substantial Completion" shall mean that stage in the progression of the Work when the Work is sufficiently complete in accordance with this Contract that the Owner can enjoy beneficial use or occupancy of the Work and can utilize the Work for its intended purpose, even though minor miscellaneous work and/or adjustment may be required.

### **3.3 TIME IS OF THE ESSENCE**

3.3.1 All limitations of time set forth in the Contract Documents are of the essence of this Contract.

## **ARTICLE IV: CONTRACT PRICE**

### **4.1 THE CONTRACT PRICE**

4.1.1 The Owner shall pay, and the Contractor shall accept, as full and complete payment for all of the Work required herein, the fixed sum of \$96,000.00.

The sum set forth in this Paragraph 4.1 shall constitute the Contract Price which shall not be modified except by written Change Order as provided in this Contract.

## **ARTICLE V: PAYMENT OF THE CONTRACT PRICE**

### **5.1 SCHEDULE OF VALUES**

5.1.1 Within ten (10) calendar days of the effective date hereof, the Contractor shall submit to the Owner and/or to the Architect a Schedule of Values allocating the Contract Price to the various portions of the Work. The Contractor's Schedule of Values shall be prepared in such form, with such detail, and supported by such data as the Architect or the Owner may require to substantiate its accuracy. The Contractor shall not imbalance the Schedule of Values nor artificially inflate any element thereof. The violation of this provision by the Contractor shall constitute a material breach of this Contract. The Schedule of Values shall be used only as a basis for the Contractor's Applications for Payment and shall only constitute such basis after it has been

acknowledged and accepted in writing by the Architect and the Owner.

### **5.2 PAYMENT PROCEDURE**

5.2.1 The Owner shall pay the Contract Price to the Contractor as provided below.

5.2.2 **PROGRESS PAYMENTS** - Based upon the Contractor's Applications for Payment submitted to the Architect and upon Certificates for Payment subsequently issued to the Owner by the Architect, the Owner shall make progress payments to the Contractor on account of the Contract Price.

5.2.3 On or before the 25th day of each month after commencement of the Work, the Contractor shall submit an Application for Payment for the period ending the 15th day of the month to the Architect in such form and manner, and with such supporting data and content, as the Owner or the Architect may require. Therein, the Contractor may request payment for ninety percent (90%) of that portion of the Contract Price properly allocable to Contract requirements properly provided, labor, materials and equipment properly incorporated in the Work, less the total amount of previous payments received from the Owner. Such Application for Payment shall be signed by the Contractor and shall constitute the Contractor's representation that the Work has progressed to the level for which payment is requested in accordance with the Schedule of Values, that the Work has been properly installed or performed in full compliance with this Contract, and that the Contractor knows of no reason why payment should not be made as requested. Thereafter, the Architect will review the Application for Payment 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 Application for Payment and is as required by this Contract. The Architect shall determine and certify to the Owner the amount properly owing to the Contractor. The Owner shall make partial payments on account of the Contract Price to the Contractor within thirty (30) days following the Architect's receipt and approval of each Application for Payment. The amount of each partial payment shall be the amount certified for payment by the Architect 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 Architect's certification of the Contractor's Application for Payment shall not preclude the Owner from the exercise of any of its rights as set forth in Paragraph 5.3 below.

5.2.4 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment, all Work for which payments have been received from the Owner shall be free and clear of liens, claims, security interest or other encumbrances in favor of the Contractor or any other person or entity whatsoever.

5.2.5 The Contractor shall promptly pay each Subcontractor out of the amount paid to the Contractor on account of such Subcontractor's Work, the amount to which such Subcontractor is entitled. In the event the Owner becomes informed that the Contractor has not paid a Subcontractor as herein provided, the Owner shall have the right, but not the duty, to issue future checks in payment to the Contractor of amounts otherwise due hereunder naming the Contractor and such Subcontractor as joint payees. Such joint check procedure, if employed by the Owner, 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.

5.2.6 No progress payment, nor any use or occupancy of the Project by the owner, shall be interpreted to constitute an acceptance of any Work not in strict accordance with this Contract.

### **5.3 WITHHELD PAYMENT**

5.3.1 The Owner may decline to make payment, may withhold funds, and, if necessary, may demand the return of some or all of the amounts previously paid to the Contractor, to protect the Owner from loss because of:

- (a) defective Work not remedied by the Contractor nor, in the opinion of the Owner, likely to be remedied by the Contractor;
- (b) claims of third parties against the Owner or the Owner's property;
- (c) failure by the Contractor to pay Subcontractors or others in a prompt and proper fashion;
- (d) evidence that the balance of the Work cannot be completed in accordance with the Contract for the unpaid balance of the Contract Price,
- (e) evidence that the Work will not be completed in the time required for substantial or final completion;
- (f) persistent failure to carry out the Work in accordance with the Contract;
- (g) damage to the Owner or a third party to whom the Owner is, or may be, liable.

In the event that the Owner makes written demand upon the Contractor for amounts previously paid by the Owner as contemplated in this Subparagraph 5.3.1, the Contractor shall promptly comply with such demand. The Owner shall have no duty to third parties to withhold payment to the Contractor and shall incur no liability for a failure to withhold funds.

### **5.4 UNEXCUSED FAILURE TO PAY**

5.4.1 If within fifteen (15) days after the date established herein for payment to the Contractor by the

Owner, the Owner, without cause or basis hereunder, fails to pay the Contractor any amount then due and payable to the Contractor, then the Contractor may after ten (10) additional days' written notice to the Owner and the Architect, and without prejudice to any other available rights or remedies it may have, stop the Work until payment of those amounts due from the Owner have been received. Late payments shall not accrue interest or other late charges.

### **5.5 SUBSTANTIAL COMPLETION**

5.5.1 When the Contractor believes that the Work is substantially complete, the Contractor shall submit to the Architect a list of items to be completed or corrected. When the Architect on the basis of an inspection determines that the Work is in fact substantially complete, it will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall state the responsibilities of the Owner and the Contractor for Project security, maintenance, heat, utilities, damage to the Work, and insurance, and shall fix the time within which the Contractor shall complete the items listed therein. Guarantees required by the Contract shall commence on the date of Substantial Completion of the Work. The Certificate of Substantial Completion shall be submitted to the Owner and the Contractor for their written acceptance of the responsibilities assigned to them in such certificate.

Upon Substantial Completion of the Work, and execution by both the Owner and the Contractor of the Certificate of Substantial Completion, the Owner shall pay the Contractor an amount sufficient to increase total payments to the Contractor to one hundred percent (100%) of the Contract Price less three hundred percent (300%) of the reasonable cost as determined by the Owner and the Architect for completing all incomplete Work, correcting and bringing into conformance all defective and nonconforming Work, and handling all unsettled claims.

### **5.6 COMPLETION AND FINAL PAYMENT**

5.6.1 When all of the Work is finally complete and the Contractor is ready for a final inspection, it shall notify the Owner and the Architect thereof in writing. Thereupon, the Architect will make final inspection of the Work and, if the Work is complete in full accordance with this Contract and this Contract has been fully performed, the Architect will promptly issue a final Certificate for Payment 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 pursuant to this Contract. If the Architect is unable to issue its final Certificate for Payment and is required to repeat its final inspection of the Work, the Contractor shall bear the cost of such repeat final inspection(s) which cost may be deducted by the Owner from the Contractor's final payment.

5.6.1.1 If the Contractor fails to achieve final completion within the time fixed by the Architect in its Certificate of Substantial Completion, the Contractor shall pay the

Owner the sum set forth hereinabove as liquidated damages per day for each and every calendar day of unexcused delay in achieving final completion beyond the date set forth herein for final completion of the Work. Any sums due and payable hereunder 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. 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 and when 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.

5.6.2 The Contractor shall not be entitled to final payment unless and until it submits to the Architect its affidavit that all payrolls, invoices for materials and equipment, and other liabilities connected with the Work for which the Owner, or the Owner's property might be responsible, have been fully paid or otherwise satisfied; releases and waivers of lien from all Subcontractors of the Contractor and of any and all other parties required by the Architect or the Owner; consent of Surety, if any, to final payment. If any third party fails or refuses to provide a release of claim or waiver of lien as required by the Owner, the Contractor shall furnish a bond satisfactory to the Owner to discharge any such lien or indemnify the Owner from liability.

5.6.3 The Owner shall make final payment of all sums due the Contractor within ten (10) days of the Architect's execution of a final Certificate for Payment.

5.6.4 Acceptance of final payment shall constitute a waiver of all claims against the Owner by the Contractor except for those claims previously made in writing against the Owner by the Contractor, pending at the time of final payment, and identified in writing by the Contractor as unsettled at the time of its request for final payment.

5.6.5 Under no circumstance shall Contractor be entitled to receive interest on any payments or monies due Contractor by the Owner, whether the amount on which the interest may accrue is timely, late, wrongfully withheld, or an assessment of damages of any kind.

## **ARTICLE VI: THE OWNER**

### **6.1 INFORMATION, SERVICES AND THINGS REQUIRED FROM OWNER**

6.1.1 The Owner shall furnish to the Contractor, at the time of executing this Contract, any and all written and tangible material in its possession concerning conditions below ground at the site of the Project.

Such written and tangible material is furnished to the Contractor only in order to make complete disclosure of such material 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 surveys, legal limitations and utility locations (if known), and a legal description of the Project site.

6.1.2 Excluding permits and fees normally the responsibility of the Contractor, the Owner shall obtain all approvals, easements, and the like required for construction and shall pay for necessary assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

6.1.3 The Owner shall furnish the Contractor, free of charge, one copy of the Contract Documents for execution of the Work.

### **6.2 RIGHT TO STOP WORK**

6.2.1 If the Contractor persistently fails or refuses to perform the Work in accordance with this Contract, or if the best interests of the public health, safety or welfare so require, the Owner may order the Contractor to stop the Work, or any described portion thereof, until the cause for stoppage has been corrected, no longer exists, or the Owner orders that Work be resumed. In such event, the Contractor shall immediately obey such order.

### **6.3 OWNER'S RIGHT TO PERFORM WORK**

6.3.1 If the Contractor's Work is stopped by the Owner under Paragraph 6.2, and the Contractor fails within seven (7) days of such stoppage to provide adequate assurance to the Owner that the cause of such stoppage will be eliminated or corrected, then the Owner may, without prejudice to any other rights or remedies the Owner may have against the Contractor, proceed to carry out the subject Work. In such a situation, an appropriate Change Order shall be issued deducting from the Contract Price the cost of correcting the subject deficiencies, plus compensation for the Architect's additional services and expenses necessitated thereby, if any. If the unpaid portion of the Contract Price is insufficient to cover the amount due the Owner, the Contractor shall pay the difference to the Owner.

## **ARTICLE VII: THE CONTRACTOR**

7.1 The Contractor is again reminded of its continuing duty set forth in Subparagraph 1.5.7. The Contractor shall perform no part of the Work at any time without adequate Contract Documents or, as appropriate, approved Shop Drawings, Product Data or Samples for such portion of the Work. If the Contractor performs any of the Work knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Architect, the Contractor shall bear responsibility for such performance and shall bear the cost of correction.

7.2 The Contractor shall perform the Work strictly in accordance with this Contract.

7.3 The Contractor shall supervise and direct the Work using the Contractor's best skill, effort and attention. The Contractor shall be responsible to the Owner for any and all acts or omissions of the Contractor, its employees and others engaged in the Work on behalf of the Contractor.

7.3.1 The Contractor shall give adequate attention to the faithful prosecution of the Work and the timely completion of this Contract, with authority to determine the manner and means of performing such Work, so long as such methods insure timely completion and proper performance.

7.3.2 The Contractor shall exercise all appropriate means and measures to insure a safe and secure jobsite in order to avoid and prevent injury, damage or loss to persons or property.

**7.4 WARRANTY**

7.4.1 The Contractor warrants to the Owner that all labor furnished to progress the Work under this Contract will be competent to perform the tasks undertaken, that the product of such labor will yield only first-class results, that materials and equipment furnished will be of good quality and new unless otherwise permitted by this Contract, and that the Work will be of good quality, free from faults and defects and in strict conformance with this Contract. All Work not conforming to these requirements may be considered defective.

7.5 The Contractor shall obtain and pay for all permits, fees and licenses necessary and ordinary for the Work. The Contractor shall comply with all lawful requirements applicable to the Work and shall give and maintain any and all notices required by applicable law pertaining to the Work.

**7.6 SUPERVISION**

7.6.1 The Contractor shall employ and maintain at the Project site only competent supervisory personnel. Absent written instruction from the Contractor to the contrary, the superintendent shall be deemed the Contractor's authorized representative at the site and shall be authorized to receive and accept any and all communications from the Owner or the Architect.

7.6.2 Key supervisory personnel assigned by the Contractor to this Project are as follows:

NAME	FUNCTION
_____	_____
_____	_____
_____	_____
_____	_____

So long as the individuals named above remain actively employed or retained by the Contractor, they shall

perform the functions indicated next to their names unless the Owner agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assume one or more of those functions listed above, the Contractor shall be bound by the provisions of this Subparagraph 7.6.2 as though such individuals had been listed above.

7.7 The Contractor, within fifteen (15) days of commencing the Work, shall submit to the Owner and the Architect for their information, the Contractor's schedule for completing the Work. The Contractor's schedule shall be revised no less frequently than monthly (unless the parties otherwise agree in writing) and shall be revised to reflect conditions encountered from time to time and shall be related to the entire Project. Each such revision shall be furnished to the Owner and the Architect. Failure by the Contractor to strictly comply with the provisions of this Paragraph 7.7 shall constitute a material breach of this Contract.

7.8 The Contractor shall continuously maintain at the site, for the benefit of the owner and the Architect, one record copy of this Contract marked to record on a current basis changes, selections and modifications made during construction. Additionally, the Contractor shall maintain at the site for the Owner and Architect the approved Shop Drawings, Product Data, Samples and other similar required submittals. Upon final completion of the Work, all of these record documents shall be delivered to the Owner.

**7.9 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

7.9.1 Shop Drawings, Product Data, Samples and other submittals from the Contractor do not constitute Contract Documents. Their purpose is merely to demonstrate the manner in which the Contractor intends to implement the Work in conformance with information received from the Contract Documents.

7.9.2 The Contractor shall not perform any portion of the Work requiring submittal and review of Shop Drawings, Product Data or Samples unless and until such submittal shall have been approved by the Architect. Approval by the Architect, however, shall not be evidence that Work installed pursuant thereto conforms with the requirements of this Contract.

**7.10 CLEANING THE SITE AND THE PROJECT**

7.10.1 The Contractor shall keep the site reasonably clean during performance of the Work. Upon final completion of the Work, the Contractor shall clean the site and the Project and remove all waste, rubbish, temporary structures, and other materials together with all of the Contractor's property therefrom. Contractor shall dispose of all refuse at a Texas Natural Resource Conservation Commission approved landfill. The Contractor shall further restore all property damaged during the prosecution of the Work and shall leave the site in a clean and presentable condition. No additional payment shall be made by the Owner for this work, the compensation having been considered and included in the contract price.

## **7.11 ACCESS TO WORK AND INSPECTIONS**

7.11.1 The Owner and the Architect shall have access to the Work at all times from commencement of the Work through final completion. The Contractor shall take whatever steps necessary to provide access when requested. When reasonably requested by the Owner or the Architect, the Contractor shall perform or cause to be performed such testing as may be necessary or appropriate to insure suitability of the jobsite or the Work's compliance with the Contract requirements.

## **7.12 INDEMNITY AND DISCLAIMER**

7.12.1 **OWNER SHALL NOT BE LIABLE OR RESPONSIBLE FOR, AND SHALL BE INDEMNIFIED, DEFENDED, HELD HARMLESS AND RELEASED BY CONTRACTOR FROM AND AGAINST ANY AND ALL SUITS, ACTIONS, LOSSES, DAMAGES, CLAIMS, OR LIABILITY OF ANY CHARACTER, TYPE, OR DESCRIPTION, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES FOR INJURY OR DEATH TO ANY PERSON, OR INJURY OR LOSS TO ANY PROPERTY, RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS, INCLUDING THE CONTRACTOR, OR PROPERTY, ARISING OUT OF, OR OCCASIONED BY, DIRECTLY OR INDIRECTLY, THE PERFORMANCE OF CONTRACTOR UNDER THIS AGREEMENT, INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF OWNER, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE OWNER UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. THE PROVISIONS OF THIS INDEMNIFICATION ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY. IT IS THE EXPRESSED INTENT OF THE PARTIES TO THIS AGREEMENT THAT THE INDEMNITY PROVIDED FOR IN THIS CONTRACT IS AN INDEMNITY EXTENDED BY CONTRACTOR TO INDEMNIFY AND PROTECT OWNER FROM THE CONSEQUENCES OF THE CONTRACTOR'S AS WELL AS THE OWNER'S NEGLIGENCE, WHETHER SUCH NEGLIGENCE IS THE SOLE OR PARTIAL CAUSE OF ANY SUCH INJURY, DEATH, OR DAMAGE.**

7.12.2 The Contractor will secure and maintain Contractual Liability insurance to cover this indemnification agreement that will be primary and non-contributory as to any insurance maintained by the Owner for its own benefit, including self-insurance. In addition, Contractor shall obtain and file with Owner a Standard Certificate of Insurance evidencing the required coverage.

7.12.3 In claims against any person or entity indemnified under this Paragraph 7.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 7.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

## **7.13 NONDISCRIMINATION**

7.13.1 The Contractor shall not discriminate in any way against any person, employee or job applicant on the basis of race, color, creed, national origin, religion, age, sex, or disability where reasonable accommodations can be effected to enable the person to perform the essential functions of the job. The Contractor shall further insure that the foregoing nondiscrimination requirement shall be made a part and requirement of each subcontract on this Project.

## **7.14 PREVAILING WAGE RATES**

7.14.1 The Contractor shall comply in all respects with all requirements imposed by any laws, ordinances or resolutions applicable to the Project with regard to the minimum prevailing wage rates for all classes of employees, laborers, subcontractors, mechanics, workmen and persons furnishing labor and services to the Project. The City of Lancaster has adopted US Department of Labor's Davis Bacon Wage Determinations as the Prevailing Wage Rate Schedule, available to the Contractor by request, which specifies the classes and wage rates to be paid to all persons. The Contractor shall pay not less than the minimum wage rates established thereby for each class, craft or type of labor, workman, or mechanic employed in the execution of this Contract. The failure of the Contractor to comply with this requirement shall result in the forfeiture to the City of \$10.00 of a sum of not less than Sixty Dollars (\$60.00) for each person per day, or portion thereof, that such person is paid less than the prevailing rate. Upon request by the Owner, Contractor shall make available for inspection and copying its books and records, including but not limited to its payroll records, account information and other documents as may be required by the Owner to insure compliance with this provision.

## **7.15 JOB SITE SAFETY PRECAUTIONS**

7.15.1 The Contractor shall at all times exercise reasonable precautions for the safety of its employees, laborers, subcontractors, mechanics, workmen and others on and near the jobsite and shall comply with all laws, ordinances, regulations, and standards of federal, state and local safety laws and regulations. The Contractor shall provide such machinery guards, safe walk-ways, ladders, bridges, and other safety devices as may be necessary or appropriate to insure a safe and secure jobsite and shall require its subcontractors to comply with this requirement. The Contractor shall immediately comply with any and all safety requirements imposed by the Architect during the progress of the Work.

## **7.16 WARNING DEVICES AND BARRICADES**

7.16.1 The Contractor shall furnish and maintain such warning devices, barricades, lights, signs, pavement markings, and other devices as may be necessary or appropriate or required by the Architect to protect persons or property in, near or adjacent to the jobsite, including . No separate compensation shall be paid to

the Contractor for such measures. Where the Work is being conducted in, upon or near streets, alleys, sidewalks, or other rights-of-way, the Contractor shall insure the placement, maintenance and operation of any and all such warning devices as may be required by the City of Lancaster and shall do so until no longer required by the City. Such devices shall be in compliance with and conform to the manual and specifications for the uniform system of traffic control devices adopted by the Texas Department of Transportation.

#### **7.17 PROTECTION OF UTILITIES & OTHER CONTRACTORS**

7.17.1 The Contractor shall use best efforts to leave undisturbed and uninterrupted all utilities and utility services provided to the jobsite or which presently exists at, above or beneath the location where the Work is to be performed. In the event that any utility or utility service is disturbed or damaged during the progress of the Work, the Contractor shall forthwith repair, remedy or restore the utility at Contractor's sole expense.

7.17.2 The Contractor understands and acknowledges that other contractors of the Owner or of other entities may be present at the jobsite performing other work unrelated to the Project. The Contractor shall use best efforts to work around other contractors without impeding the work of others while still adhering to the completion date established herein. In the event that the Contractor's work is or may be delayed by any other person, the Contractor shall immediately give notice thereof to the Architect and shall request a written Change Order in accordance with the procedures set forth by this Contract. The Contractor's failure to provide such notice and to request such Change Order shall constitute a waiver of any and all claims associated therewith.

### **ARTICLE VIII: CONTRACT ADMINISTRATION**

#### **8.1 THE ARCHITECT**

8.1.1 When used in this Contract the term "Architect" does not necessarily denote a duly licensed, trained or certified architect; as used herein, the term shall be used interchangeably and shall mean a designated Architect, Engineer, or Contract Administrator (who may not be an architect or engineer) for the Owner, said person to be designated or redesignated by the Owner prior to or at any time during the Work hereunder. The Architect may be an employee of the Owner or may be retained by the Owner as an independent contractor but, in either event, the Architect's duties and authority shall be as set forth hereinafter. The Contractor understands and agrees that it shall abide by the decisions and instructions of the Architect notwithstanding the contractual relationship between the Owner and Architect. All of the Owner's instructions to the Contractor shall be through the Architect.

In the event the Owner should find it necessary or convenient to replace the Architect, the Owner shall retain a replacement Architect and the status of the replacement Architect shall be that of the former Architect.

#### **8.2 ARCHITECT'S ADMINISTRATION**

8.2.1 The Architect, unless otherwise directed by the Owner in writing, will perform those duties and discharge those responsibilities allocated to the Architect as set forth in this Contract. The Architect shall be the Owner's representative from the effective date of this Contract until final payment has been made.

8.2.2 The Owner and the Contractor shall communicate with each other in the first instance through the Architect.

8.2.3 The Architect shall be the initial interpreter of the requirements of the drawings and specifications and the judge of the performance thereunder by the Contractor. The Architect shall render written or graphic interpretations necessary for the proper execution or progress of the Work with reasonable promptness on request of the Contractor.

8.2.4 The Architect will review the Contractor's Applications for Payment and will certify to the Owner for payment to the Contractor, those amounts then due the Contractor as provided in this Contract.

8.2.5 The Architect shall have authority to reject Work which is defective or does not conform to the requirements of this Contract. If the Architect deems it necessary or advisable, the Architect shall have authority to require additional inspection or testing of the Work for compliance with Contract requirements.

8.2.6 The Architect will review and approve, or take other appropriate action as necessary, concerning the Contractor's submittals including Shop Drawings, Product Data and Samples. Such review, approval or other action shall be for the sole purpose of determining conformance with the design concept and information given through the Contract Documents.

8.2.7 The Architect will prepare Change Orders and may authorize minor changes in the Work by Field Order as provided elsewhere herein.

8.2.8 The Architect shall, upon written request from the Contractor, conduct inspections to determine the date of Substantial Completion and the date of final completion, will receive and forward to the Owner for the Owner's review and records, written warranties and related documents required by this Contract and will issue a final Certificate for Payment upon compliance with the requirements of this Contract.

8.2.9 The Architect's decisions in matters relating to aesthetic effect shall be final if consistent with the intent of this Contract.

#### **8.3 CLAIMS BY THE CONTRACTOR**

8.3.1 The Architect shall determine all claims and matters in dispute between the Contractor and Owner with regard to the execution, progress, or sufficiency of the Work or the interpretation of the Contract Documents, including but not limited to the plans and specifications. Any dispute shall be submitted in writing to the Architect within seven (7) days of the event or

occurrence or the first appearance of the condition giving rise to the claim or dispute who shall render a written decision within a reasonable time thereafter. The Architect's decisions shall be final and binding on the parties. In the event that either party objects to the Architect's determination as to any submitted dispute, that party shall submit a written objection to the Architect and the opposing party within ten (10) days of receipt of the Architect's written determination in order to preserve the objection. Failure to so object shall constitute a waiver of the objection for all purposes.

8.3.2 Pending final resolution of any claim of the Contractor, the Contractor shall diligently proceed with performance of this Contract and the Owner shall continue to make payments to the Contractor in accordance with this Contract.

**8.3.3 CLAIMS FOR CONCEALED, LATENT OR UNKNOWN CONDITIONS** - The Contractor expressly represents that it has been provided with an adequate opportunity to inspect the Project site and thoroughly review the Contract Documents and plans and specifications prior to submission of its bid and the Owner's acceptance of the bid. Subject to the conditions hereof, Contractor assumes full responsibility and risk for any concealed, latent or unknown condition which may affect the Work. No claims for extra work or additional compensation shall be made by Contractor in connection with concealed, latent or unknown conditions except as expressly provided herein. Should concealed, latent or unknown conditions encountered in the performance of the Work (a) below the surface of the ground or (b) in an existing structure be at variance with the conditions indicated by this Contract, or should unknown conditions of an unusual nature differing materially from those ordinarily encountered in the area and generally recognized as inherent in Work of the character provided for in this Contract, be encountered, the Contract Price shall be equitably adjusted by Change Order upon the written notice and claim by either party made within seven (7) days after the first observance of the condition. As a condition precedent to the Owner having any liability to the Contractor for concealed or unknown conditions, the Contractor must give the Owner and the Architect written notice of, and an opportunity to observe, the condition prior to disturbing it. The failure by the Contractor to make the written notice and claim as provided in this Subparagraph shall constitute a waiver by the Contractor of any claim arising out of or relating to such concealed, latent or unknown condition and the Contractor thereby assumes all risks and additional costs associated therewith.

**8.3.4 CLAIMS FOR ADDITIONAL COSTS** - If the Contractor wishes to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the Owner therefore, the Contractor shall give the Architect written notice of such claim within seven (7) days after the occurrence of the event, or the first appearance of the condition, giving rise to such claim. Such notice shall be given by the Contractor before proceeding to execute any additional or changed Work.

The failure by the Contractor to give such notice and to give such notice prior to executing the Work shall constitute a waiver of any claim for additional compensation.

8.3.4.1 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 costs shall be strictly limited to direct costs incurred by the Contractor and shall in no event include indirect costs or consequential damages of the Contractor. The Owner shall not be liable to the Contractor for claims of third parties, including Subcontractors. The Owner shall not be liable to the Contractor for any claims based upon delay to the Contractor for any reason whatsoever including any act or neglect on the part of the Owner.

**8.3.5 CLAIMS FOR ADDITIONAL TIME** - If the Contractor is delayed in progressing 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 neglect to act by the Owner or someone acting in the Owner's behalf, or by changes ordered in the Work, unusual delay in transportation, unusually adverse weather conditions not reasonably anticipated, fire or any causes beyond the Contractor's control, then the date for achieving Substantial Completion of the Work shall be extended upon the written notice and claim of the Contractor to the Owner and the Architect, for such reasonable time as the Architect may determine. Any notice and claim for an extension of time by the Contractor shall be made not more than seven (7) days after the occurrence of the event or the first appearance of the condition giving rise to the claim and shall set forth in detail the Contractor's basis for requiring additional time in which to complete the Project. In the event the delay to the Contractor is a continuing one, only one notice and claim for additional time shall be necessary. If the Contractor fails to make such claim as required in this Subparagraph, any claim for an extension of time shall be waived. The procedures and remedies provided by this provision shall be the sole remedy of Contractor and Contractor shall not assert nor be entitled to any additional delays or damages associated therewith.

#### **8.4 FIELD ORDERS**

8.4.1 The Architect shall have authority to order minor changes in the Work not involving a change in the Contract Price or in Contract Time and not inconsistent with the intent of the Contract. Such changes shall be effected by Field Order and shall be binding upon the Contractor. The Contractor shall carry out such Field Orders promptly.

#### **8.5 MEDIATION**

8.5.1 In the event that a dispute arises under the terms of this Contract, following an adverse determination by the Architect and proper preservation of the issue as required herein, the parties agree to submit to mediation. In such event, the parties shall agree to a designated person to serve as mediator and

each party shall be responsible for payment of one-half of the total mediation fees. The parties shall submit the dispute to mediation as soon as practical and in no event later than one (1) year after the Architect's written decision on the matter. At least one designated representative of each party must attend and participate in good faith in an effort to resolve the matters in dispute.

8.5.2 In no event shall the foregoing provision justify or authorize any delay in the progress of the Work; the parties shall abide by the decision of the Architect in accomplishing the timely completion of the Project.

## **ARTICLE IX: SUBCONTRACTORS**

### **9.1 DEFINITION**

9.1.1 A Subcontractor is an entity which has a direct contract with the Contractor to perform a portion of the Work. No Subcontractor shall be in privity with the Owner.

### **9.2 AWARD OF SUBCONTRACTS**

9.2.1 Upon execution of the Contract, the Contractor shall furnish the Owner, in writing, the names of persons or entities proposed by the Contractor to act as a Subcontractor on the Project. The Owner shall promptly reply to the Contractor, in writing, stating any objections the Owner may have to such proposed Subcontractor. The Contractor shall not enter into a subcontract with a proposed Subcontractor with reference to whom the Owner has made timely objection. The Contractor shall not be required to subcontract with any party to whom the Contractor has objection.

9.2.2 All subcontracts shall afford the Contractor rights against the Subcontractor which correspond to those rights afforded to the Owner against the Contractor herein, including those rights afforded to the Owner by Subparagraph 12.2.1 below. All subcontracts shall incorporate by reference the provisions hereof and shall provide that no claims, causes or demands shall be made by any Subcontractor against the Owner.

9.2.3 The Contractor shall indemnify, defend and hold harmless the Owner from and against any and all claims, demands, causes of action, damage, and liability asserted or made against the Owner by or on behalf of any Subcontractor.

## **ARTICLE X: CHANGES IN THE WORK**

### **10.1 CHANGES PERMITTED**

10.1.1 Changes in the Work within the general scope of this Contract, consisting of additions, deletions, revisions, or any combination thereof, may be ordered without invalidating this Contract, by Change Order or by Field Order.

10.1.2 Changes in the Work shall be performed under applicable provisions of this Contract and the Contractor shall proceed promptly with such changes.

### **10.2 CHANGE ORDER DEFINED**

10.2.1 Change Order shall mean a written order to the Contractor executed by the Owner and the Architect, issued after execution of this Contract, authorizing and directing a change in the Work or an adjustment in the Contract Price or the Contract Time, or any combination thereof. The Contract Price and the Contract Time may be changed only by written Change Order.

### **10.3 CHANGES IN THE CONTRACT PRICE**

10.3.1 Any change in the Contract Price resulting from a Change Order shall be determined as follows: (a) by mutual agreement between the Owner and the Contractor as evidenced by (1) the change in the Contract Price being set forth in the Change Order, (2) such change in the Contract Price, together with any conditions or requirements related thereto, being initialed by both parties and (3) the Contractor's execution of the Change Order, or (b) if no mutual agreement occurs between the Owner and the Contractor, then, as provided in Subparagraph 10.3.2 below.

10.3.2 If no mutual agreement occurs between the Owner and the Contractor as contemplated in Subparagraph 10.3.1 above, the change in the Contract Price, if any, shall then be determined by the Architect on the basis of the reasonable expenditures or savings of those performing, deleting or revising the Work attributable to the change, including, in the case of an increase or decrease in the Contract Price, a reasonable allowance for direct job site overhead and profit. In such case, the Contractor shall present, in such form and with such content as the Owner or the Architect requires an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order. Reasonable expenditures or savings shall be limited to the following: reasonable costs of materials, supplies, or equipment including delivery costs, reasonable costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance, reasonable rental costs of machinery and equipment exclusive of hand tools whether rented from the Contractor or others, reasonable costs of premiums for all bonds and insurance, permit fees, and sales, use or other taxes related to the Work, and reasonable cost of direct supervision and jobsite field office overhead directly attributable to the change. In no event shall any expenditure or savings associated with the Contractor's home office or other non-jobsite overhead expense be included in any change in the Contract Price. Pending final determination of reasonable expenditures or savings to the Owner, payments on account shall be made to the Contractor on the Architect's Certificate for Payment.

10.3.3 If unit prices are provided in the Contract, and if the quantities contemplated are so changed in a proposed Change Order that application of such unit prices to the quantities of Work proposed will cause

substantial inequity to the Owner or to the Contractor, the applicable unit prices shall be equitably adjusted.

#### **10.4 MINOR CHANGES**

10.4.1 The Architect shall have authority to order minor changes in the Work not involving a change in the Contract Price or an extension of the Contract Time and not inconsistent with the intent of this Contract. Such minor changes shall be made by written Field Order, and shall be binding upon the owner and the Contractor. The Contractor shall promptly carry out such written Field Orders.

#### **10.5 EFFECT OF EXECUTED CHANGE ORDER**

10.5.1 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, the Contract Price and the Contract Time. 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.

#### **10.6 NOTICE TO SURETY; CONSENT**

10.6.1 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 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.

### **ARTICLE XI: UNCOVERING & CORRECTING WORK**

#### **11.1 UNCOVERING WORK**

11.1.1 If any of the Work is covered contrary to the Architect's request or to any provisions of this Contract, it shall, if required by the Architect or the Owner, be uncovered for the Architect's inspection and shall be properly replaced at the Contractor's expense without change in the Contract Time.

11.1.2 If any of the Work is covered in a manner not inconsistent with Subparagraph 11.1.1 above, it shall, if required by the Architect or Owner, be uncovered for the Architect's inspection. If such Work conforms strictly with this Contract, costs of uncovering and proper replacement shall by Change Order be charged to the Owner. If such Work does not strictly conform with this Contract, the Contractor shall pay the costs of uncovering and proper replacement.

#### **11.2 CORRECTING WORK**

11.2.1 The Contractor shall immediately proceed to correct Work rejected by the Architect as defective or failing to conform to this Contract. The Contractor shall pay all costs and expenses associated with correcting

such rejected Work, including any additional testing and inspections, and reimbursement to the Owner for the Architect's services and expenses made necessary thereby.

11.2.2 If within one (1) year after Substantial Completion of the Work any of the Work is found to be defective or not in accordance with this Contract, the Contractor shall correct it promptly upon receipt of written notice from the Owner. This obligation shall survive final payment by the Owner and termination of this Contract. With respect to Work first performed and completed after Substantial Completion, this one year obligation to specifically correct defective and nonconforming Work shall be extended by the period of time which elapses between Substantial Completion and completion of the subject Work.

11.2.3 Nothing contained in this Paragraph 11.2 shall establish any period of limitation with respect to other obligations which the Contractor has under this Contract. Establishment of the one year time period in Subparagraph 11.2.2 relates only to the duty of the Contractor to specifically correct the Work.

#### **11.3 OWNER MAY ACCEPT DEFECTIVE OR NONCONFORMING WORK**

11.3.1 If the Owner chooses to accept defective or nonconforming Work, the Owner may do so. In such event, the Contract Price shall be reduced by the greater of (a) the reasonable cost of removing and correcting the defective or nonconforming Work, and (b) 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 its 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.

### **ARTICLE XII: CONTRACT TERMINATION**

#### **12.1 TERMINATION BY THE CONTRACTOR**

12.1.1 If the Work is stopped for a period of ninety (90) days by an order of any court or other public authority, or as a result of an act of the Government, through no fault of the Contractor or any person or entity working directly or indirectly for the Contractor, the Contractor may, upon ten (10) days' written notice to the Owner and the Architect, terminate performance under this Contract and recover from the Owner payment for the actual reasonable expenditures of the Contractor (as limited in Subparagraph 10.3.2 above) for all Work executed and for materials, equipment, tools, construction equipment and machinery actually purchased or rented solely for the Work, less any salvage value of any such items.

12.1.2 If the Owner shall persistently or repeatedly fail to perform any material obligation to the Contractor for a period of fifteen (15) days after receiving written notice

from the Contractor of its intent to terminate hereunder, the Contractor may terminate performance under this Contract by written notice to the Architect and the Owner. 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 pursuant to Subparagraph 12.2.1 hereunder.

## **12.2 TERMINATION BY THE OWNER**

### **12.2.1 FOR CONVENIENCE**

12.2.1.1 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.

12.2.1.2 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 terminated orders or subcontracts to the Owner or its designee.

12.2.1.3 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.

#### **12.2.1.4**

(a) The Contractor shall submit a termination claim to the Owner and the Architect specifying the amounts due because of the termination for convenience together with costs, pricing or other data required by the Architect. If the Contractor fails to file a termination claim within one (1) year from the effective date of termination, the Owner shall pay the Contractor, an amount derived in accordance with subparagraph (c) below.

(b) The Owner and the Contractor may agree to the compensation, if any, due to the Contractor hereunder.

(c) Absent agreement to the amount due to the Contractor, the Owner shall pay the Contractor the following amounts:

(i) Contract prices for labor, materials, equipment and other services accepted under this Contract;

(ii) 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 overhead and profit thereon (such profit shall not include anticipated profit or consequential damages), provided however, that 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;

(iii) Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Subparagraph 12.2.1.2 of this Paragraph. These costs shall not include amounts paid in accordance with other provisions hereof.

The total sum to be paid the Contractor under this Subparagraph 12.2.1 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.

### **12.2.2 FOR CAUSE**

12.2.2.1 If the Contractor persistently or repeatedly refuses or fails to prosecute the Work in a timely manner, abandons the jobsite and fails to resume work within five (5) days of written notice thereof by the Owner, fails to grant or allow access to the jobsite by the Owner or Architect, fails to supply enough properly skilled workers, supervisory personnel or proper equipment or materials, fails to make prompt payment to Subcontractors or for materials or labor, persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a violation of a material provision of this Contract, then the Owner may by written notice to the Contractor, without prejudice to any other right or remedy, terminate the employment of the Contractor and take possession of the site and of all materials, equipment, tools, construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever methods it may deem expedient. In such case, the Contractor shall not be entitled to receive any further payment until the Work is finished.

12.2.2.2 If the unpaid balance of the Contract Price does not exceed the cost of finishing the work, including compensation for the Architect's additional services and expenses made necessary thereby, such difference shall be paid by the Contractor to the Owner. This obligation for payment shall survive the termination of the Contract.

12.2.2.3 In the event the employment of the Contractor is terminated by the Owner for cause pursuant to Subparagraph 12.2.2 and it is subsequently determined by a Court of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Subparagraph 12.2.1 and the provisions of Subparagraph 12.2.1 shall apply.

## **ARTICLE XIII: INSURANCE**

### **13.1 CONTRACTOR SHALL MAINTAIN INSURANCE**

13.1.1 The Contractor at his own expense shall purchase, maintain and keep in force during the life of this contract, adequate insurance that will protect the Contractor and/or any Additional Insured from claims

which may arise out of or result from operations under this contract. The insurance required shall provide adequate protections from all claims, whether such operations be by the Contractor or by any Additional Insured or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone whose acts of any of them may be liable and from any special hazards, such as blasting, which may be encountered in the performance of this contract in the amounts as shown below in Paragraph 13.2.1.

13.1.2 The Contractor shall not commence work on any Contract in the City of Lancaster until the Contractor has obtained all the insurance required under this paragraph and such insurance has been approved by the City.

### **13.2 TYPES AND AMOUNTS OF INSURANCE**

13.2.1. The Contractor shall furnish and maintain during the life of the contract adequate Insurance in such amounts as follows:

<u>Type of Insurance</u>	<u>Amount</u>
Worker's Compensation as set forth in the Worker's Compensation Act.	
Commercial General Liability	
	\$1,000,000 Each Accident/Occurrence. The policy shall have no coverage removed by exclusions.
Limit of Insurance per Project or Owner's and Contractor's Protective Liability Insurance for the Project.	
Automobile Liability	
	\$500,000 Combined single limit per occurrence.

### **13.2 INSTALLATION FLOATER**

This insurance shall protect the Contractor and the Owner from all insurable risks of physical loss or damage to materials and equipment not otherwise covered under builder's risk insurance, while in warehouse or storage areas, during installation, during testing, and after the work is completed. Installation floater insurance shall be of the "all risks" type, with coverage's designed for the circumstances which may occur in the particular work included in this contract. The coverage shall be for an amount not less than the insurable value of the work at completion, less the value of the materials and equipment insured under builder's risk insurance. The value shall include the aggregate value of the Owner furnished equipment and materials to be erected or installed by the Contractor not otherwise insured under builder's risk insurance.

### **13.3 Builders Risk**

This insurance shall be written in completed value form and shall protect the Contractor and the Owner against risks of damage to buildings, structures, and materials and equipment not otherwise covered under installation floater insurance, from the perils of fire and lightning, the perils included in the standard extended coverage endorsement, and the perils of vandalism and malicious mischief. The amount of such insurance shall not be

less than the insurable value of the work at completion less the value of the materials and equipment insured under installation floater insurance.

**Equipment installed under this contract shall be insured under installation floater insurance when the aggregate value of the equipment exceeds \$10,000.00.**

**If the work does not include the construction of building structures, builder's risk insurance may be omitted providing the installation floater insurance fully covers all work.**

Builder's risk insurance shall provide for losses to be payable to the Contractor and the Owner as their interests may appear and shall contain a waiver of subrogation rights against the insured parties.

### **13.4 ADDITIONAL INSURED / PROJECT INFORMATION**

The Owner shall be named as an additional insured on the Commercial General Liability (Public), Policies furnished by the Contractor.

The project name and bid/contract number shall be listed on the certificate.

### **13.5 WRITTEN NOTIFICATION**

Each insurance policy shall contain a provision requiring that thirty (30) days prior to expiration, cancellation, non-renewal or any material change in coverage, a notice there of shall be given by certified mail to the Purchasing Agent, City of Lancaster, PO Box 940, Lancaster, Texas, 75146.

### **13.6 PREMIUMS AND ASSESSMENTS**

Companies issuing the insurance policies shall have no recourse against the City for payment of any premiums or assessments for any deductibles which are at the sole responsibility and risk of the Contractor.

### **13.7 CERTIFICATE OF INSURANCE**

Proof that the insurance is in force shall be furnished to the City of Lancaster on a Standard Certificate of Insurance Form. In the event any insurance policy shown on the Certificate of Insurance has an expiration date that is prior to the completion and final acceptance of the project by the City of Lancaster, the contractor shall furnish the City proof of identical continued coverage no later than thirty (30) days prior to the expiration date shown on the Certificate of Insurance.

### **13.8 PRIMARY COVERAGE**

The coverage's provided herein shall be primary and noncontributory with any other insurance maintained by the City of Lancaster, Texas, for its benefit, including self insurance.

### **13.9 WORKER'S COMPENSATION INSURANCE COVERAGE**

13.9.1 The Contractor shall:

1) provide coverage for its employees providing services on a project, for the duration of the

project based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements;

2) provide a certificate of coverage showing workers' compensation coverage to the governmental entity prior to beginning work on the project;

3) provide the governmental entity prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the contractor's current certificate of coverage ends during the duration of the project;

4) obtain from each person providing services on a project, and provide to the governmental entity:

(A) a certificate of coverage, prior to that person beginning work on the project, so the governmental entity will have on file certificates of coverage showing coverage for all persons providing services on the project; and

(B) no later than seven days after receipt by the contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

5) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

6) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the contractor knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project;

7) post a notice on each project site informing all persons providing services on the project that they are required to be covered, and stating how a person may verify current coverage and report failure to provide coverage. This notice does not satisfy other posting requirements imposed by the Act or other commission rules. This notice must be printed with a title in at least 30 point bold type and text in at least 19 point normal type, and shall be in both English and Spanish and any other language common to the worker population. The text for the notices shall be the following text provided by the Texas Worker's Compensation Commission on the sample notice, without any additional words or changes:

#### **Required Workers' Compensation Coverage**

*"The law requires that each person working on this site or providing services related to this construction project must be covered by workers' compensation insurance. This includes persons providing, hauling, or delivering equipment or materials, or providing labor or transportation or other service related to the project,*

*regardless of the identity of their employer or status as an employee."*

*"Call the Texas Workers' Compensation Commission at 512-440-3789 to receive information on the legal requirement for coverage, to verify whether your employer has provided the required coverage, or to report an employer's failure to provide coverage."*

and

(8) contractually require each person with whom it contracts to provide services on a project, to:

(A) provide coverage based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements for all of its employees providing services on the project, for the duration of the project;

(B) provide a certificate of coverage to the contractor prior to that person beginning work on the project;

(C) include in all contracts to provide services on the project the language in subsection (e) (3) of this rule;

(D) provide the Contractor, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(E) obtain from each other person with whom it contracts, and provide to the Contractor:

(i) a certificate of coverage, prior to the other person beginning work on the project; and

(ii) prior to the end of the coverage period, a new certificate of coverage showing extension of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;

(F) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;

(G) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project; and

(H) contractually require each other person with whom it contracts, to perform as required by sub-paragraphs (A) - (H) of this paragraph, with the certificate of coverage to be provided to the person for whom they are providing services.

**ARTICLE XIV: MISCELLANEOUS**

**14.1 LAWS AND ORDINANCES**

14.1.1 The Contractor shall at all times and in all respects observe and comply with all federal, state and local laws, ordinances, and regulations applicable to the Project and Work. The Contractor shall further insure that all Subcontractors observe and comply with said laws, ordinances and regulations.

**14.2 GOVERNING LAW**

14.2.1 The Contract shall be governed by the laws of the State of Texas. Venue for any causes of action arising under the terms or provisions of this Contract or the Work to be performed hereunder shall be in the courts of Dallas County, Texas.

**14.3 SUCCESSORS AND ASSIGNS**

14.3.1 The Owner and Contractor bind themselves, their successors, assigns and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in this Contract. The Contractor shall not assign this Contract without written consent of the Owner.

**14.4 SURETY BONDS**

14.4.1 If the Contract Price exceeds the sum of \$25,000.00, the Contractor shall furnish separate performance and payment bonds to the Owner, according to the requirements set out in the bid documents and state statutes to guaranty full and faithful performance of the Contract and the full and final payment of all persons supplying labor or materials to the Project. Each bond required by the bid documents or state statute 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 form suitable to the Owner and shall be executed by a surety, or sureties, reasonably suitable to the Owner and

authorized to do business in the State of Texas by the State Board of Insurance.

14.4.2 If the Contract Price exceeds the sum of \$25,000.00, the Contractor, upon execution of the Contract and prior to commencement of the Work, shall furnish to the Owner a two-year maintenance bond in the amount of one hundred percent (100%) of the Contract Price covering the guaranty and maintenance prescribed herein, written by an approved surety authorized and duly licensed to conduct business in the State of Texas. The cost of said maintenance bond shall be included in the Contractor's unit bid prices and shall be paid by the Contractor.

**14.5 SEVERABILITY**

14.5.1 The provisions of this Contract are herein declared to be severable; in the event that any term, provision or part hereof is determined to be invalid, void or unenforceable, such determination shall not affect the validity or enforceability of the remaining terms, provisions and parts, and this Contract shall be read as if the invalid, void or unenforceable portion had not be included herein.

**14.6 AMENDMENTS**

14.6.1 This Contract may be amended by the parties only by a written agreement duly executed by both parties. The failure of the Owner to object to any nonperformance or nonconforming work or to enforce any provision hereof shall in no event be regarded as or construed to be a waiver, release or modification of any term or provision in this Contract, nor shall such failure to object or enforce stop the Owner from insisting on strict compliance with this Contract or from recovering damages, costs or expenses arising as a result of such nonperformance or nonconforming work.

**14.7 NOTICES**

14.6.1 All notices required by this Contract shall be presumed received when deposited in the mail properly addressed to the other party or Architect at the address set forth herein or set forth in a written designation of change of address delivered to all parties and the Architect.

**EXECUTED In single or multiple originals, this 11th day of April, 2011.**

CITY OF LANCASTER

USA Shade & Fabric Structures, Inc.

\_\_\_\_\_  
Opal Mauldin-Robertson, City Manager

\_\_\_\_\_  
Type/Print Name and Title

ATTEST:

8505-A Chancellor Row  
Dallas, TX 75247

\_\_\_\_\_  
Dolle K. Downe, City Secretary

# PROPOSAL

**Corporate Mailing Address:**  
 P.O. Box 560168  
 Dallas, TX 75356-0168  
 (800) 966-5005



**USASHADE**  
 & Fabric Structures, Inc.



A Brand of USA Shade & Fabric Structures, Inc.

**Remittance address:**  
 USA Shade & Fabric Structures, Inc.  
 P.O. Box 678420  
 Dallas, TX 75267-8420

**This is a legal agreement – Please read carefully. Complete and initial all pages**

<b>Purchaser:</b> City of Lancaster	<b>Date:</b> January 11, 2011	<b>Sales Rep:</b> Robyn White
<b>Contact:</b> Dawn Berry	<b>PO Number:</b>	<b>Phone:</b> 214-663-0519
<b>Phone:</b> 972-218-1329	<b>Quote No.:</b> 1000146DHH	<b>Email:</b> rwhite@usa-shade.com
<b>Billing Information:</b>	<b>Shipping Information:</b>	<b>Jobsite Information (including site name):</b>
211 N Henry Lancaster, TX 75146		2000 N Dallas Avenue Lancaster, TX 75134
<b>Contact:</b> Dawn Berry	<b>Contact:</b>	<b>Contact:</b> Dawn Berry
<b>Phone:</b> 972-218-1329	<b>Phone:</b>	<b>Phone:</b> 972-218-1329
<b>Fax:</b> 972-218-3621	<b>Fax:</b>	<b>Fax:</b> 972-218-3621
<b>Email:</b> dberry@lancaster-tx.com	<b>Email:</b>	<b>Email:</b> dberry@lancaster-tx.com

## STRUCTURE PRICING

QTY	DESCRIPTION	DETAILS	PRICE
	<b>Custom Amphitheater Structure</b> <b>40 x 40 x 12</b> 	Structure Size 40 x 40 Number of Posts 4 Number of Fabric Tops 1 Fabric Type Shadesure™ Fabric Color TBD Steel Color TBD Post Attachment Method Embedded Entry Height 12 ft Wind load 90MPH Snow load 5Lbs/Sft Notes: Footings by others	\$71,450

## PRICING DETAILS

Accessories / Miscellaneous			
QTY	ITEM	DETAILS	COST
1	Custom Amphitheater Structure		\$71,450
		<b>Total for Access/Misc Items:</b>	\$
<b>Unit Total</b>		\$71,450	<b>PAYMENT TERMS:</b>
Accessories/Miscellaneous			
Shipping/Handling		\$1,750	
<b>SUBTOTAL</b>		\$73,200	
Sales Tax	%		(1) Upon execution of the Agreement (Deposit)
Assembly/Installation		\$20,300	(2) Upon delivery of Sun Port(s)
Engineering		\$2,500	(3) Upon completion of assembly/installation
<b>TOTAL PRICE</b>		<b>\$96,000</b>	(4) Other (specify):
			<b>NOTES:</b>
			Footings to be provided by General Contractor

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## GENERAL SCOPE OF WORK

### PERMIT REQUIREMENTS

YES	NO	
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Purchaser is responsible for Permit Submittal
<input type="checkbox"/>	<input type="checkbox"/>	

### ASSEMBLY REQUIREMENTS

YES	NO	
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Underground obstacles
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Dirt Removal
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Soil Tests
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Concrete Cutting
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Concrete Truck Access
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Fencing
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Special Inspection
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Permits (see Permit Requirements)

### ENGINEERING REQUIREMENTS

Building Code	
Type of drawings	
# of sealed drawings	
Calculations Required	
Notes:	

<input type="checkbox"/>	<input checked="" type="checkbox"/>	Prevailing Wages & Certified Payroll
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Union Wages
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Removal of existing structure or poles
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Curb Repair
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Landscaping Repair
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Electrical hook-up or trenching
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Site Plan Approval
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Site Survey
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Bobcat Access
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Liquidated Damages
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Other special conditions (noted below):
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Anchor Bolts Included

### PRICING INCLUDES

YES	NO	
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Assembly/Installation (based on a single mobilization)
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Shipping and Handling
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Engineered Drawings
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Sales Tax
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Permit Submittal
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Permit fees
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Accessories
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Coastal Primer
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Payment and Performance Bonds
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<b>FOOTINGS TO BE INSTALLED BY OTHERS</b>

## GENERAL TERMS AND CONDITIONS AND WARRANTY

- Proposal:** The above proposal is valid for 30 days from the date first set forth above. After 30 days we reserve the right to increase prices due to the rise in costs of raw material, fuel or other cost increases. When applicable, USA Shade & Fabric Structures, Inc. reserves the right to implement a surcharge for significant increases in raw materials, including the following, but not limited to; fuel, steel and concrete. Due to the duration of time between proposals, contracts and final installation, USA Shade & Fabric Structures, Inc. reserves the right to implement this surcharge when applicable.
- Purchase:** By executing this proposal, or submitting a purchase order pursuant to this proposal (which shall incorporate the terms of this agreement specifically by reference) which is accepted by the SA Shade & Fabric Structures, Inc. (the "Company"), the purchaser identified above ("you" or the "Purchaser") agrees to purchase the Sun Ports brand shade structures ("Structures") and the services to be provided by the Company, as detailed in the "Structure Pricing" and "General Scope of the Work" sections of this agreement, above, or in the relevant purchase order accepted by the Company, for use by Purchaser or for installation by Company or Purchaser on behalf of a third-party who will be the ultimate owner of the Structures (the ultimate owner of a Structure, whether Purchaser or a third-party, being the "Owner").
- Short Ship Claims:** Purchaser has 15 days from receipt of the Structures to file a short ship report in writing to its sales representative. Company will not honor claims made after this time.
- Standard Exclusions:** Unless specifically included under "General Scope of the Work" section above, this agreement does not include, and Company will not provide Services, labor or materials for any of the following work: (a) removal and disposal of any materials containing asbestos or any hazardous materials as defined by the EPA; (b) moving Owner's property around the installation site; (c) repair or

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Dallas, TX 75267-8420

replacement of any Purchaser or Owner-supplied materials; (d) repair of concealed underground utilities not located on prints, supplied to Company by Owner during the bidding process, or physically staked out by Owner, and which are damaged during construction; or (e) repair of damage to existing surfaces that could occur when construction equipment and vehicles are being used in the normal course of construction.

- 5) **Bonding Guidelines:** If Purchaser will use or provide the Structures and Services for an Owner other than Purchaser (including, without limitation, as a subcontractor of Purchaser), Purchaser will include the following statement in Purchaser's contract with Owner:  

"The manufacturer's warranty for the Sun Ports brand shade structures is a separate document between USA Shade & Fabric Structures, Inc. and the ultimate owner of the Sun Ports brand shade structures, which will be provided to the ultimate owner at the time of completion of the installation and other services to be provided by USA Shade & Fabric Structures, Inc. Due to surety requirements, any performance and/or payment bond will cover only the first year of USA Shade & Fabric Structures, Inc. warranty."
- 6) **Insurance Requirements:** Company is not required to provide any insurance coverage in excess of Company's standard insurance. A copy of the Company's standard insurance is available for your review prior to acceptance of the Company's quote.
- 7) **Payment:** Terms of payment are defined in the "Pricing Details" section and are specific to this contract. For purposes of this agreement, "Completion" is defined as being the point at which the Structure is suitable for its intended use, the issue of an occupancy consent, or a final building department approval is issued, whichever occurs first. In any event where Completion cannot be effected due to delays or postponements caused by the Purchaser or Owner, final payment (less 10% retainage) is due within 30 days of the date when Completion was scheduled, had the delay not occurred. All payments must be made to USA Shade & Fabric Structures, Inc., PO Box 678420, Dallas TX 75267-8420. If the Purchaser or Owner fails or delays in making any scheduled milestone payments, the Company may suspend the fulfillment of its obligations hereunder until such payments are made, or Company may be relieved of its obligations hereunder if payment is more than 60 days past due. Company may use all remedies available to it under current laws, including but not limited to filing of liens against the property and using a collection agency or the courts to secure the collection of the outstanding debt.
- 8) **Lien Releases:** Upon request by Owner, Company will issue appropriate partial lien releases as corresponding payments are received from Purchaser, but prior to receiving final payment from Purchaser or Owner. Company will provide a full release of liens upon receipt of final payment. In accordance with state laws, Company reserves the right to place a lien on the property if final payment has not been received 10 days prior to the filing deadline for liens.
- 9) **Site-plan Approval, Permits, Permit Fees, Plans, Engineering Drawings and Surveying:** Site-plan approval, permits, permit fees, plans, engineering drawings and surveying are specifically excluded from this agreement and the Services unless specified under the "General Scope of Work". The Company does not in any way warrant or represent that a permit or site plan approval for construction will be obtained. Sealed engineered drawings that are required but not included in the "General Scope of Work" will result in an additional cost to Purchaser.
- 10) **Manufacturing & Delivery:** Manufacturing lead-time from Company's receipt of the "Notice To Proceed" is approximately 6 to 8 weeks for standard Structures, and 8 to 12 weeks for custom Structures. Delivery is approximately 1 week thereafter. Delivery of Structures may be prior to or at start of assembly.
- 11) **Returned Product, Deposits and/or Cancelled Order:** Within the first 45 days after shipment from our facility, all returned product(s) and cancelled orders are subject to a 50% restocking fee. No returns are available following this 45 day period. All deposits are nonrefundable. All expenses incurred (engineering, site surveys, shipping and handling, etc) are the responsibility of the purchaser, up to notice of cancellation.
- 12) **Concealed Conditions:** "Concealed conditions" include, without limitation, water, gas, sprinkler, electrical and sewage lines, post tension cables, and steel rebar. This agreement is based solely on observations Company was able to make either by visual inspection or by drawings and / or plans submitted by Owner at the time this agreement was bid. If additional Concealed Conditions are discovered once work has commenced which were not visible at the time this proposal was bid, Company will stop work and point out these unforeseen Concealed Conditions to Purchaser or Owner so that Purchaser and Company can execute a change order for any additional work. In any event, any damage caused by or to unforeseen Concealed Conditions is the sole responsibility of the Purchaser and Company shall not be held liable for any such damage. Soil conditions are assumed to be soil that does not contain any water, hard rock (such as limestone, caliche, etc.), rocks bigger than 4 inches in diameter or any other condition that will require additional labor, equipment and / or materials not specified by the Purchaser or Owner in the bidding process. Any condition requiring additional labor, equipment and / or materials to complete the drilling or concrete operations will require a change order before Company will complete the process. Price quotes are based on a drill pier footing. Any variation will incur additional charges (i.e. spread footings, concrete mat, sand, water, landfill, etc.). Costs for footing and installation do not include any allowance for extending below frost lines (the additional costs for which vary by geographical region).

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- 13) **Changes in the Work:** During the course of this project, Purchaser may order changes in the work (both additions and deletions). The cost of these changes will be determined by the Company, and a change order form must be completed and signed by both the Purchaser and the Company, which will detail the "General Scope of the Change Order". Should any change order be essential to the completion of the project, and the Purchaser refuses to authorize such change order, then Company will be deemed to have performed its part of the project, and the project and Services will be terminated. Upon such termination, Company will submit a final billing to Purchaser for payment, less a labor allowance for work not performed but including additional charges incurred due to the stoppage. No credit will be allowed for materials sold and supplied, which will remain the property of the Purchaser.
- 14) **Warranty; Limitations of Liability:**
- Company warrants that all Company-supplied labor and Services will be performed in a good and workmanlike manner.
  - The warranty set forth in this Section 14 will be the Purchaser's sole and exclusive warranty.
  - The warranty set forth in this Section 14 will run from the date of performance of the service by the Company, and any warranty claims brought by Purchaser must be brought within 30 days of the date of performance of the Service giving rise to the claim.
  - Purchaser's sole remedy for a breach of the warranty set forth in this Section 14 will be the re-performance of the Services, or if that is not possible or practical, the refund of the price of the Services that breached the warranty.
  - Purchaser shall notify Company in writing detailing any defects in Service for which a warranty claim is being made.
  - **COMPANY SHALL NOT IN ANY EVENT BE LIABLE FOR INDIRECT, SPECIAL, CONSEQUENTIAL, INCIDENTAL PUNITIVE OR LIQUIDATED DAMAGES IN ANY ACTION ARISING FROM OR RELATED TO THIS AGREEMENT, WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE), INTENDED CONDUCT OR OTHERWISE, INCLUDING WITHOUT LIMITATION, DAMAGES RELATING TO THE LOSS OF PROFITS, INCOME OR GOODWILL, REGARDLESS OF WHETHER COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**
  - **IN NO EVENT WILL COMPANY'S LIABILITY FOR MONETARY DAMAGES UNDER THIS AGREEMENT EXCEED THE FEES PAID OR DUE AND PAYABLE FOR THE SERVICES UNDER THIS AGREEMENT (OR THE RELEVANT PURCHASE ORDER).**
  - **EXCEPT FOR THE WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT, COMPANY MAKES, AND PURCHASER RECEIVES, NO WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, ARISING OUT OF, RELATED TO, OR UNDER THIS AGREEMENT, AND SPECIFICALLY DENIES THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AND MERCHANTABILITY. FURTHER, EXCEPT AS EXPRESSLY SET FORTH HEREIN, COMPANY ACKNOWLEDGES THAT THE SERVICES AND STRUCTURES PROVIDED HEREIN ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND. COMPANY DOES NOT WARRANT THAT THE SERVICES OR STRUCTURES WILL MEET YOUR REQUIREMENTS OR THOSE OF THE OWNER.**
  - For all Structures installed by the Company, Purchaser must sign and return the "Customer Checklist and Sign-off" form to the Company within 10 business days from the construction completion date, or Company will not be held responsible for any warranties under this Section 14 or any damage to the Structure.
  - The warranties for the Structures are contained in a separate document between Company and the ultimate Owner of the Structures, which will be provided to Owner at the time of completion of the work.
- 15) **Indemnification:** To the fullest extent permitted by law, Purchaser shall indemnify, defend and hold harmless the Company and its consultants, agents and employees or any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, related to the installation of the Structure or performance of the Services, provided that such claim, damage, loss or expense is attributable to bodily injury to, sickness, disease or death of a person or to injury to or destruction of tangible property, but only to the extent caused by the negligent acts or omissions of the Purchaser or its agents, employees, or subcontractors or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 15.
- 16) **Warranty:**
- USA SHADE provides a limited warranty on all USA SHADE-supplied labor and materials. No other warranty is implied.
  - The warranty set forth shall be the purchaser's sole and exclusive warranty, and is void if structures are not paid for in full.
  - The warranty is void if any changes, modifications, additions or attachments are made to the structures without the prior written consent of USA SHADE.
  - The warranty is void if the structures are not assembled in strict compliance with USA SHADE specifications.
  - The warranty will be void if regular maintenance is not performed. This is particularly critical in regions where dirt/sand may cause abrasion of fabric.

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- The warranties below are effective from the date of sale, or, if assembled by USA SHADE, the date of construction completion.
- USA SHADE reserves the right to repair or replace any item covered by this warranty.
- Purchaser shall notify USA SHADE in writing, detailing any defects for which a warranty claim is being made.
- USA SHADE shall not in any event be liable for indirect, special, consequential, or liquidated damages.
- USA SHADE specifically denies the implied warranties of fitness for a particular purpose and merchantability.
- No signs, objects, fans, light fixtures, etc., may be hung from the structures, unless specifically engineered by USA SHADE. These items may interfere with the fabric, voiding the warranty.
- The warranty shall be void if damage to the steel frame or fabric top is caused by misuse, willful or intentional damage, vandalism, any Act of God (i.e. hurricane, tornado, micro/macroburst), including, but not limited to, ice, snow, or wind in excess of applicable building code parameters.
- For all units assembled by USA SHADE the "Customer Checklist and Sign-off" form must be signed and returned to USA SHADE within 10 business days from the date of construction completion, or USA SHADE will not be held responsible for any damage to the structures. The warranty will also be considered null and void until this checklist is received by USA SHADE.

### Shadesure™ Fabric:

- Shadesure™ fabrics carry a 10-year limited manufacturer's warranty from the date of assembly, against failure from significant fading, deterioration, breakdown, mildew, outdoor heat, cold, or discoloration, with the exception of Red and Coolbrella™ fabrics, which carry a 3-year limited warranty. Should the fabric need to be replaced under the warranty, USA SHADE will manufacture and ship a new fabric at no charge for the first 6 years, thereafter pro-rated at 18% per annum over the last 4 years.
- This warranty shall be void if damage to the fabric is caused by contact with chemicals, misuse, vandalism, any Act of God (i.e. hurricane, tornado, micro/macroburst), including, but not limited to, ice, snow, or wind in excess of the applicable building code parameters.
- All fabric tops are warranted for winds/gusts up to 90mph and prior to snow or ice accumulation.
- All fabric curtains, valances and flat vertical panels are not covered under the warranty.
- Fabric is not warranted where it is assembled on a structure that is not engineered and built by USA SHADE.
- USA SHADE structures are designed to eliminate friction between the rafters and fabric. The warranty will be voided if any modification or attachment is made to the rafter(s). The fabric will wear/tear should any object be placed between the rafter and the fabric, voiding the warranty.
- Labor for the removal, assembly, and/or freight will be covered for a period of 1 year, where the structures supplied and assembled by USA SHADE are defective. In all cases where the structures are not assembled by USA SHADE, or its agents, all labor for the removal, assembly, and/or freight will be at the customers' expense, and the warranty will only be applicable to the repair or replacement of the defective materials.
- USA SHADE reserves the right, in cases where certain fabric colors have been discontinued, to offer the customer a choice of available colors to replace the warranted fabric of the discontinued color. USA SHADE does not warrant that any particular color will be available for any period of time, and reserves the right to discontinue any color for any reason, without recourse by the owner of the discontinued fabric color.

### Colourshade® FR Fabric:

- Colourshade® FR fabrics carry a 5-year limited manufacturer's warranty from the date of assembly, against failure from significant fading, deterioration, breakdown, mildew, outdoor heat, cold, or discoloration, with the exception of FR Red and Coolbrella™ fabrics, which carry a 3-year limited warranty. Should the fabric need to be replaced under the warranty, USA SHADE will manufacture and ship a new fabric at no charge for 5 years.
- This warranty shall be void if damage to the fabric is caused by contact with chemicals, misuse, vandalism, any Act of God (i.e. hurricane, tornado, micro/macroburst), including, but not limited to, ice, snow, or wind in excess of the applicable building code parameters.
- All fabric tops are warranted for winds/gusts up to 90mph and prior to snow or ice accumulation.
- All fabric curtains, valances and flat vertical panels are not covered under the warranty.
- Fabric is not warranted where it is assembled on a structure that is not engineered and built by USA SHADE.
- USA SHADE structures are designed to eliminate friction between the rafters and fabric. The warranty will be voided if any modification or attachment is made to the rafter(s). The fabric will wear/tear should any object be placed between the rafter and the fabric, voiding the warranty.
- Labor for the removal, assembly, and/or freight will be covered for a period of 1 year, where the structures supplied and assembled by USA SHADE are defective. In all cases where the structures are not assembled by USA SHADE or its agents, all labor for the removal, assembly and/or freight will be at the customers' expense, and the warranty will only be applicable to the repair or replacement of the defective materials.
- USA SHADE reserves the right, in cases where certain fabric colors have been discontinued, to offer the customer a choice of available colors to replace the warranted fabric of the discontinued color. USA SHADE does not warrant that any particular color will be available for any period of time and reserves the right to discontinue any color for any reason, without recourse by the owner of the discontinued fabric color.

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*NOTE: Shadesure™ and Colourshade® FR fabric warranties cover fabric tops up to 40' in length. Fabric tops over 40' in length are covered by a non-prorated 5-year warranty. Additionally, fabric tops made from other fabric types (i.e. Sunbrella®) will include their respective manufacturer's warranty.*

Shadesure and Coolbrella are trademarks of USA SHADE & Fabric Structures, Inc.

Colourshade is a registered trademark of Multiknit Pty. Ltd.

Sunbrella is a registered trademark of Glen Raven Custom Fabrics, LLC.

### Steel:

- The structural integrity of the steel is warranted for 10 years.
- Workmanship and powder coated surfaces are warranted for 1 year.
- This warranty shall be void if damage to the steel frame is caused by misuse, vandalism, any Act of God (i.e. hurricane, tomado, micro/macrobust), including, but not limited to, ice, snow, or wind in excess of applicable building code parameters.

### Thread:

- USA SHADE warranties its sewing thread for a period of 8 years.
- The thread will be free from defects in material/workmanship and will not be damaged by exposure to sunlight, weather, or water.
- This warranty does not cover damage from fire, cuts, vandalism, misuse, or any Act of God (i.e. hurricane, tomado, micro/macrobust), including, but not limited to, ice, snow, or wind in excess of the applicable building code.
- Labor for the removal, assembly and/or freight of tops with damage caused by thread will only be covered in instances where USA SHADE has assembled the unit. In all cases where units were not assembled by USA SHADE, all labor for the removal, assembly and/or freight will be for the customers account and the warranty will only be applicable to the repair or replacement of defective materials.

### 17) Assembly/Installation:

- Company will notify Purchaser of the scheduled assembly date. Owner agrees to have an owner representative meet the assembly crew at the job site on the scheduled assembly date to verify the exact location where the Structure(s) is to be placed
- Labor for the removal, assembly and/or freight charges will only be covered by Company in instances where the Structures supplied and installed by Company are determined by the Company to be defective. In all cases where Structures are not installed by Company, all labor for the removal, assembly and/or freight of the Structures will be Purchaser' responsibility.
- Installation prices are based on a single mobilization charge. If additional mobilization is needed, there will be additional charges.
- If the requested Services require Company access to Owner's premises Company will be provided access to the Owner's premises free and clear of debris, automobiles or other interference Monday thru Friday during the hours of 8am to 6pm, and Company will have access to water and electrical facilities during installation. Additional charges will apply if utilities are not easily accessible. All automobiles will be moved prior to Company's crew beginning any installation.
- Company will not be responsible for moving or repairing any underground utility lines such as electrical, telephone, gas, water, or sprinkler lines that may be encountered during installation.
- Any additional costs incurred as a result of hard rock conditions requiring extra equipment, utility removal or repair resulting in delay will result in additional charges unless they are detailed on as-built site drawings provided to Company or marked on the ground and communicated to Company in writing prior to fabrication and installation.

18) Installation/Assembly on-site: Where installation/assembly is part of the Services, Purchaser must provide the Company with a detailed drawing prepared by or for the Owner showing exactly where the Structure(s) are to be assembled as well as detailing any obstacles or other impediments that may cause the assembly process to be more difficult. Any fixture(s), e.g., playground, pools etc., that the Structure(s) is/are to be assembled over must also be detailed, along with their peak heights (if applicable).

19) Site/Use Review by Purchaser: Company relies on the Purchaser to determine that the Structure(s) ordered are appropriate and safe for the Owner's installation site and/or intended use. Company is not responsible for damages or injuries resulting from collisions by moving objects or persons with the structure post. Company can recommend or supply at additional cost, padding for posts from a third party manufacturer.

20) Preparatory Work: Where installation/assembly is part of the Services and in the event that the foundation or job site is not suitable or ready for assembly to begin on the scheduled day, a delay of order notification must be sent to Company at least 4 working days before in order to allow Company to reschedule the project. In the event that Company is not notified and incurs an expense in attempting to execute the assembly, a re-mobilization charge may be charged to Purchaser before Company will reschedule the assembly.

21) Delegation: Subcontractors: The Services and the manufacturing and assembly of the Structures may be performed by subcontractors under appropriate agreements with the Company.

# PROPOSAL

Corporate Mailing Address:  
P.O. Box 560168  
Dallas, TX 75356-0168  
(800) 966-5005



**USASHADE**  
& Fabric Structures, Inc.



A Brand of USA Shade & Fabric Structures, Inc.

Remittance address:  
USA Shade & Fabric Structures, Inc.  
P.O. Box 678420  
Dallas, TX 75267-8420

- 22) **Force Majeure: Impracticability:** The Company shall not be charged with any loss or damage for failure or delay in delivering or assembling of the shade Structures when such failure or delay is due to any cause beyond the control of the Company, due to compliance with governmental regulations or orders, or due to any acts of God, strikes, lockouts, slowdowns, wars or shortages in transportation, materials or labor.
- 23) **Dispute Resolution:** Any controversy or claim arising out of or related to this agreement must be settled by binding arbitration administered in Dallas, Texas by a single arbitrator selected by the parties or by the American Arbitration Association, and conducted in accordance with the construction industry arbitration rules. Judgment upon the award may be entered in any court having jurisdiction thereof.
- 24) **Entire Agreement; No Reliance:** This agreement represents and contains the entire agreement between the parties. Prior discussion or verbal representations by the parties that are not contained in this agreement are not part of this agreement. Purchaser hereby acknowledges that it has not received or relied upon any statements or representations by Company or its agents which are not expressly stipulated herein, including. Without limitation any statements as to the Structures, warranties or Services provided hereunder.
- 25) **No Third-Party Beneficiaries:** This agreement creates no third party rights or obligations between Company and any other person, including any Owner who is not also a purchaser. It is understood and agreed that the parties do not intend that any third party should be a beneficiary of this Agreement.
- 26) **Governing Law:** The agreement will be construed and enforced in accordance with the laws of the State of Texas.
- 27) **Assignment:** Purchaser may not assign this agreement, by operation of law or otherwise, without the prior written consent of Company. The agreement shall be binding upon and insure to the benefit of the Company and the Purchaser, and their successors and permitted assigns.
- 28) **Materially Increased Costs:** Company reserves the right to implement a surcharge for material increases in raw materials, including but not limited to fuel, steel and concrete. Due to the duration of proposals and contracts, Company reserves the right to implement this surcharge when it determines that raw material cost increases warrant it.

Executed to be effective as of the date executed by the Company:

**PURCHASER:**

**City of Lancaster Park & Rec**

Signature: \_\_\_\_\_  
 By: (Print) \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**COMPANY:**

**USA SHADE & FABRIC STRUCTURES, INC.**

Signature: Robyn White  
 By: (Print) Robyn White  
 Title: Regional Sales Manager  
 Date: January 11, 2011

**NOTE: All purchase orders and contracts should be drafted in the name of USA Shade & Fabric Structures, Inc.**

NOTES:

- 1 Within ten (10) days after acceptance of this Proposal, the undersigned will execute the formal contract and will deliver an approved Surety Bond and such other bonds as required by the Contract Documents for the faithful performance of the Contract. The attached bid security in the amount of 5% is to become the property of the Owner in the event the contract and bond(s) are not executed and delivered within the time above set forth as liquidated damages for the delay and additional work caused thereby.
- 2 The undersigned assures that its employees and applicants for employment and those of any labor organizations, subcontractors, or employment agency, in either furnishing or referring employee applicants to the undersigned, are not discriminated against.
- 3 The bidder agrees to begin construction within ten (10) calendar days after the issuance of the Notice to Proceed with Construction (Work Order), and achieve substantial completion within forty five (45) calendar days after receipt of said notice. Certificate of Acceptance for final completion must be obtained within ninety (90) calendar days after receipt of said notice.

Receipt is acknowledged of the following addenda:

Addendum No. 1 12/21/2010

Addendum No. 2 \_\_\_\_\_

Addendum No. 3 \_\_\_\_\_

Respectfully submitted by:

USA SHADE & Fabric Structures, Inc.  
Company (Printed)

Robyn White  
Name (Printed)

8505 Chancellor Row Dallas, TX 75247  
Address

214-905-9500  
Phone

214-905-9514  
Fax

**CONTRACTOR'S BID BOND**

**KNOW ALL MEN BY THESE PRESENTS,**

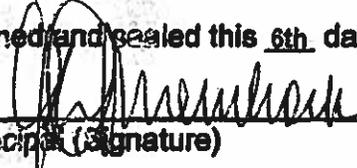
That we USA Shade & Fabric Structures, Inc., Principal, and Continental Casualty Company a corporation duly organized under the laws of the State of Illinois, and authorized to issue surety bonds in the State of Texas, Surety herein, are held and firmly bound unto the City of Lancaster, owner, in the sum of Five Percent of Total Amount Bid Dollars (\$ 5% TAB) for the payment of which sum we will bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has submitted or is about to submit a bid to Owner on a contract for:  
**Lancaster Community Park Amphitheater**

NOW, THEREFORE, if the Owner shall accept the bond of the Principal and the Principal shall enter into a contract with the Owner in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or contract documents with good and sufficient surety for the faithful performance of such contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such contract and give such bond or bonds, then this obligation shall be null and void, otherwise to remain in full force and effect and the amount hereof shall be paid to and retained by Owner as liquidated damages for Principal's failure to do so.

IN WITNESS WHEREOF, this instrument has been executed by the duly authorized representatives of the Principal and the Surety.

Signed and sealed this 6th day of January, 2011

  
Principal (Signature)

J.D. Sarembock  
Typed / Printed Name

By: CFO  
Title

(NAME OF SURETY) Continental Casualty Company

By:   
Attorney-in-Fact Michael D. Hendrickson

POWER OF ATTORNEY APPOINTING INDIVIDUAL ATTORNEY-IN-FACT

Know All Men By These Presents, That Continental Casualty Company, an Illinois insurance company, National Fire Insurance Company of Hartford, an Illinois insurance company, and American Casualty Company of Reading, Pennsylvania, a Pennsylvania insurance company (herein called "the CNA Companies"), are duly organized and existing insurance companies having their principal offices in the City of Chicago, and State of Illinois, and that they do by virtue of the signatures and seals herein affixed hereby make, constitute and appoint

Pat J Moore, Gary W Wheatley, Bryan K Moore, Clark D Fresher, Monica Sprague-Campos, Richard Deal, Individually, of San Antonio, TX  
Michael D Hendrickson, Individually, of Hurst, TX

their true and lawful Attorney(s)-in-Fact with full power and authority hereby conferred to sign, seal and execute for and on their behalf bonds, undertakings and other obligatory instruments of similar nature

- In Unlimited Amounts -

and to bind them thereby as fully and to the same extent as if such instruments were signed by a duly authorized officer of their insurance companies and all the acts of said Attorney, pursuant to the authority hereby given is hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the By-Law and Resolutions, printed on the reverse hereof, duly adopted, as indicated, by the Boards of Directors of the insurance companies.

In Witness Whereof, the CNA Companies have caused these presents to be signed by their Senior Vice President and their corporate seals to be hereto affixed on this 15th day of October, 2010.



Continental Casualty Company  
National Fire Insurance Company of Hartford  
American Casualty Company of Reading, Pennsylvania

*Jacquelyne M. Belcastro*  
Jacquelyne M. Belcastro Senior Vice President

State of Illinois, County of Cook, ss:

On this 15th day of October, 2010, before me personally came Jacquelyne M. Belcastro to me known, who, being by me duly sworn, did depose and say: that she resides in the City of Chicago, State of Illinois; that she is a Senior Vice President of Continental Casualty Company, an Illinois insurance company, National Fire Insurance Company of Hartford, an Illinois insurance company, and American Casualty Company of Reading, Pennsylvania, a Pennsylvania insurance company described in and which executed the above instrument; that she knows the seals of said insurance companies; that the seals affixed to the said instrument are such corporate seals; that they were so affixed pursuant to authority given by the Boards of Directors of said insurance companies and that she signed her name thereto pursuant to like authority, and acknowledges same to be the act and deed of said insurance companies.



My Commission Expires September 17, 2013

*Eliza Price*  
Eliza Price Notary Public

CERTIFICATE

I, Mary A. Ribikawskis, Assistant Secretary of Continental Casualty Company, an Illinois insurance company, National Fire Insurance Company of Hartford, an Illinois insurance company, and American Casualty Company of Reading, Pennsylvania, a Pennsylvania insurance company do hereby certify that the Power of Attorney herein above set forth is still in force, and further certify that the By-Law and Resolution of the Board of Directors of the insurance companies printed on the reverse hereof is still in force. In testimony whereof I have hereunto subscribed my name and affixed the seal of the said insurance companies this 6<sup>th</sup> day of January 2011.



Continental Casualty Company  
National Fire Insurance Company of Hartford  
American Casualty Company of Reading, Pennsylvania

*Mary A. Ribikawskis*  
Mary A. Ribikawskis Assistant Secretary

**State of Texas**

**Claim Notice Endorsement**

To be attached to and form a part of Bond No. NA \_\_\_\_\_.

In accordance with Section 2253.021(f) of the Texas Government Code and Section 53.202(6) of the Texas Property Code any notice of claim to the named surety under this bond(s) should be sent to:

**CNA Surety  
333 South Wabash  
Chicago, IL 60604**

**Telephone: (312) 822-5000**

**1 IMPORTANT NOTICE**

To obtain information or make a complaint:

2 You may contact Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company at 312-822-5000.

3 You may call Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company's toll-free telephone number for information or to make a complaint at:

**1-877-672-6115**

4 You may also write to Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company at:

CNA Surety  
333 South Wabash  
Chicago, IL 60604

5 You may contact the Texas Department of Insurance to obtain information on companies, coverages, rights or complaints at:

**1-800-252-3439**

6 You may write the Texas Department of Insurance:

P.O. Box 149104  
Austin, TX 78714-9104  
Fax: (512) 475-1771  
Web: <http://www.tdi.state.tx.us>  
E-Mail: [ConsumerProtection@tdi.state.tx.us](mailto:ConsumerProtection@tdi.state.tx.us)

**7 PREMIUM OR CLAIM DISPUTES:**

Should you have a dispute concerning your premium or about a claim you should contact Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company first. If the dispute is not resolved, you may contact the Texas Department of Insurance.

**8 ATTACH THIS NOTICE TO YOUR POLICY:**

This notice is for information only and does not become a part or condition of the attached document.

**AVISO IMPORTANTE**

Para obtener informacion o para someter una queja:

Puede comunicarse con Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company al 312-822-5000.

Usted puede llamar al numero de telefono gratis de Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company's para informacion o para someter una queja al:

**1-877-672-6115**

Usted tambien puede escribir a Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company:

CNA Surety  
333 South Wabash  
Chicago, IL 60604

Puede comunicarse con el Departamento de Seguros de Texas para obtener informacion acerca de companias, coberturas, derechos o quejas al:

**1-800-252-3439**

Puede escribir al Departamento de Seguros de Texas:

P.O. Box 149104  
Austin, TX 78714-9104  
Fax: (512) 475-1771  
Web: <http://www.tdi.state.tx.us>  
E-Mail: [ConsumerProtection@tdi.state.tx.us](mailto:ConsumerProtection@tdi.state.tx.us)

**DISPUTAS SOBRE PRIMAS O RECLAMOS:**

Si tiene una disputa concerniente a su prima o a un reclamo, debe comunicarse con el Continental Casualty Company, National Fire Insurance Company, American Casualty Company or Continental Insurance Company primero. Si no se resuelve la disputa, puede entonces comunicarse con el departamento (TDI).

**UNA ESTE AVISO A SU POLIZA:**

Este aviso es solo para proposito de informacion y no se convierte en parte o condicion del documento adjunto.

# ACORD™ CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)  
8/30/2010

PRODUCER Phone: 817-299-3800 Fax: 817-299-3890  
IBTX Risk Services Hurst  
8701 Bedford Eulesse Rd., #450  
Hurst TX 76053

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

**INSURERS AFFORDING COVERAGE**

**NAIC #**

**INSURED**

USA Shade & Fabric Structures, Inc.  
P.O. Box 560168  
Dallas TX 75356

INSURER A: Continental Casualty Co	20443
INSURER B: Valley Forge Insurance Compan	20508
INSURER C: National Fire Insurance of Ha	20478
INSURER D: GOTHAM INS CO	25569
INSURER E:	

**COVERAGES**

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR ADD'L LTR INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
B	<b>GENERAL LIABILITY</b> <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR  GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC	CPP2091508209	8/29/2010	8/29/2011	EACH OCCURRENCE \$1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$200,000 MED EXP (Any one person) \$15,000 PERSONAL & ADV INJURY \$1,000,000 GENERAL AGGREGATE \$2,000,000 PRODUCTS - COMP/OP AGG \$2,000,000
C	<b>AUTOMOBILE LIABILITY</b> <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS	CA2091508212	8/29/2010	8/29/2011	COMBINED SINGLE LIMIT (Ea accident) \$1,000,000  BODILY INJURY (Per person) \$  BODILY INJURY (Per accident) \$  PROPERTY DAMAGE (Per accident) \$
	<b>GARAGE LIABILITY</b> <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT \$  OTHER THAN AUTO ONLY: EA ACC \$ AGG \$
A	<b>EXCESS/UMBRELLA LIABILITY</b> <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE  <input type="checkbox"/> DEDUCTIBLE <input checked="" type="checkbox"/> RETENTION \$10,000	CU2091508243	8/29/2010	8/29/2011	EACH OCCURRENCE \$10,000,000 AGGREGATE \$10,000,000  \$ \$ \$
B	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	WC2091508226 WC2089224285 - CA	8/29/2010 8/29/2010	8/29/2011 8/29/2011	<input checked="" type="checkbox"/> WC STATUTORY LIMITS <input type="checkbox"/> OTHER E.L. EACH ACCIDENT \$1,000,000 E.L. DISEASE - EA EMPLOYEE \$1,000,000 E.L. DISEASE - POLICY LIMIT \$1,000,000
D	<b>OTHER</b> Professional Liability	P10152510	8/29/2010	8/29/2011	\$3,000,000 Occurrence \$3,000,000 Aggregate Claims Made; Ded.: \$25,000 Retro Date: 06/01/2007

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

\*10 Day Notice of Cancellation applies for non-payment of premium\*

**CERTIFICATE HOLDER**

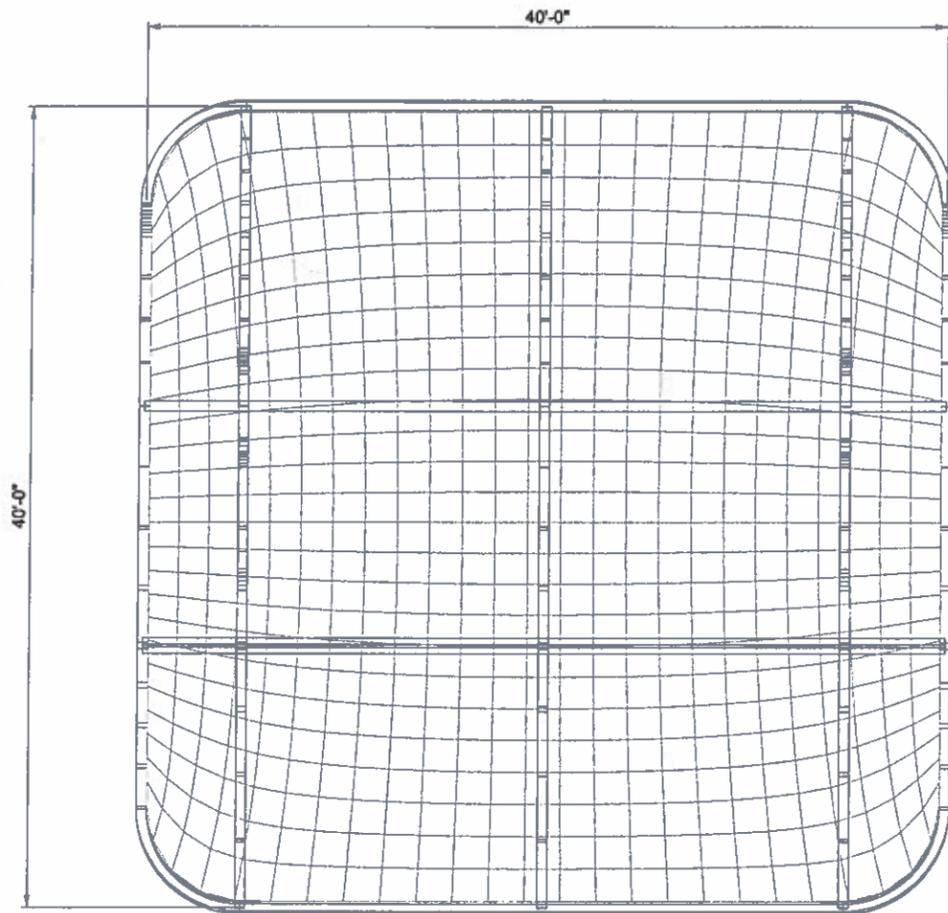
**CANCELLATION 30**

Sample

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30\* DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

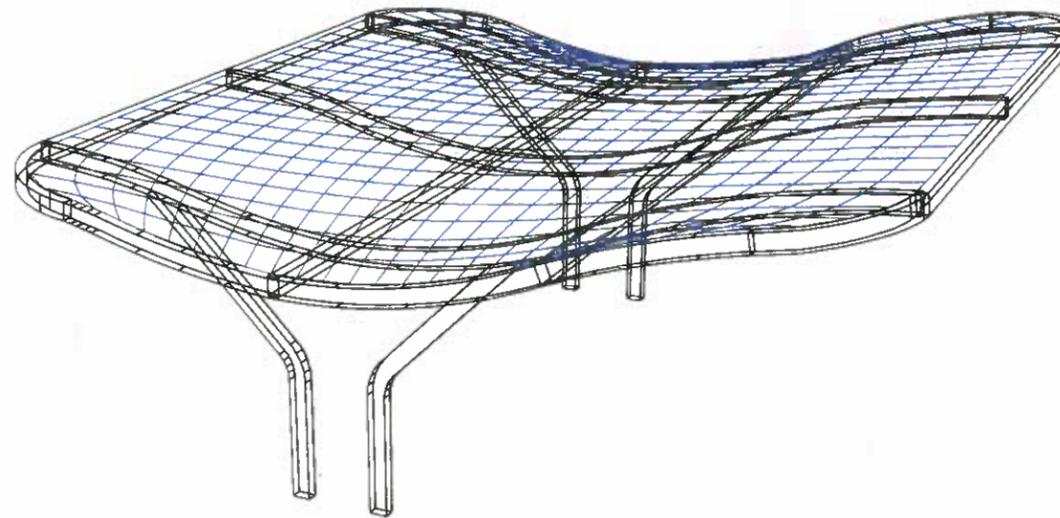
AUTHORIZED REPRESENTATIVE

*Joseph Clayborne*

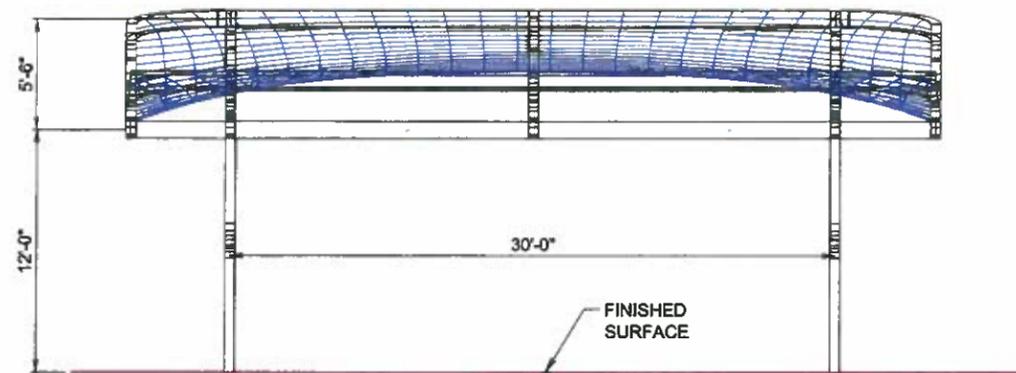


PLAN VIEW

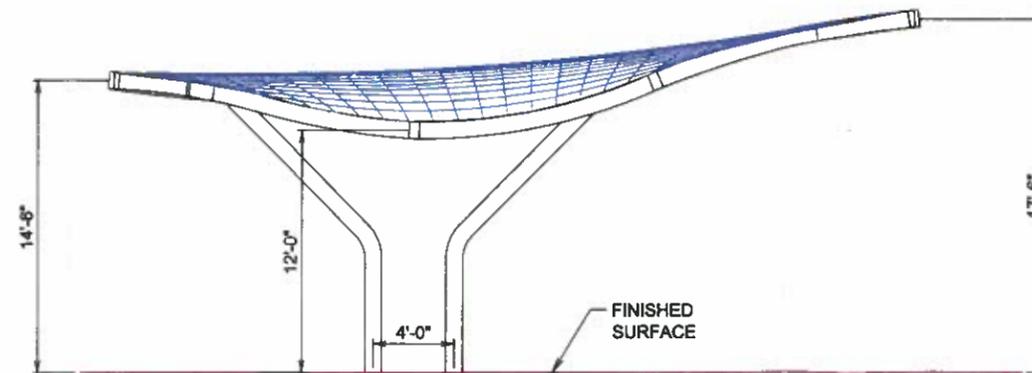
NOTE:  
ALL DIMENSIONS AND HEIGHTS ARE APPROXIMATE,  
MUST BE FIELD VERIFIED OR CUSTOMER APPROVED, BEFORE ANY FINAL DESIGN, FABRICATION OR INSTALLATION WORK



PERSPECTIVE VIEW



FRONT ELEVATION



SIDE ELEVATION

CUSTOMER:  
**ROBERT HALFF & ASSOCIATES**  
PROJECT NAME:  
**LANCASTER AMPHITHEATER**  
LOCATION:  
**DENTON, TX**

STRUCTURE TYPE:  
**CUSTOM STAGE COVER**  
SIZE:  
**40' x 40' x 12'e**

THESE PLANS AND SPECIFICATIONS ARE THE PROPERTY OF USA SHADE AND FABRIC STRUCTURES, INC. AND SHALL NOT BE REPRODUCED WITHOUT THEIR WRITTEN PERMISSION.

**CORPORATE HEADQUARTERS**  
8506-A CHANCELLOR ROW  
DALLAS, TX 75247  
800-988-5005

**WEST COAST HEADQUARTERS**  
350 KALMUS DR  
COSTA MESA, CA 92626  
800-507-4233

**REGIONAL OFFICES:**  
PALM DESERT, CA - NORTHERN CA  
NEW JERSEY - ARIZONA - NEVADA  
HOUSTON - AUSTIN

**USA SHADE**  
& Fabric Structures, Inc.



CERTIFICATIONS:  
IAS CERTIFICATION No: FA-025  
CLARK COUNTY MANUFACTURER  
CERTIFICATION NUMBER (NEVADA): 355

REV	DESCRIPTION	DATE	DRW	CHK	ENG

Drawn By: FPFE 02/16/10  
Checked By: FPFE 02/16/10  
Approved By: FPFE 02/16/10

DRAWING DESCRIPTION:  
**OPTION 1**

DWG. **CON-FEB-021-10**

PAGE **1001**

REV.

**LANCASTER CITY COUNCIL**  
Agenda Communication for  
April 11, 2011

**6**

AG11-006

**Consider a resolution of the City Council of the City of Lancaster, Texas, authorizing the City Manager to enter into a ten-year Interlocal Master Agreement with the County of Dallas for participation in the Major Capital Improvement Program (MCIP) for the purpose of transportation improvements on roads within the City of Lancaster that are inside Dallas County and that are on the North Central Texas Council of Government's (NCTCOG) regional Thoroughfare Plan; repealing all resolutions in conflict; providing a severability clause; and providing an effective date.**

**This request supports the City Council 2010-2011 Policy Agenda.**

**Goal 5: Sound Infrastructure**

**Background**

Dallas County provides the opportunity for cities to benefit from capital improvements to transportation infrastructure within their city limits at reduced costs by collaborating with them through the County's Major Capital Improvement Program (MCIP). The MCIP gives authority to the County to construct mutually agreed upon transportation infrastructure improvement projects utilizing standard basic design within the city limits with the city paying only fifty percent (50%) of the construction costs, excluding city owned utilities relocation, and/or adjustments or betterments for which the city must pay 100%.

The program is governed by a ten-year interlocal master agreement between the County and the city. The previous ten-year interlocal agreement between the County and the City was executed April 24, 2001 and is set to expire on this date in 2011. A renewal ten-year interlocal agreement is attached for Council's approval. Without the agreement in place, no project specific agreements or other project initiating actions between the County and the City can take place until the agreement is renewed.

This program is a huge benefit to the City in terms of cost savings for projects. To illustrate this, shown below are projects that have taken place between the City and the County under the past 10-year Interlocal Agreement:

City of Lancaster/Dallas County MCIP Projects								
STREET	FROM	TO	BUDGETED COST					TOTAL
			CITY		CITY UTILITIES	COUNTY		
Wintergreen Rd Ph4 (completed 08/2007)	SH 342	Jefferson St	2,210,635	50%	916,030	2,210,635	50%	5,337,300
Houston School Road (currently on-going)	Pleasant Run	Wheatland	8,652,000	62%	3,000,000	5,348,000	38%	17,000,000
Wintergreen Rd Ph1 (letting date 01/2015)	IH-35	HSR	4,250,000	50%	1,500,000	4,250,000	50%	10,000,000

As you can see from the table above, without this program and cost sharing by the County, the City would have to carry the lone burden of significantly higher costs for major construction projects.

**Considerations**

- **Operational** – The County oversees construction of agreed upon projects within the city limits unless otherwise agreed upon.
- **Legal** – The City Attorney has reviewed and approved the attached resolution and ten-year interlocal master agreement.
- **Financial** – The costs of transportation improvement projects within Lancaster agreed upon by the City of Lancaster and Dallas County will be shared 50/50 between the County and the City excluding noted exceptions.
- **Public Information** – There are no public information requirements.

**Options/Alternatives**

1. Approve the resolution as presented.
2. Deny the resolution.

**Recommendation**

Staff recommends approval of the resolution.

**Attachments**

- Resolution
- Ten-Year Interlocal Master Agreement with Dallas County

**Prepared and submitted by:**  
Clovia A. English, Public Works Director

**Date:** March 18, 2011

**RESOLUTION NO. 2011-04-32**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, AUTHORIZING THE CITY MANAGER TO ENTER INTO A TEN-YEAR INTERLOCAL MASTER AGREEMENT WITH THE COUNTY OF DALLAS FOR PARTICIPATION IN THE MAJOR CAPITAL IMPROVEMENT PROGRAM (MCIP) FOR THE PURPOSE OF TRANSPORTATION IMPROVEMENTS ON ROADS WITHIN THE CITY OF LANCASTER THAT ARE INSIDE DALLAS COUNTY AND THAT ARE ON THE NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENT'S (NCTCOG) REGIONAL THOROUGHFARE PLAN; REPEALING ALL RESOLUTIONS IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS,** the City of Lancaster and County of Dallas desire to enter into an a ten-year Interlocal Agreement for mutually agreed upon maintenance and improvement of City streets by the County; and

**WHEREAS,** Chapter 791 of the Texas Government Code, as amended, provides authorization for local government to enter into interlocal contracts; and

**WHEREAS,** certain conditions exist in the City of Lancaster that warrant the need to improve City streets; and

**WHEREAS,** it is necessary and in the best interest of the City of Lancaster to enter into a ten-year Interlocal Agreement with the County of Dallas.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS:**

**Section 1.** That the City Manager is hereby authorized to execute the ten-year Interlocal Agreement with the County of Dallas on behalf of the City of Lancaster for maintenance and improvement of City Streets.

**Section 2.** Any prior Resolution of the City Council in conflict with those contained in this Resolution are hereby repealed and revoked.

**Section 3.** Should any part of this Resolution be held to be invalid for any reason, the remainder shall not be affected thereby, and such remaining portions are hereby declared to be severable.

**Section 4.** This Resolution shall take effect immediately from and after its passage, and it is accordingly so resolved.

**PASSED AND APPROVED** by the Lancaster City Council on this the 11<sup>th</sup> day April 2011.

**APPROVED:**

\_\_\_\_\_  
Marcus E. Knight, Mayor

**ATTEST:**

\_\_\_\_\_  
Dolle K. Downe, City Secretary

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Robert E. Hager, City Attorney

**MASTER AGREEMENT GOVERNING  
MAJOR CAPITAL IMPROVEMENT PROGRAM**

**THIS MASTER AGREEMENT** is made by and between the City/Town of Lancaster, Texas, hereinafter called "City" or "Town", and Dallas County, hereinafter called "County", acting by and through its duly authorized officials, which desire to enter into an Interlocal Agreement, hereinafter called Master Agreement, for the purpose of Transportation Improvements on roads inside Dallas County that are on the North Central Texas Council of Government's Regional Thoroughfare Plan.

**WITNESSETH**

**WHEREAS**, pursuant to Court Order 2001-814, dated April 24, 2001, County Commissioners Court approved participation in Transportation Major Capital Improvement Program within the cities inside Dallas County; and

**WHEREAS**, the approved project lists may be modified, updated or approved by the Commissioners Court on a periodic, as-needed basis; and

**WHEREAS**, Chapter 791 of the Texas Government Code, as amended, provides authorization for local governments to enter into interlocal agreements; and

**NOW THEREFORE, THIS AGREEMENT** is hereby made and entered into by City/Town and County for the mutual consideration stated herein:

**ARTICLE I. DEFINITIONS**

The following definitions are incorporated into this agreement for all purposes.

- A. **AMENDMENT** shall mean a written document executed by all parties detailing changes, additions or deletions in the Master Agreement.
- B. **AMENITY** shall mean Project features not included in the Standard Basic Project Design including but not limited to street pavers, colored concrete, planters, irrigation, decorative lighting, special signage, or any other feature above and beyond the Standard Basic Project Design or any increase in capacity in excess of County determined requirements based on anticipated future traffic flow.
- C. **CITY/TOWN** shall mean the City/Town of Lancaster, Dallas County, Texas.
- D. **CONTEXT SENSITIVE SOLUTIONS (CSS)** is a collaborative, interdisciplinary approach that involves all stakeholders to develop a transportation facility that fits its physical setting and preserves scenic, aesthetic, historic and environmental resources, while maintaining safety and mobility. CSS is an approach that considers the total context within which a transportation improvement project will exist. CSS principles include the employment of early,

continuous and meaningful involvement of the public and all stakeholders throughout the project development process. It is the intent of Dallas County Public Works Department to use the essential elements of CSS in all approaches to deliver the project. Some projects will dictate very intense use of CSS, while others will only use a few of the elements, but the County will always consider CSS.

- E. **COUNTY** shall mean County of Dallas, State of Texas.
- F. **DIRECT PROJECT and PROGRAM COSTS** shall mean those costs that can be identified specifically with a particular project or program cost objective. These costs generally include compensation of employees for the time devoted and identified specifically to the performance of the project or program, cost of materials acquired, consumed or expended specifically for the purpose of the project or program; equipment changes; damage claims and other approved capital expenditures; change orders; travel expenses incurred specifically to carry out the project including, but not limited to, design, right-of-way, road or street drainage, utility relocation and adjustment and construction. Direct Cost does not include either City/Town or County general overhead.
- G. **EFFECTIVE DATE** shall mean the date of the signature of the last person necessary for this **Master Agreement** to become effective.
- H. **EXTRA TERRITORIAL JURISDICTION- (ETJ)** shall mean the unincorporated area outside the incorporated boundaries of the municipality as determined in Chapter 42 of the Texas Government Code, as amended.
- I. **FIVE PHASE PROJECT DELIVERY SYSTEM** shall mean the process for delivering a project from conception to completion as detailed in Exhibit A, attached hereto and as well as any additions or supplements thereto. The five phases of the project delivery system are planning, design, right of way, utility clearance, and construction.
- J. **FUNDING AGREEMENT** shall mean the agreement between the County and a City/Town to establish a preliminary proposed budget for a project. As design is completed and the engineering estimate is refined, the funding agreement shall be incorporated into the Project Specific Agreement.
- K. **INDIRECT COSTS** shall mean those costs that benefit more than one project and cannot be readily identified with a particular final project or program cost objective. Their precise benefits to a specific project are often difficult or impossible to trace.
- L. **IN-HOUSE PROJECT DELIVERY COSTS** shall mean all costs associated with the development of the Major Capital Improvement Program (MCIP) "Call for Projects", selection of projects, scoping of projects, project design, property acquisition and construction of projects. Cost Accounting shall include but is not limited to employee time reimbursement, materials, equipment and other expenditures necessary for the management and continuation of the MCIP.
- M. **INTERLOCAL AGREEMENTS** shall mean contracts or agreements entered into between City/Town and County in accordance with Texas Government Code Chapter 791.
- N. **LEAD AGENCY** shall mean that entity responsible for project management, including, but not limited to planning, design, right-of-way acquisition, approved utility relocation or adjustment and construction unless otherwise designated.
- O. **MASTER AGREEMENT** shall mean this document including all incorporated documents, attachments, and exhibits.

- P. **MEMORANDUM OF AGREEMENT (MOA)** shall mean a written document which incorporates the results of the Preliminary Design Charrette.
- Q. **MULTI-MODAL CONNECTIVITY IMPROVEMENTS** shall mean projects which comply with the concepts in the 2005 SAFETEA-LU Act, any amendments, or any future federal transportation acts which increase safety, accessibility, flexibility, efficiency, and enhance the integration and connectivity of the transportation system, across and between modes throughout the County for motorized and non-motorized users.
- R. **ORPHAN ROADS** shall mean all or part of a street or road right of way which are outside the incorporated limits of a municipality (or municipalities) and the incorporated area of the municipality (or municipalities) abuts or extends into the right of way. These roadway segments have, in effect, been “orphaned” by the abutting City/Town (or cities) that they serve in that they have been left unincorporated. Thus the County has primary responsibility for maintenance, operation, enforcement, police and/or emergency services within these unincorporated rights of way.
- S. **PARCEL OR PARCELS** shall mean those portions or part of land and improvements located either wholly or partially thereon, identified by County, City/Town or other Stakeholder as required for right-of-way requirements of the Project. Such right-of-way shall include the existing street, road, drainage or other City/Town or County real property ownership and all additional real property to be utilized for the Project.
- T. **PRELIMINARY CONCEPT CHARRETTE (PCC)** shall have the same meanings and purposes as the Preliminary Design Charrette, but be conducted very early in the design start, before substantial design is underway. The conditions for which a PCC is appropriate will be determined by the lead agency, but will usually be a greater uncertainty of what the road improvement will involve, the purposes, varying contexts (e.g. Transit Oriented Development, Recreational Oriented Development, Industrial Oriented Development, etc.). Use of CSS will usually mean that a PCC will be conducted, since its use fits perfectly into CSS concepts. Other conditions encountered may dictate the use of a PCC, such as poor soils, presence of unconsolidated solid waste dumps, innovative integration of master planning with project delivery, unusual ROW challenges, budgetary constraints (thus calling for significant Value Engineering efforts), etc. The results of properly using a PCC will be that early consensus will be achieved on a basic approach to the project design and construction, thus avoiding wasted design funding and loss of momentum for project delivery.
- U. **PRELIMINARY DESIGN CHARRETTE (PDC)** shall mean a meeting of decision making stakeholders and other members of the project team for the purpose of discussing feasible design alternatives, forging strong consensus among all stakeholders for the selected alternative, and entering into a MOA for the overall estimate, alignment and scope of the project. The PDC will be scheduled when the preliminary design is complete or near completion. This means horizontal and vertical alignment alternatives have been designed, ROW requirements are at least approximately known for each alternative, and the design is 40% to 60% complete. The result of a PDC that is conducted with all the stakeholders present is that the strong consensus achieved will help assure the project is able to overcome any challenges with design completion, ROW acquisition, utility design and relocation, and finally, road construction.
- V. **PROJECT MANAGER** shall mean the person appointed by the Lead Agency who is assigned the primary duty for assuring Project Team coordination and timely project delivery. There will be only one Project Manager assigned to a Project.

- W. **PROJECT TEAM** shall mean representatives from County, City/Town, and other Stakeholders as may be mutually agreed upon by County, City/Town and Stakeholders or otherwise with responsibility for delivering the completed Project.
- X. **PROJECT(S)** shall mean the proposed thoroughfare and multi-modal connectivity improvements approved by the Commissioners Court for inclusion in the Transportation MCIP and approved by the City/Town.
- Y. **PROJECT DURATION** shall mean the active life of the project. Project shall commence with the application for a project by the City/Town and acceptance by the Dallas County Commissioners Court. Project shall be considered complete when construction has been fully completed and the one year maintenance period has expired or the project has been terminated in accordance with Article IV of this Agreement.
- Z. **PROJECT SPECIFIC AGREEMENT or PROJECT SUPPLEMENTAL AGREEMENT (PSA)** shall mean an agreement subsequent to this document which is entered into to establish the contractual rights and responsibilities of the City/Town and County as it relates to a particular Project. A PSA supersedes the MOA or Funding Agreements.
- AA. **RIGHT OF WAY (ROW)** is a strip of land that is granted, through a ROW deed, an easement or other mechanism, for the Project. ROW shall mean that real property or property interest identified by County or City/Town, as necessary for the construction of the Project which shall include the existing street, road, drainage or other City/Town or County real property ownership and all additional real property to be utilized for the Project.
- BB. **SCOPING SHEETS** shall be attached to each PSA. These sheets will set forth the design criteria to be used for the project, including the alignment, appropriate specifications, typical section and other parameters of the project. As project goals and needs are more clearly defined the Scoping Sheets shall be updated and revised by the project manager to reflect current construction goals.
- CC. **STANDARD BASIC PROJECT DESIGN** shall mean the standard County-approved City/Town criteria for paving, bridges, drainage and appurtenances, traffic control items including pavement marking, warranted uniform signals, street light foundations, pull boxes, conduit, sidewalks, medians, storage/turn lanes, access, required structural retaining walls and standard driveways excluding road or street amenities, or such design criteria as may be mutually agreed upon in a project Scoping Sheets.
- DD. **TxDOT** shall mean the Texas Department of Transportation.
- EE. **UTILITIES** shall mean each City/Town utility, public utility, common carrier, governmental or quasi-governmental facility, fiber optic facility, or other facility located within the limits of the Project by virtue of Texas or Federal Law or agreement between the entity and the City/Town, County, or State of Texas.
- FF. **CITY/TOWN UTILITY** shall mean those owned or operated by City/Town which requires relocation or adjustment for the purpose of the construction of the Project as identified by Project plans.
- GG. **UTILITY IN PUBLIC RIGHT-OF-WAY** shall mean all UTILITIES located within the limits of any governmental entity.
- HH. **UTILITY IN PRIVATELY OWNED RIGHT-OF-WAY** shall mean all Utilities, excluding City/Town Utilities, whose facilities are located within a private easement.

II. **UTILITY BETTERMENT** shall mean any increase in the capacity of any Utility's Facility adjusted or relocated as a part of the PROJECT as compared to the existing Facility, or any upgrading of the Utility's Facility above the standard practices, devices or materials, specified by the Utility and customarily used by City/Town or Utility on projects solely financed by City/Town or Utility. Provided, however, that any adjustments necessary to successfully accomplish the Project shall not be considered a Betterment, and further, that any increase in the capacity of the Utility Facility resulting solely from the replacement of devices or materials no longer regularly manufactured, processed or installed shall not be considered a Betterment, provided that such replacement shall be only to the standard devices or materials currently used on other projects financed solely by City/Town or Utility. This meaning shall apply to utilities that are part of the project as well as the standard basic street components (See "STANDARD BASIC PROJECT DESIGN").

## **ARTICLE II. PERIOD OF THE AGREEMENT**

This Master Agreement becomes effective when signed by the last party whose signing makes the respective agreement fully executed (The "Effective Date"). This Master Agreement shall expire ten years from the Effective Date unless terminated in accordance with Article IV.

## **ARTICLE III. AMENDMENTS**

This Master Agreement may be amended with the mutual consent of the City/Town and County. Any amendment must be in writing and approved by the parties' respective governing bodies through either a Court Order from Commissioners Court or a City/Town Council Resolution.

## **ARTICLE IV. TERMINATION, DEFAULT, TIME OF THE ESSENCE AND FORCE MAJEURE**

### **A. TERMINATION**

- a. This Master Agreement may be terminated by any of the following conditions:
  1. By expiration of term of the agreement.
  2. By either party, by notice in writing establishing the effective date of termination to the other party as consequence of the party being in default of the provisions of this Agreement or any supplemental agreement or failure to timely provide funding, with proper allowances being made for circumstances beyond the control of the defaulting party.
  3. By either party with ninety days written notice to the other party.
- b. Should either party terminate this Master Agreement as herein provided, all existing, fully executed supplemental agreements made under this Master Agreement shall not be terminated and shall automatically incorporate all the provisions of this Master Agreement.
- c. In the event that any supplemental agreement is terminated prior to completion of the Project, no additional Costs shall be incurred other than Costs due and payable at the time of termination for services actually performed or that shall become due and payable due to such termination. The Lead Agency, to the extent permitted, may terminate all project contracts,

unless written notice is given by either party to the other of its intent to complete the Project, and prepare a final accounting for the Project.

- d. If the Project is terminated by the City/Town prior to the award of any construction contract and the Project is located within the City/Town limits, City/Town shall pay to County the full amount expended by County on the project and County shall transfer to City/Town its rights and all deliverables that it may be entitled to receive under the existing professional services or other project contracts or agreements. Such amount shall be included in the final accounting for the Project. Such amount shall be due and payable in full ninety (90) days subsequent to the termination, or thirty days subsequent to delivery of final accounting.
- e. Once the construction contract has been awarded by the governing body of the Lead Agency, the PSA for that Project cannot be terminated until completion of the construction.
- f. In the event that a Project is terminated prior to the award of the construction contract, either party may, upon written notice, take over the project and prosecute the work to completion by contract or otherwise at its sole cost and expense. In the event that the party completing the work is not the Lead Agency, it is agreed that the Project Manager will furnish to the Completing Party a listing of current records pertaining to any outstanding obligations or other records or information required by any project contract, including any Work Order, or requested in writing by Completing Party in either printed or electronic format or both. The Lead Agency agrees to cooperate with the Completing Party. The Lead Agency will use its best efforts to transfer to the Completing Party all contracts. Obligations under such contracts shall become the sole obligation of the Completing Party upon transfer. Completing party agrees to timely pay all future obligations under such contract as they become due and payable. Completing Party hereby releases the Lead Agency from any and all liability under such assigned contracts subsequent to date of transfer, effective upon the transfer date. Lead Agency shall exercise its best efforts to insure a transition of services without interruption.

Either party shall have the right to retain copies of all data, information, engineering, studies, or other items produced to the date of termination.

- g. Provisions b through g of this section shall survive the termination of this Master Agreement and any PSA and shall be a continuing obligation until the transition of services, all payments made and the Projects are complete. All items listed or required in this provision shall be furnished by Lead Agency to Completing Party without additional cost or expense to completing party.

#### **B. FORCE MAJEURE:**

Neither County nor City/Town shall be deemed in violation of this Contract if it is prevented from performing any of its obligations hereunder by reason of, for or through strikes, stoppage of labor, riot, fire, flood, invasion, insurrection, accident, order of court, judge or civil authority, an act of God, or any cause reasonably beyond the party's control and not attributable to its neglect. In the event of such an occurrence the time for performance of such obligations or duty shall be suspended until such time that such inability to perform, shall be removed. The party claiming the suspension shall give notice of such impediment or delay in performance to the other party within ten (10) days of the knowledge of such occurrence. Each party shall make all reasonable efforts to mitigate the effects of any suspension. The provisions of this Article IV section B shall survive the termination of this Master Agreement.

## **ARTICLE V. LIABILITY FOR ACT AND OMISSIONS**

**County and City/Town agree that both County and City/Town shall each be responsible for their own negligent acts or omissions or other tortuous conduct in the course of performance of this Master Agreement without waiving any sovereign or governmental immunity available to either County or City/Town under Texas law and without waiving any available defenses under Texas law. Nothing in this paragraph shall be construed to create or grant any rights, contractual or otherwise, in or to any third persons or entities. The provisions of this Article V shall survive the termination of this Master Agreement.**

## **ARTICLE VI. LEAD AGENCY**

- A. Lead Agency shall be that entity which is responsible for the project from conception through to completion of construction. City/Town and County may choose for County to manage project through design and construction and for City/Town to acquire ROW.
- B. In the event that the City/Town is Lead Agency the City/Town shall:
- a. Provide project management and leadership from project selection to construction completion following the 5 Phase Project Delivery System as detailed in Exhibit A, attached hereto and as well as any additions or supplements thereto;
  - b. Lead Agency shall be responsible for hosting the Preliminary Concept Charrettes and or Preliminary Design Charrettes and Neighborhood Public Workshops;
  - c. Acquire ROW necessary for project;
  - d. Enter into or obtain whatever agreements or permits necessary for project completion;
  - e. Provide County with opportunity for significant input in plan development and periodic progress reviews; and
  - f. Provide records for periodic auditing for either financial accounting or engineering accounting or both.
- C. For City/Town-led projects in which the City/Town is considering to specify transportation infrastructure elements exceeding the Standard Basic Project Design criteria, County funding will only be eligible to the Standard Basic Project Design criteria unless the City/Town and County have arrived at mutual agreement through involvement of County during the initial design phases including the Design Partnering Kick-off Meeting and as necessary the Preliminary Concept Charrette and Preliminary Design Charrette meetings.

## **ARTICLE VII. CITY/TOWN COVENANTS AND AGREES AS FOLLOWS:**

- A. To execute with reasonable promptness the necessary agreements for the implementation of design and construction of the Projects mutually agreed upon and incorporated herein by PSA.
- B. To provide City/Town Council Resolution adopting approved preferred alignment, proposed estimated budget, and commitment to meet Project funding for each milestone as specified herein or in the Funding Agreement and/or PSA.
- C. To provide City/Town Council Resolution adopting the subdivision regulation in the ETJ as defined in Article XVII below.

- D. City/Town agrees to share the funding of each Project with County on an equal share basis of 50%/50% or as otherwise agreed cost sharing arrangement as specified in a Funding Agreement and/or PSA with the following exclusions:
- a. City/Town shall bear the entire cost of:
    1. City/Town owned utilities relocation or adjustment such as water and sanitary sewer facilities, except utility adjustments directly attributable to storm sewer improvement conflicts;
    2. Amenities including but not limited to street pavers, colored concrete, planters, decorative lighting, special signage, or any other feature over the Standard Basic Project Design;
    3. Utility Betterments
    4. Direct costs of City/Town which is fulfilling the role of Lead Agency, shall be totally funded by City/Town unless supported by a detailed hourly accounting system equal to County's accounting system.
    5. City/Town Indirect Costs.
- E. When mutual written agreement has been reached as to Projects' concepts, design elements and limits by County and City/Town at the PDC, City/Town agrees to acquire ROW required for designated projects by voluntary dedication, the subdivision platting process and/or other legal means, to the maximum extent possible, and to ensure through the building permitting process that setback requirements are imposed to limit encroachment upon the required ROW. City/Town agrees to fund ROW not acquired, but reasonably expected to be acquired. City/Town also agrees to fund the removal of improvements that are encroachments within existing or proposed ROW areas.
- F. In the event of any proposed use of the Project ROW that will conflict with the proposed Project and City/Town is unable to obtain such ROW as described above, City/Town shall notify County of such conflict. County and City/Town shall determine if the acquisition of the conflicting parcel would be in the best interest of the Project. In the event that agreement is reached and the parcel is acquired such cost shall be included in the pro rated cost of the project in the agreed upon proportions.
- G. City/Town hereby grants the County authority to enter into eminent domain proceedings within the City/Town limits on each specific ROW alignment and/or project as approved by the City/Town and County.
- H. To require all Utilities located within or using the present public ROW on all designated transportation projects within City's/Town's municipal limits to adjust and/or relocate said Utilities as required by the proposed improvement of the designated transportation Project. City/Town Utilities shall be relocated or adjusted at no cost to County except as may be specifically set forth in this Master Agreement.
- I. City/Town agrees to be cooperative on issues relating to billboards, advertising signs, non-conforming uses, zoning and similar restrictions and to exercise its best efforts to provide variances when possible to minimize cost and delay of Project. Additional Project cost caused or contributed to by City/Town ordinance, zoning, non-conforming use determination or other requirement shall be paid in full by City/Town.
- J. City/Town shall require the adjustment and/or relocation of Utilities to be accomplished and finalized, as expeditiously as possible after approval of final plans to prevent Project schedule

delays. Notwithstanding anything contained herein to the contrary, all Utilities shall be adjusted or relocated and the ROW clear for construction not later than thirty (30) days prior to the award of the construction contract. City/Town will notify the County and other Stakeholders when utility conflicts would impact progress of the project completion. County and City/Town agree to work in partnership and with all Stakeholders to solve the problem; to include engaging elected officials in the problem resolution with the goal to prevent delays in the commencement or prosecution of construction on the Project.

- K. Where planned roadway improvements (including, but not limited to storm drainage,) are in conflict with City/Town owned water and sanitary sewer systems, that could otherwise remain in place, the actual costs of the necessary adjustment of City/Town water and sewer utilities shall be pro rated at the overall percentage agreed to by City/Town and County for cost sharing. City/Town shall be responsible for funding one hundred percent (100%) of any Betterment; as well as 100% of any relocation that is caused by City/Town installation during the Project Duration. Except as provided herein, all costs for adjustment and/or relocation of utilities in the public ROW shall be the responsibility of the Utility Owner or of the City/Town Utility. Any Project delay or other damages caused by City/Town Utility failure to timely relocate or adjust the facility shall be at the entire cost of City/Town.
- L. To provide for continuing surveillance and control of ROW to prevent the construction, placement, storage or encroachment of any signs, personal property or other appurtenances in the existing or proposed ROW. In the event that the aforementioned features are allowed by City/Town to encroach on necessary ROW during the duration of the project, City/Town shall bear the entire cost of removal or relocation of said encroachment.
- M. To provide to County for County's or County's designee's use, at no cost, adequate copies of all construction standards, codes, (specifically including zoning and development codes), plats, specifications, guidelines, standards or any other pertinent information as determined by County to be required for the completion of the Project. Additionally, City/Town shall furnish County, at no cost, such documents as necessary to keep all items previously furnished to County current.
- N. Actively participate and provide authorized representation with decision making power at PCC and/or PDC, preconstruction meeting, partnering meetings and project team meetings which are necessary to project development/completion and fiduciary relationships.
- O. City/Town agrees to provide timely review of interim submittals. "Timely review" will be agreed upon during the PCC and/or PDC as a part of the Project schedule. City/Town further agrees that if no review notes are submitted by City/Town in writing to County on a timely basis, plans are approved as submitted.
- P. When City/Town is Lead Agency City/Town agrees to allow forty-five days for County review of submittals and any comments shall be incorporated into final document.
- Q. City/Town agrees that it will pay all additional project cost for any City/Town requested discretionary change, including, but not limited to Amenities and Utility Betterments, in or addition to the design or construction of the project subsequent to the City/Town opportunity to review the sixty five percent (65%) design plans.
- R. Provide at City's/Town's cost for the continuing maintenance of all the Project ROW, such as mowing, drainage, trash removal, etc., during the period between acquisition and construction.
- S. During the construction of the Project and after completion of the Project, City/Town will be responsible for the control, operation, police enforcement and/or emergency services, without cost or contribution from the County.

- T. After the completion of a Project and the one year maintenance period, the City/Town will be responsible for all future maintenance without cost or contribution from the County.
- U. Bear the entire cost of design, construction and administration for landscaping, streetscaping, streetlighting, as such items are not included in the Standard Basic Project Design and other amenities specified or requested by City in excess of Standard Basic Project Design.
- V. It is the intent of this Master Agreement that the County will be the Lead Agency. In the event that the City/Town and County agree in writing that City/Town will manage and administer one or more Projects, City/Town and County will enter into a PSA as to that project(s). In such instance, City/Town agrees to assume all Lead Agency responsibilities except as may be set forth in the PSA as determined by mutual consent.

**ARTICLE VIII. UTILITY IMPACTS.**

- A. In cases where a Utility is located in a Privately Owned ROW, and it is necessary to relocate the facility or make adjustments by reason of the widening or improvement of the designated project, the County (or City/Town if acting as the Lead Agency) will, after submission by utility company of ROW documentation and cost estimates acceptable to the City/Town, County and other Stakeholders, assign the actual costs for the relocation and/or adjustment of said utility to the Project.
- B. In cases where a Utility in Public ROW, excluding City/Town Utilities, occupies any portion of the Project ROW by Texas or Federal Law or by agreement with the City/Town that allows or permits the City/Town to cause the relocation of the utility for the construction of the project, the City/Town shall timely require and enforce the relocation or adjustment requirement at no cost to the project. In the event that the City/Town has no legal or contractual right to cause the relocation, the relocation or adjustment shall be relocated or adjusted and all cost shall be a Project Cost. City/Town shall take all steps necessary to insure that such relocation or adjustment shall not conflict with or delay the Project schedule.

**ARTICLE IX. COUNTY COVENANTS AND AGREES AS FOLLOWS:**

- A. To provide as a Project Cost preliminary engineering which will define project details, e.g., location, scope of work and specific right of way alignment for each improvement. Such preliminary engineering shall be submitted to the City for approval, prior to proceeding with the final design and any right of way acquisition.
- B. To provide as a Project Cost for the construction of transportation improvements based upon design criteria conforming to Standard Basic Project Design in conformity with applicable City ordinances and standards, to the extent of Commissioners Court approved program funding. Scope of work shall include the agreed upon design standards as the basis for improvement criteria. Deviations from mutually agreed upon application of City/Town standards and/or design criteria shall require prior approval of City/Town. Where City/Town standards do not exist, TxDOT standards as of the Effective Date of this Master Agreement shall be utilized unless otherwise mutually agreed by PSA.
- C. To actively participate and provide authorized representation at Predesign Charrette, preconstruction meeting, partnering meetings and project team meetings which are necessary to project development and completion and fiduciary relationships.

- D. To provide project management of each Project where County is Lead Agency from commencement to completion of construction. City and County may further agree by mutual consent to redefine project management roles as beneficial to the Project as defined in the MOA and supplemental agreements.
- E. Upon receipt of written request detailing the information requested, to provide information related to the Project to City/Town or City's/Town's designee at no cost to the City.
- F. County agrees to provide review of interim submittals within forty-five days and hereby agrees that if no review notes are submitted by County (if City/Town is filling the role as Project Manager) in writing to City/Town, plans are approved as submitted.
- G. To submit final engineering plans for review and written approval by City/Town at least thirty (30) days prior to advertising for construction.
- H. To provide for the acquisition, including acquisition by Eminent Domain, of the necessary additional ROW, on designated projects, in accordance with minimum standard requirements and utilizing existing public ROW to the maximum extent possible as a Project cost.
- I. To require all contractors to secure all necessary permits required by City/Town on said construction projects.
- J. To furnish record drawings of construction plans for the permanent records of City/Town within twelve (12) months upon completion and acceptance of the transportation improvement Project.
- K. To transfer the real property or property interest acquired by County and used for the Project to City/Town.
- L. In the event County and City agree in writing that City will be the Lead Agency for the agreed upon Project, County will reimburse City for agreed costs as detailed in Article XIII. (Funding) in an amount not to exceed the Project cost as approved by Dallas County Commissioners Court and incorporated in the PSA. All County payments shall be in accordance with County Policies and Procedures or as may be mutually agreed between the parties and incorporated in a PSA.

**ARTICLE X. PRELIMINARY DESIGN CHARRETTE (PDC), PRELIMINARY  
CONCEPT CHARRETTE (PCC)**

- A. City/Town and County, as specified in Articles VII and X, respectively, will designate officials or representatives to participate in a PCC and/or PDC to be conducted on a mutually agreeable date and location. At least part of this meeting will be conducted on the Project site.
- B. Results from PCC will identify the general project scope, the basic approach and concepts to be taken with the project, the elements of CSS that will be included, and some ideas for alignments alternatives. Lead agency will already have been determined, and as well as project administration and management roles, to include the Project Manager. Key project team participants shall be introduced to stakeholders at the PCC and or PDC. Results from the PDC will identify the preferred alignment of the project which all stakeholders can support and build momentum behind, and provide all stakeholders a commitment for project delivery schedules and project budgets.

**ARTICLE XI. FISCAL FUNDING**

Notwithstanding anything to the contrary herein, this Master Agreement is expressly contingent upon the availability of County funding for each item and obligation contained herein. City/Town shall have

no right of action against the County as regards this Master Agreement, specifically including any funding by County of the Project in the event that the County is unable to fulfill its obligations under this Master Agreement as a result of the lack of sufficient funding for any item or obligation from any source utilized to fund this Master Agreement or failure of any funding party to budget or authorize funding for this Master Agreement during the current or future fiscal years. In the event of insufficient funding, or if funds become unavailable in whole or part, the County, at its sole discretion, may provide funds from a separate source or terminate this Master Agreement. In the event that payments or expenditures are made, they shall be made from current funds as required by Chapter 791, Texas Government Code.

Notwithstanding anything to the contrary herein, this Master Agreement is expressly contingent upon the availability of City/Town funding for each item and obligation contained herein. County shall have no right of action against the City/Town as regards this Master Agreement, specifically including any funding by City/Town of the Project in the event that the City/Town is unable to fulfill its obligations under this Master Agreement as a result of the lack of sufficient funding for any item or obligation from any source utilized to fund this Master Agreement or failure of any funding party to budget or authorize funding for this Master Agreement during the current or future fiscal years. In the event of insufficient funding, or if funds become unavailable in whole or part, the City/Town, at its sole discretion, may provide funds from a separate source or terminate this Master Agreement. In the event that payments or expenditures are made, they shall be made from current funds as required by Chapter 791, Texas Government Code.

#### **A. ARTICLE XII. FUNDING**

A. City/Town and County mutually agree to proportionately fund the Direct Project and Program costs as agreed by the parties in a PSA. Unless otherwise specified in the PSA, County shall bear fifty percent (50%) of the total Direct Project and Program costs excluding the Amenities, relocation or adjustment of City/Town Utilities, Utility Betterment, Indirect Cost, Direct Cost not supported by detailed hourly accounting system and other items as specified in this Master Agreement, Funding Agreement or any PSA. County shall not be responsible for any amount of funding in excess of the Project not-to-exceed amount as shown in the PSA. Unless otherwise specified in the PSA, City/Town shall bear fifty percentage (50%) of all Direct Project and Program costs. In addition, City/Town agrees to fund all other City cost as provided herein, including, but not limited to, Amenities, relocation or adjustment of City/Town Utilities, Utility Betterment, Indirect Cost, Direct Cost not supported by detailed hourly accounting system and other items as specified in this Master Agreement, Funding Agreement or any PSA.

B. Unless otherwise stated in a PSA, the milestones for each project shall be (1) preliminary and primary design (2) ROW acquisition and utility relocation or adjustment and (3) construction. The Lead Agency shall prepare an estimated cost for each milestone. Upon approval of the cost by the other party, each party shall fund its share of the respective milestones by placing that amount of money in an escrow account or otherwise encumber the funds to insure that the Lead Agency will have sufficient funding available from current revenue for the timely payment of Project milestone costs. The Lead Agency may bill the other party for periodic payments for the actual amount of work completed toward the completion of the milestone. Upon completion of the milestone, the non-management party will be furnished a notice that such work has been completed and the amount of funding that may be utilized to pay subsequent milestone Project cost. Notwithstanding any other term or condition contained herein or in any PSA, neither party will be required to award any contract until

written certification has been received that funding has been placed in escrow or encumbered for the payment of the non-awarding party's portion of the Project cost.

C. In the event that the cost of the Project shall exceed the not-to-exceed amount, City/Town and County agree to either reduce the scope of construction or seek additional funding to complete the Project at the agreed upon cost share percentages. At the termination of the Project, the Lead Agency will do a final cost accounting of the Project. In the event that the amount paid by either party exceeds its portion of the actual cost, the difference will be remitted to such party. In the event that additional funds are due, the Lead Agency will bill the other party who agrees to pay such funds within thirty (30) days of receipt of such billing.

D. If City/Town elects to manage Project, County will reimburse City/Town based on invoices for actual costs expended as supported by documentation approved by County Auditor. Any and all supporting documentation required by County Auditor shall be included with invoice from City/Town.

E. Upon execution of a PSA, City/Town shall escrow an amount adequate for initial project costs which County may use to pay for initial professional services required for scoping, preliminary, and primary design.

F. City/Town and County shall enter into Funding Agreement and/or PSA to establish commitments as required for each project. Suggested timeframes for Funding Agreements, PSAs and/or any amendments are:

- a. As soon as project accepted by Commissioners Court and as a result of the kick off partnering meeting, a Funding Agreement to establish Lead Agency for preliminary engineering and general funding responsibilities and procedures for reimbursement by Participating Agency; or
- b. When the preliminary engineering plans are at 60% complete; or
- c. After construction bids are opened amend the PSA as needed.

### **ARTICLE XIII. NO THIRD-PARTY BENEFICIARY ENFORCEMENT.**

It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all right of action relating to such enforcement shall be strictly reserved to City/Town and County and nothing contained in this Agreement shall give or allow any claim or right of action whatsoever by any other person on this Agreement. It is the express intention of City/Town and the County that any entity other than City/Town or the County receiving services or benefits under this agreement shall be deemed an incidental beneficiary only. This Agreement is intended only to set forth the contractual right and responsibilities of the agreement parties.

### **ARTICLE XIV. RIGHT OF ENTRY**

The City/Town agrees that County shall have the right to enter upon the Project area for the time period necessary for the completion of the Project. City/Town agrees to furnish such police or other City/Town personnel as requested by County for traffic control or other public safety matters at no cost to the Project or County.

## **ARTICLE XV. LIST OF PROJECTS**

City/Town agrees that it has been furnished with a list of the potential Projects as approved by the Dallas County Commissioners Courts, subject to the agreement between the parties of a PSA. City/Town stipulates and agrees that the Commissioners Court Order approving the projects identifies the potential Project location and describes the type of project in sufficient detail that the City/Town is fully aware of the location and type of projects being considered.

## **ARTICLE XVI. ORPHAN ROAD POLICY;**

The County encourages all cities adjacent to orphan roads in the county to develop, commit to and submit a plan to the County for completing the annexation of the orphan road segments and assuming full responsibility for these roadways. In instances where two cities abut the same orphan road segment, the County encourages the two cities to jointly develop a plan of the annexation of that segment. The County offers its assistance to the cities in developing such plans.

- A. The County, at the discretion of the Commissioners' Court, may give additional selection value to projects in cities that have submitted a specific plan for the annexation of orphan roads when the County selects, approves and schedules projects for funding in the County's major MCIP. Such preference may also be given in approving projects for road and bridge district participation (Type "B" work).
- B. The County, at the discretion of the Commissioners Court, may also refuse to participate in discretionary projects, such as road and bridge district projects or MCIP projects, in a City/Town that elects not to pursue the annexation of orphan road segments that abut its boundaries. Failure to notify the County of the City's/Town's intent to annex and/or failure to submit a plan for annexation in a timely manner shall be construed by the County as the City's/Town's election not to pursue annexation.
- C. The County, at the discretion of the Commissioners Court, may select specific orphan road segments for improvement when a City commits to annexation of the segment upon completion of the project. However, the specific plan for annexation of orphan roads submitted by the City/Town will not be limited to annexation upon completion of improvements by the County. The County improvements may be made as road and bridge projects or as MCIP projects (subject to other MCIP criteria including regional thoroughfare plan designation and City/Town cost participation.)
- D. This policy application is prospective and projects selected by the County and approved by the Commissioners Court prior to the date of the adoption of this policy shall not be impacted by this policy.
- E. The County shall provide written notification of the adoption of, and future revisions of, this policy to the cities abutting orphan road segments.
- F. The provisions of this Article XVI shall survive the termination of this Master Agreement.

(Ord. No. 2002-637; Ord. No 2006-1171)

**ARTICLE XVII. SUBDIVISION REGULATIONS IN THE  
EXTRA TERRITORIAL JURISDICTION**

County and City/Town agree that City is the office that is authorized to: (1) accept plat applications for tracts of land located in the extraterritorial jurisdiction; (2) collect all applicable plat application fees; (3) provide applicants one response indicating approval or denial of the plat application; and (4) establishes a single set of consolidated and consistent regulations related to plats, subdivision construction plans, and subdivisions of land. The provisions of this Article XVII shall survive the termination of this Master Agreement.

**ARTICLE XVIII. MISCELLANEOUS GENERAL PROVISIONS**

**A. Applicable Law.** This Agreement and all matters pertinent thereto shall be construed and enforced in accordance with the laws of the State of Texas and exclusive venue shall be in Dallas County, Texas. Notwithstanding anything herein to the contrary, this Agreement is expressly made subject to County's and City/Town's Sovereign Immunity, Title 5 of Texas Civil Practice and Remedies Code, and all applicable State of Texas and Federal laws.

**B. Entire Agreement.** This Agreement, constitutes the entire agreement between the parties hereto and may not be modified except by an instrument in writing executed by the parties hereto as herein provided.

**C. Severability.** If any provision of this Agreement shall be held invalid, void or unenforceable, the remaining provisions hereof shall not be affected or impaired, and such remaining provisions shall remain in full force and effect.

**D. Default/Waiver/Mitigation.** It is not a waiver of default if the non-defaulting party fails to declare immediately a default or delays in taking any action. Pursuit of any remedies set forth in this Agreement does not preclude pursuit of other remedies in this Agreement or provided by law.

**E. Federal or State of Texas Funding.** In the event that any work or part thereof is funded by State of Texas or U. S. Government funding and any statute, rule, regulation, grant, contract provision or other State of Texas or U. S. Government law, rule, regulation or other provision imposes additional or greater requirement(s) than stated herein, City/Town agrees to timely comply therewith without additional cost or expense to County.

**F. Headings.** The titles which are used following the number of each paragraph are only for convenience in locating various provisions of this Agreement and shall not be deemed to affect the interpretation or construction of such provision.

**G. Number and Gender.** Words of any gender used in this Agreement shall be held and construed to include any other gender; and words in the singular shall include the plural and vice versa, unless the text clearly requires otherwise.

**H. Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

**I. Notice.** Any notice provided for in this Agreement to be given by either party to the other, shall be required to be in writing and shall be deemed given when personally delivered, or three (3) business days after being deposited in the United States Mail, postage prepaid, certified, returned receipt requested, or registered addressed as follows:

To County: County of Dallas  
Director of Public Works  
Dallas County  
Administration Building  
411 Elm Street, Fourth Floor  
Dallas, Texas 75202-3389

To City/Town: City of Lancaster, Texas  
Director of Public Works  
1425 N Dallas Ave., Ste 101  
Lancaster, Texas 75134

Either party may change its address for notice by giving the other party notice thereof.

The City/Town of Lancaster, State of Texas, has executed the Agreement pursuant to duly authorized City/Town Council Resolution \_\_\_\_\_, Minutes \_\_\_\_\_ Dated the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

The County of Dallas, State of Texas, has executed this agreement pursuant to Commissioners Court Order Number \_\_\_\_\_ and passed on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

**CITY/TOWN OF LANCASTER**

**COUNTY OF DALLAS**

BY \_\_\_\_\_  
TITLE

BY \_\_\_\_\_  
Clay Lewis Jenkins, County Judge

DATE \_\_\_\_\_

DATE \_\_\_\_\_

ATTEST \_\_\_\_\_  
CITY SECRETARY \ ATTORNEY

APPROVED AS TO FORM:

  
\_\_\_\_\_  
\*Gordon R. Hikel, Chief, Civil Division  
Dallas County District Attorney

\*By law, the District Attorney's Office may only advise or approve contracts or legal documents on behalf of its clients. It may not advise or approve a contract or legal document on behalf of other parties. Our review of this document was conducted solely from the legal perspective of our client. Our approval of this document was offered solely for the benefit of our client. Other parties should not rely on this approval, and should seek review and approval by their own respective attorney(s).

# EXHIBIT

# A



**DEPARTMENT OF PUBLIC WORKS**

411 ELM ST., 4TH FLOOR  
DALLAS, TEXAS 75202

**PROJECT MANAGEMENT PRACTICES  
MANUAL**

**5 PHASE  
PROJECT DELIVERY SYSTEM**

**JULY 2009**

# INTRODUCTION

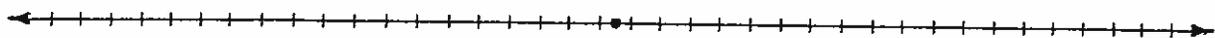
The purpose of this manual is to provide a standard practice guide on project management practices within the Dallas County Public Works Department. It is meant to assure that a standard approach is used by all Project Managers (PMs) and other project team members in the delivery of County-led transportation projects. The guidelines are meant to meet the requirements and intent of the American Public Works Association's (APWA) publication entitled "The Public Works Management Practices Manual" (The Manual). The Manual contains 529 recommended practice statements that describe the critical elements necessary for a full-service public works agency to accomplish its mission. We estimate that about 300 statements apply to the missions of Dallas County Public Works Department. The practice statements "call for the development and implementation of a policy or procedure in the form of a rule, regulation, written directive, or for the execution of an activity, report, procedure or other action." This PMP manual is intended to fulfill that requirement and covers a number of practice statements. It begins with Practice Statement 10.8 "Project Management" in the Chapter 10, "Planning and Development." It also includes practices elements in a general sense from Chapters 11 "Engineering Design," Chapter 12 "Bid Process," Chapter 13 "Project Management," Chapter 14 "Right-of-Way Management," and Chapter 15 "Utility Coordination." Our basic methodology is a strong matrix approach, so that our PMs are assigned from the time a planning initiative become a true approved project, to completion of the total project. We use the terminology found in the Project Management Institute's "A Guide to the Project Management Body of Knowledge" (PMBOK). This includes the definition of a "Matrix Organization" which we aspire to be. This definition is: "Any organization structure in which the project manager shares responsibility with the functional managers for assigning priorities and for directing the work of individuals assigned to the project." When we speak of a project matrix team, we are referring to a team led by an appointed PM who has team members from throughout the 4 functional divisions of Dallas County Public Works. These four divisions are Transportation and Planning, Property, Engineering & Construction, and Program & Engineering Management. The PMs are assigned to the Engineering and Construction division, but manage projects from cradle to completion. There is no hand-off between functional divisions.

This Practice Manual is purposely short. We desire to provide a guide to project delivery practices, not an exhaustive "how to" manual. Other Public Works Practices (all indexed to the APWA Practices Chapters and numbers) do provide more detailed instructions on the specific elements of project delivery. Our experience is that very thick manuals are not used as much as shorter guidelines that provide the boundaries of good practice and a standard approach on the essentials. We then empower our individual PMs to work within the guidelines, leveraging their own strengths (their "hedgehog" talents) to work the details in delivering their individual projects.

## PHASE 1 -- PLANNING & PRELIMINARY DESIGN



### STEP ONE, PROJECT DEFINITION



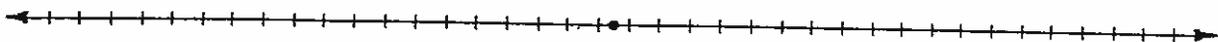
1. Transportation Planning distributes a "Call for Projects" to all Dallas County cities. This is a process initiated every 2 to 3 years and involves partnering with all the cites and stakeholders. The nomination period is open for 4-6 months before projects are submitted, usually in August of odd numbered years. Public Works will host a partnering workshop and

include a luncheon in the middle of a meeting about 4 hours long. Various aspects of this Call for Projects Workshop and process will be adjusted based on input from city partners.

2. Planning Division will adjust the project selection criteria based on input from the cities, criteria that NCTCOG is using, and guidance from the County Commissioners. The final criteria and Call process will be briefed and approved by the Commissioners Court and a 5-signature letter will be used to transmit the Call to the cities. The amount of time for the nomination process will be adjusted based on feedback from the cities. This is to assure they have enough time to brief their elected officials, plan for inclusion of projects in city bond elections, and prioritize city capital spending. After the Planning Division assures all the information is submitted correctly (and assists some of the smaller city staffs in submissions), a matrix team of Public Works (PW) employees begins with an executeability analysis that precedes selection of projects for inclusion in the County's MCIP. The team, with Engineering & Construction, Planning, & Property people involved, provides assistance with risk assessments from various perspectives --feasibility, cost estimates, scope definition, political aspects, funding, technical issues, utilities, safety, environmental, and traffic factors, etc. Property Division team members examine Right-of-Way (ROW) & utilities, looking at feasibility, types of property involved, other significant factors, such as at-grade railroad crossings, relocations, etc.
3. The Director and AD's meet with each Commissioner separately to go over the slate of nominated and analyzed projects in his/her District. Google Earth or other technology is used to give the Commissioner a comprehensive look at the nominated project and its environs. The pros and cons of each project are discussed with each Commissioner taking their own approach to project selection. The technical grading scores act as a common denominator to assure only effective projects are in the ballpark for selection. Public Works provides data on previous funding commitments, and percent of thoroughfare roads & population of each city, to help Commissioners decide on the projects to be selected. Every project is placed into a Program Year (PY) (year slated for construction start), based on District and overall County MCIP cash flow projections. After briefing each Commissioner and the Judge, the updated spreadsheet called the "MCIP Transportation Funding Commitments" is presented in Briefing format in public forum to the Commissioners Court. The following week, a Court Order is submitted and the MCIP is then formally approved by the Court, with a 5 Signature Court Order.
4. The MCIP has been formulated on the premise that legal agreements should reflect the nature and character of the program. Equal funding partnerships, matrix Project Management, Context Sensitive Solutions methods of project delivery, and partnering principles applied in every phase of project delivery are the essential elements of the MCIP. The time it takes for getting inter-local agreements approved should never be on the critical path of project delivery. Therefore much effort has been expended between the Civil DA legal staff and Public Works staff to formulate a "Master Agreement Governing Transportation Major Capital Improvement Projects." This MCIP Master Agreement has been signed by 26 Dallas County cities with approved projects and serves as the legal basis for partnerships between the various cities and Dallas County. It will be renewed every 10 years. Later during project design, enough information will be known to forge a Project Supplemental Agreement (PSA) that details the specifics of that particular project. None of the basic elements of a city-county legal agreement have to be repeated in the PSA, thus simplifying the process and time involved.

5. A kickoff meeting is next held with each of the City Partners who have projects selected. This key meeting sets the basic parameters for each of the projects, such as cash flow requirements for each partner, who the lead agency for project delivery will be, agreed upon technical criteria, known risks, roles for each stakeholder, etc., all focused on assuring timely project delivery and moving the project into construction during the selected PY. If there is a great deal of uncertainty associated with the project (e.g. part of some economic development such as transit oriented development, or part of brown field development, or other significant environmental challenges, or a very significant change in planned use of an area in the future, e.g. industrial changing to mixed use, etc), then the lead agency may conduct a *Planning Charrette*. The purpose of this meeting with all significant stakeholders is to determine the beginning scope and the realm of possible approaches. Serious design cannot begin until there is stakeholder agreement on a relatively reasonable set of alternatives, which bear some relationship to the scope of funding currently available. Partnering relationships will also be established at this Charrette which should be sustained throughout the life of the project.
6. Public Works commits to using Partnering Principles of Trust, Commitment, and Shared Vision in addition to Best Practices of Project Management Principles throughout the life of the project. Each City is invited to use the same principle-centered teamwork as we work together to deliver the selected projects. This partnering approach is also an integral part of Context Sensitive Solutions (CSS), a design methodology that involves early and continuous involvement of all stakeholders.
7. For every project that the city and county stakeholders agree to assign Dallas County as the Lead Agent, a Project Manager (PM) will be assigned by the Assistant Director of Engineering and Construction. In addition the Assistant Director in consultation with the PM and other Assistant Directors and PW Business Unit leaders, will identify matrix team members for the project.
8. An initial Project Funding & Execution Status (PFES) and Program Management and Planning Status (PMAPS) form will be developed by the PM for each project in coordination with the PEMD & the AD, Engineering & Construction. Each business unit leader will review PFES and PMAP in order to provide an adequate workforce for each project, and assure team members assignments are balanced.
9. Decision on use of Subsurface Utility Engineering (SUE) will be made before initiating design. In the analysis of candidate projects, utility relocation risks will have been identified. When these risks are high (the usual situation), then funding will be planned in the design for SUE efforts. PW now has in place an IDIQ contract for quick implementation of SUE consultant efforts. Utility partnering efforts include initiatives for joint efforts wherever feasible. This information will be critical for designers to use as they launch the design. Total integration of the SUE methodology will help assure that ALL utility impacts are considered in every phase of project delivery.

## **STEP TWO, PRELIMINARY DESIGN**



1. A systematic decision process as part of the Public Works Business Operating Plans (PWBOP) updating is done to determine which design efforts will be completed with in-house designers and which will be done by consultants. For consultant selection, a rigorous and systematic process will be used to select the best qualified consultants for each project. An initial contract will be signed with a best qualified consultant to perform the entire preliminary design, or participate as a Preliminary Design liaison, trainer, or expert to advise

an in-house design force for the project. As much as possible, an Indefinite Delivery, Indefinite Quantity (IDIQ) methodology will be used to help assure inordinate amounts of time are not used in the best qualified selection process required by state law. City partners will be given the opportunity to provide input to the County in the consultant selection process.

2. County, city, or joint team of in-house designers or selected consultant firm begins initial design efforts under the leadership of the PM. This design effort will be initiated formally with a ***Design Partnering Workshop***. The PM will assure all significant stakeholders are invited and commit to attend & participate. The meeting will be designed to assure all stakeholders are committed to a smooth and strong start to design, that all the vital stakeholders are involved early, and that progress meetings are scheduled on a regular basis. This will involve commitments by the design team (consultant or in-house) and by the city and county people involved in design approval. Goals include committing to resolve alignment issues early in the design process. In some circumstances, a feasibility study may be required to compare & contrast different alternatives before real design can begin. Estimated ROW takes, utility impacts, and environmental affects for each alternative may need to be reported before stakeholders decide on a preferred alternative for preliminary design. The design partnering meeting will be held over a lunch hour and include a 50%-50% cost shared, modest lunch.
3. CSS methodology will continue to be used, stressing total stakeholder involvement, throughout the project delivery process. Task Force and Matrix Team meetings will be scheduled in order to assure effective teamwork. The Institute of Transportation Engineers (ITE) manual "Context Sensitive Solutions in Designing Major Urban Thoroughfares for Walkable Communities" will be used as an overall design guide.
4. When a consultant is used as the design agent, a contract will be negotiated for the preliminary design only, unless the project is relatively simple and the final solutions are not in question. The idea is to avoid protracted negotiations on the total scope and fee, when many of the factors influencing final design consideration are not yet known. An amendment to the contract for completion of the Primary Design can be negotiated after Preliminary Design is nearing completion. At this time, the unknowns should be relatively few and the scope negotiation much easier to navigate. The decision to amend the contract for completion of the Primary Design will be made after an interim evaluation is completed using the County's consultant evaluation system. Every effort will be made to assure a seamless design process, without interruptions by prolonged negotiations in signing the Primary Design amendment to the contract.
5. A ***Preliminary Design Charrette*** (PDC) will be planned by the Project Manager who will lead the execution with all stakeholders (Cities, utilities, County, any private parties or other decision-makers). The scope of invitees to the PDC will be dependent upon project complexity and number of unknowns. The goal of the PDC is to build consensus and support behind the project and alignment alternative that is finally selected by the stakeholders. Many projects have been derailed by lack of support when opposition arises. A great effort will be made to assure attendance of all the key players. This consensus building effort is an integral part of any CSS approach to design. The Director and Assistant Directors will be personally involved and the PM will make special efforts to assure political leaders have the meeting on their calendars and plan to attend, or at least have a clear invitation. In addition, by name individual contacts will have to be made to assure utility company representatives attend, since key alignment decisions will be made that can affect,



used to optimal effect during the life of the project. When one of our IDIQ consultants is hired (survey, miscellaneous design, SUE or materials testing) we will work with them using partnering concepts and treat them as members of the Public Works team. Also, the design firm for water and/or wastewater services will be integrated, and wherever possible, we will attempt to assure the design consultant for the transportation project is also selected by our city partner to design the municipal utility improvements. We will expect any of our consultant partners to become familiar with the elements of our 5-Phase project delivery system and to commit to the precepts of design partnering..

5. Traffic and utilities data will be considered in design, with data from partner city, County, NCTCOG, TxDOT, or consultant. Agreed upon level of S.U.E. will be key input into design details, and utilities partnering imperatives will be used throughout the design and construction phases.
6. Any required environmental impact analysis will be completed during phase 2. Common sense will be used to address significant issues without wasting time on clearly unimportant areas. The goal is to execute environmentally sustainable transportation infrastructure that improves the overall quality of life of our joint customers, the transportation users and citizens of Dallas County and our cities.
7. Right of Way (ROW) documents will be finalized, with quality controlled by the consultant or in-house design team. The Quality Assurance (QA) function will be completed by both the PM and the Property Division in a smoothly coordinated manner, using pre-coordinated checklists. At the appropriate time, the documents will be delivered to Property Division, but the PM still retains overall responsibility for timely project delivery. Early involvement on ROW issues, including utility relocation aspects (such as getting possible Rights of Entry for utility relocation) is critical for success. Early provision of final and accurate ROW documents will be a critical milestone of the design contract.
8. Design Consultant or In-house Design Team completes work on provided schedule, keeping all the commitments made during the Design Partnering Meeting and the Preliminary Design Charrette. Consultants and/or In-house Design Team are expected to assure that they accomplish "muddy boots" design with true "eyes-on" the total project site. The project should have been walked several times by the time the design is complete. Most underground utilities have above ground markings, which are often overlooked until construction. In design review, we will avoid lengthy rounds of passing designs back and forth, in favor of "over-the-shoulder" reviews, as required to meet design completion timelines. These will include city and other interested stakeholders under the orchestration of the PM.
9. The PM completes an interim evaluation of the design consultant. Special note will be taken of the consultant's system for assuring QC of all design effort including ROW documents. After construction is complete, the PM performs a final consultant evaluation, using our standard evaluation system contained in the contract. The consultant is given an opportunity to evaluate the County's project management process as well.



## PHASE 4 – ROW Completion & Utility Adjustment

1. ROW acquisition is carried to completion, again under the active project management and leadership of the PM, with proactive activity of the ROW acquisition team. If the city or another partner such as TxDOT is the ROW acquisition agency, the PM will still track carefully the progress and proactively lead efforts to remove obstacles, etc. to keep progress on schedule.
2. The PM will use partnering principles as well as results of S.U.E. to assure utility adjustments are accomplished in time to keep scheduled project advertisement and contract award dates. The elements of Public Works Practice (PWP) 15.1, "Utilities Coordination" will be used as the guide. These principles are based on successful partnering efforts for over 10 years with major utility providers (including the UPRR). The PM will assure the attached *Essential Elements of Utility Partnering* and GUIDELINES FOR ASSURING SMOOTH RELATIONSHIPS BETWEEN LOCAL GOVERNMENTS AND UPRR is proactively used by all matrix team members.
3. The Project Manager tracks and resolves issues and work schedules, using the Matrix Team to proactively lead efforts to remove obstacles of acquisition and utilities relocation to ensure project schedule. As a matter of standard procedure, the use of utilities Rights of Entry (ROE) will be explored on every project. When conditions are there, we will use the ROE as a way to take the utility adjustment time off the project critical path. R&B forces may be needed to clear trees from the new ROW or to move fencing, and will be procured through requests to the Commissioner involved.
4. The City works as part of Matrix Team to expedite utility relocations. Many times, franchise utilities have relationships based on franchise utility agreements with cities that can be used beneficially to secure cooperation. Monthly Task Force meetings are initiated during this phase to assure early and frequent communication with all stakeholders. All team members are to proactively partner with the utilities and facilitate their relocation. Departmental policy is 0 R R (Zero Relocation of Relocations). The practices of PWP 15.1 "Utilities Coordination" will be used by all PMs. This includes use of the Utilities Special Work Assistance Team (U-SWAT) to help resolve tough utility challenges in a timely manner. The U-SWAT team is a resource for the PM and does not relieve him/her of the necessity for close team work, involvement & leadership during the utilities phase of the project. We regard the project as "in construction" during the time our utilities partners are operating in our ROW, relocating their utilities. We work hard to assure that all franchise utilities are relocated in a manner that is safe and will not impact our road construction (e.g. from improper backfill of their trenches, conflict with storm sewers, conflicts with water or sanitary sewer lines, bridge abutments, inlets, etc).
5. An Advertising Risk Assessment (ARA) is completed prior to engaging the Purchasing Department in advertising the project for construction bids. Advertising is not issued until all utilities are within a reasonable and confirmable clearance date. A deliberate decision will be made on how many days from bid opening until contract award, and how many days from contract award until the Work Order (notice to proceed) is given. Work Order dates will not be projected to occur BEFORE high assurance that all known utilities will have been relocated. A second important function of the ARA is to ascertain all the funding commitments, to update

the PFES to include all funds already expended, and to calculate an up-to-date construction estimate, called a Current Working Estimate (CWE). All of the above actions will be coordinated and finalized at a meeting scheduled and run by the PM with the Director, Assistant Director and a city partner representatives in attendance. This meeting will be scheduled as one of the critical milestones for the project.

6. The PM will assure designers (in-house or consultant) will be kept on-call for projects if required to complete requested Engineering During Construction (EDC) services, such as shop drawing submittal review and consultation on design intent, assumptions, etc. The intent is to retain the best part of the tremendous energy, effort and focus that the consultant or in-house design team has just expended in designing the project.

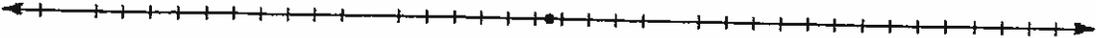
## PHASE 5 -- CONSTRUCTION



### STEP ONE CONSTRUCTION

1. The PM does all the work to advertise the project and works with the County Purchasing Department for bid opening. A 100% design completion CWE will be completed by the PM and will be used as the fair-cost government estimate for construction bidding purposes.
2. The PM leads the execution of the Project Supplemental Agreement (PSA) with each Partner giving approval of final funding on a timely basis. An updated PFES will be needed at this time. Project Manager prepares Court Briefing Memo and Court Order to award the construction contract as well as the PSA. (Note: on some projects with complicated design phases, the PSA may be signed earlier, during Phase 2).
3. The PM completes all the work for construction contract award. PM works with all partners to assure a logical and timely notice to proceed is given. This order to begin work and the contract time period will be based on status of utility relocations, any city requirements, etc.
4. The PM will plan, schedule and execute the Construction Partnering and Pre-Construction Meeting with key stakeholders in attendance. The PM will schedule for attendance and participation the Director and Assistant Director for E&C. Careful pre-planning ensures the attendance of the right stakeholders and staff. In Dallas County PW, we will normally facilitate our own Partnering meetings since we have the expertise and experience to accomplish this without hiring specialized consultants. Costs for a modest lunch will be shared 50%-50% between the county and the contractor.
5. The PM leads throughout the construction phase. The PM assures partnering principles and spirit of Partnering (**Trust, Commitment, and Shared Vision**) are maintained throughout the project construction phase. The PM establishes a regular day and time each week for the weekly construction meeting in the field. The PM assures constant communication with customers and other project stakeholders, including especially the people and businesses who are located along the road being improved or built. . This may include a construction oriented Public Information Neighborhood Meeting, as well as periodic project newsletters, notices of key construction events or phasing, progress postings on city web-sites, meeting with neighborhood interests (property owners, schools, churches, businesses, etc). We are interested in not only achieving a high quality end-product, but also in delivering the project in a user-friendly manner. This is all part of total Context Sensitive Solutions project delivery.

## **STEP TWO- PROJECT CLOSE OUT**

- 
1. The PM assures final estimate is paid to Contractor on a timely basis. The Contractor may have to be persuaded to close out the project, or the County may take unilateral action to close out, if it is in our best interests
  2. The PM completes the final Evaluation on the Contractor, using interim evaluation results (if one was done), and performance during the entire contract period. The Contractor evaluates Dallas County Public Works (on a voluntary basis).
  3. The PM assures that as-built plans are provided for the ultimate owner from marked-up construction plans.
  4. PM works with the Public Works Program & Engineering Management Division (PEMD) to assure total project costs are finalized, a final PEFS is completed and Program Management is able to disencumber any remaining funds to be put back into the MCIP fund.
  5. The PM assures city is invoiced for their remaining portion of the total project costs.
  6. The PM formally turns the project over to the City by letter citing the date of return to City for maintenance.
  7. PM plans an ARR to capture lessons learned and celebrate project completion with all involved in project delivery from design to construction completion.
  8. PM conducts one year Maintenance Bond Inspection in conjunction with all applicable stakeholders, assuring all corrections, repairs, etc are completed.
  9. The PM completes closes out the project including conduction an After Action Review to assure lessons learned are shared within the Dept and city.

## *Essential Elements of Utility Partnering*

1. Know the utilities' customers and **remember that we have the same customers.**
2. Make utilities move **only if absolutely necessary to achieve the project purpose.**
3. Move only once if the move is, in fact, **essential.**
4. Get involved with actual field reconnaissance early. Include and engage Project Representatives or Constructibility personnel very early.
5. Get the acquiring agency's Right of Way personnel involved early.
6. Schedule initial Utility Partnering Conference early. Make partnering the theme and the first topic. Do it on the jobsite to increase the effectiveness.
7. Involve and Invite Utility representatives to Neighborhood or Public Meetings.
8. Distribute roadway plans early to get started with the utility planning.
9. Coordinate with all utilities to ensure that one has no negative impact on another. Coordination should ensure that enough right of way is acquired to accommodate all of the facilities.
10. When plans are changed, get them to utility companies promptly. Provide a list of changes for our partners.
11. Communicate with utilities frequently to ensure knowledge of changing personnel and appropriate contact person.
12. Review utility company's plans, comment on plans and implement the coordination long before fieldwork needs to begin.
13. Do not begin implementing a project schedule without total feedback from all companies.
14. Identify the precise sequence of relocations that need to occur. Many companies are predecessors of other companies' relocations. Communicate this sequence to all utilities and other stakeholders. Ensure that the sequence is streamlined as much as possible.
15. One way of ensuring the streamlining of the sequence is web-based notification when each company is complete or is scheduled to be complete. Scheduling is as important as the sequence.
16. Consider that seasonal shutdown restrictions will have significant and adverse schedule impacts, sometimes up to one year. Also consider that certain times of day are restricted from utility relocation. In addition, develop procedures for emergency situations and learn the appropriate "windows of opportunity" for change-overs, etc.
17. Share accurate information with all companies & see that they share information with each other.
18. Communicate the need to follow City Ordinances, particularly those relating to traffic control, backfill and pavement restoration. Traffic control plan must be filed and approved.
19. Insure that the companies have measures for handling complaints about their work and that they do not inconvenience our mutual customers more than is absolutely essential. **Remember, O R R !!**

# GUIDELINES FOR ASSURING SMOOTH RELATIONSHIPS BETWEEN LOCAL GOVERNMENTS AND UPRR

- **Start Early Coordination** – Set up a meeting with UPRR local representative Steve Marchenke to share project selection lists, to ascertain projects with UPRR impacts. Then on impacted projects, share preliminary designs, invite UPRR to early meetings, such as stakeholder preliminary design charrettes, public workshops, etc.
- **Work out precisely the location of railroad project impacts**, before contacting UPRR. This speeds the coordination process greatly. Use MAPSCO location, subdivision, and RR Mile Post where ever possible
- **Use the UPRR.com website for a wealth of information, maps, etc.** This can save time in answering questions and can provide much information about UPRR, including points of contact, e-mail and telephone information, instructions, applications, specifications, DOT crossing information, permit requirements, ROW agreements, etc. **Very, very valuable.** Our in-house or consultant designers need to explore this web-site before launching road design whenever there is going to be a RR crossing. Procedures and responsibilities are clearly laid out, as are design guidelines and specifications. Avoid nasty surprises that can impact project costs if not budgeted.
- **Expect the UPRR owned ROW to contain many other utilities (telecommunications, power, pipelines, etc), that you will have to pay to relocate.** These are private easements the utilities have paid for and the project will have to bear the costs of relocation. UPRR is a good source of information on the potential conflicts that you will encounter. Budgeting accurately for these costs will avoid nasty surprises later.
- **Do not even think about changing Exhibit B of the standard agreement.** UPRR has agreements to work out in 23 states, and their lawyers are very vigilant to watch for precedents that might bind UP elsewhere. Work on win-wins in the body of the agreement.
- **Avoid adversarial actions and relationships, instead try the partnering approach.** UPRR will respond in-kind. They desire to maintain integrity in relations with all their communities. Do not presume upon them (e.g., impossible responses on coordination that you failed to start timely, making demands they cannot meet, presuming the worst).
- **Look for ways to forge win-wins, for UPRR and the local community.** Understand that USDOT has a policy since 1992 to reduce at-grade RR crossings by 25%. This puts tremendous pressure on RR's to accomplish this goal. Does your community have a number of little-used crossings? Explore ways to eliminate them and UPRR can do much to meet the needs of your current project.
- **When appropriate, have our attorneys communicate directly with UPRR attorneys.** The key is to have worked out all the coordination we can before that, using the information, contacts and principles described in these guidelines. Then, the Project Manager should stay involved to assure that going down “legal rabbit trails” is avoided whenever possible. If we follow the spirit of win-win, then both sides will have better results, even if our attorneys are involved, as they have to be.
- **When you're in doubt and have searched all the readily available information, call Steve Marchenke, Ken Rouse, or UPRR Real Estate division in Omaha.** Even though they have large territories to cover, they are never too busy to help you proactively solve a problem and forge a win-win. If you have a “folder number,” this will save them much time in looking up the project file information.

**LANCASTER CITY COUNCIL**  
Agenda Communication for  
April 11, 2011

**7**

AG11-007

**Discuss and consider a resolution of the City Council of the City of Lancaster, Texas, granting a request for Special Exceptions pursuant to Section 14.209 (d), of the Lancaster Development Code; to provide a Special Exception to a Masonry Requirement to permit the use of stucco on the building; to provide a Special Exception for increased height and sign area for permanent on site signage to be located on the east side of Interstate 35E approximately 2,350 feet north of the intersection of Interstate 35E and West Beltline Road and more commonly known as 740 North I-35E; and providing an effective date.**

**This request supports the City Council 2010-2011 Policy Agenda**

**Goal 2: Quality Development**

**Background**

The applicant, In and Out Burger, a regional chain fast food restaurant with nearly 260 locations, is proposing to build a restaurant in Lancaster on North Interstate 35E just north of West Beltline Road. The restaurant uses a prototype development as their standard model with regards to building size, materials, and pole and wall signs. The prototype restaurant design typically uses Stucco siding with stone accents as its façade materials and a large yellow arrow with the words IN-N-OUT BURGER for its sign.

Chapter 14.500 – District Development Regulations and Standards of the Lancaster Development Code (LDC) states in Section 14.504 (a) 2 A (Exterior walls) that each exterior wall shall consist of 100% masonry materials... constructed of stone, brick, glass block, tile, cast metal, cast or cultured stone, or a combination of those materials. It goes on to say that the use of other cementaceous products (e.g. stucco, Hardy Plank, etc.) shall be limited to 50% of the buildings exterior finishes and that stucco may not be located in the first eight (8) feet above grade on a façade visible from a street or public area.

While the proposed structure is 100% masonry, it does not meet the 50% limitation rule for use of stucco or the rule of stucco not being allowed in the first eight (8) feet above grade. The applicant is seeking an exception to these criteria to enable this restaurant to

be consistent in appearance and style with many of its other locations. Patrons can easily identify the establishment by its unique design, similar to the ability to identify other chain restaurants by their design. In Section 14.504 (a) 2 A (Exterior walls), it permits the City Council the ability to grant an exception to these requirements upon submission and approval of elevation drawings of the subject structure and material samples. The elevation drawings are attached as an exhibit to this report.

The applicant is also requesting an exception to the LDC sign standards. More specifically, the applicant is requesting an increase to the pole sign height allowed as well as the length and width of the sign. In Chapter 14.1200 – Sign Standards of the LDC, Section 14.1204 (j) allows the maximum height of a pole sign to be thirty (30) feet from ground level to the top of the sign structure. It also allows the maximum area of the sign to be two hundred and twenty-five (225) square feet not exceeding fifteen (15) feet in any direction from outer edge to outer edge.

The applicant is proposing a pole sign height of eighty (80) feet due to its location next to an elevated section of Interstate 35E. Precedence has been established on adjacent lots for the taller sign because of their depressed location next to Interstate 35E reducing their visibility from potential customers travelling on the elevated section of the freeway. Hence, both Home Depot and Logan's Roadhouse Restaurant have been granted exceptions for this cause. Also, the dimensions of the pole sign are approximately twenty-five feet and six inches (25' 6") by seventeen feet and three inches (17' 3"), thus extending beyond the fifteen (15) feet limit in both directions allowed by the Sign Standards. The applicant is seeking the extended length and width to accommodate the standard logo for the restaurant.

Section 14.209 (d) of Chapter 14.200 – Authority and Administrative Procedures of the LDC states that the City Council, pursuant to the powers conferred upon it by State law, the ordinances of the City, and this Article may grant Exceptions herein provided to the provisions of this ordinance upon finding that:

- (1) Such Exception will not substantially or permanently injure the appropriate use of adjacent property in the same district; and
- (2) Such Exception will not adversely affect the health, safety or general welfare of the public; and
- (3) Such Exception will not be contrary to the public interest; and
- (4) Such Exception will not authorize the operation of a use other than those uses specifically authorized for the district in which the property for which the Exception sought is located, except as provided elsewhere in this ordinance; and
- (5) Such Exception will be in harmony with the spirit and purpose of this ordinance; and
- (6) Such Exception will not alter the essential character of the district in which is located the property for which the Exception is sought; and
- (7) Such Exception will not substantially weaken the general purposes of the zoning regulations established for the district in which the property is located; and
- (8) Such Exception is within the spirit and intent of the City's Comprehensive plan and other policies.

**Considerations**

- **Operational** – The City Council must determine if the masonry exceptions and pole sign meet the intent of the ordinance while bringing the property from non-conforming status to a conforming site.
- **Legal** – The resolution has been reviewed by the City Attorney.
- **Financial** – There are no financial obligations for the City with approval of this masonry or sign exception.
- **Public Information** – Posting of the agenda satisfies noticing requirements.

**Options/Alternatives**

1. Approve the resolution as presented.
2. Deny the request.

**Recommendation**

Staff recommends approval for the exception of the masonry and pole sign requests.

**Attachments**

- Resolution
- Site Plan
- Elevation Plan
- Sign Plan

**Prepared and submitted by:**  
Nathaniel Barnett, Senior Planner

**Date:** March 30, 2011

**RESOLUTION NO. 2011-04-33**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS, GRANTING A REQUEST FOR SPECIAL EXCEPTIONS PURSUANT TO SECTION 14.209 (d), OF THE LANCASTER DEVELOPMENT CODE; TO PROVIDE A SPECIAL EXCEPTION TO A MASONRY REQUIREMENT TO PERMIT THE USE OF STUCCO ON THE BUILDING; TO PROVIDE A SPECIAL EXCEPTION FOR INCREASED HEIGHT AND SIGN AREA FOR PERMANENT ON SITE SIGNAGE TO BE LOCATED ON THE EAST SIDE OF INTERSTATE 35E APPROXIMATELY 2,350 FEET NORTH OF THE INTERSECTION OF INTERSTATE 35E AND WEST BELTLINE ROAD AND BEING MORE COMMONLY KNOWN AS 740 NORTH INTERSTATE 35E; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS**, the Lancaster Development Code provides a one hundred percent (100%) masonry requirement for buildings, a thirty foot (30') maximum height of a pole sign, and a maximum sign area of two hundred and twenty five (225) square feet not exceeding fifteen (15) feet in any direction from outer edge to outer edge; and

**WHEREAS**, the applicant has made a request for a special exception to be granted to said masonry requirement to allow for the use of stucco material on the exterior of the building, to allow for an eighty (80) foot pole, and expanded sign area; and

**WHEREAS**, after review and consideration, the City Council finds that the request for special exceptions as provided herein are warranted pursuant to §14.209 (d) of said code and meets the requirements of the Ordinance permits of the Lancaster Development Code to allow stucco material on the exterior of the building, should be granted.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LANCASTER, TEXAS:**

**SECTION 1.** That the request for a special exception to the one hundred percent masonry requirements of the Lancaster Development Code to allow stucco material on the exterior of the building, to allow for an eighty (80) foot pole, and expanded sign area to be located on the east side of Interstate 35E approximately 2,350 feet north of the intersection of Interstate 35E and West Beltline Road and being more commonly known as and addressed as 740 North Interstate 35E, be, and the same is, hereby granted.

**SECTION 2.** This Resolution shall become effective immediately from and after its passage, as the law and charter in such cases provides.

**DULY PASSED** and approved by the City Council of the City of Lancaster, Texas, on this the 11<sup>th</sup> day of April 2011.

**APPROVED:**

By: \_\_\_\_\_  
Marcus E. Knight, Mayor

**ATTEST:**

By: \_\_\_\_\_  
Dolle K. Downe, City Secretary

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Robert E. Hager, City Attorney  
(REH/cdb 04/04/11)





PROJECT: IN-N-OUT #7000X

OWNER: RED BERT LINE & SONS,  
 LANCASTER, TX 75146

DATE: 08/21/10  
 DRAWING: SIGN

DESIGNED BY: GERRY WILCOX  
 CHECKED BY: JERRY REED

DATE: 08/21/10  
 NOTED

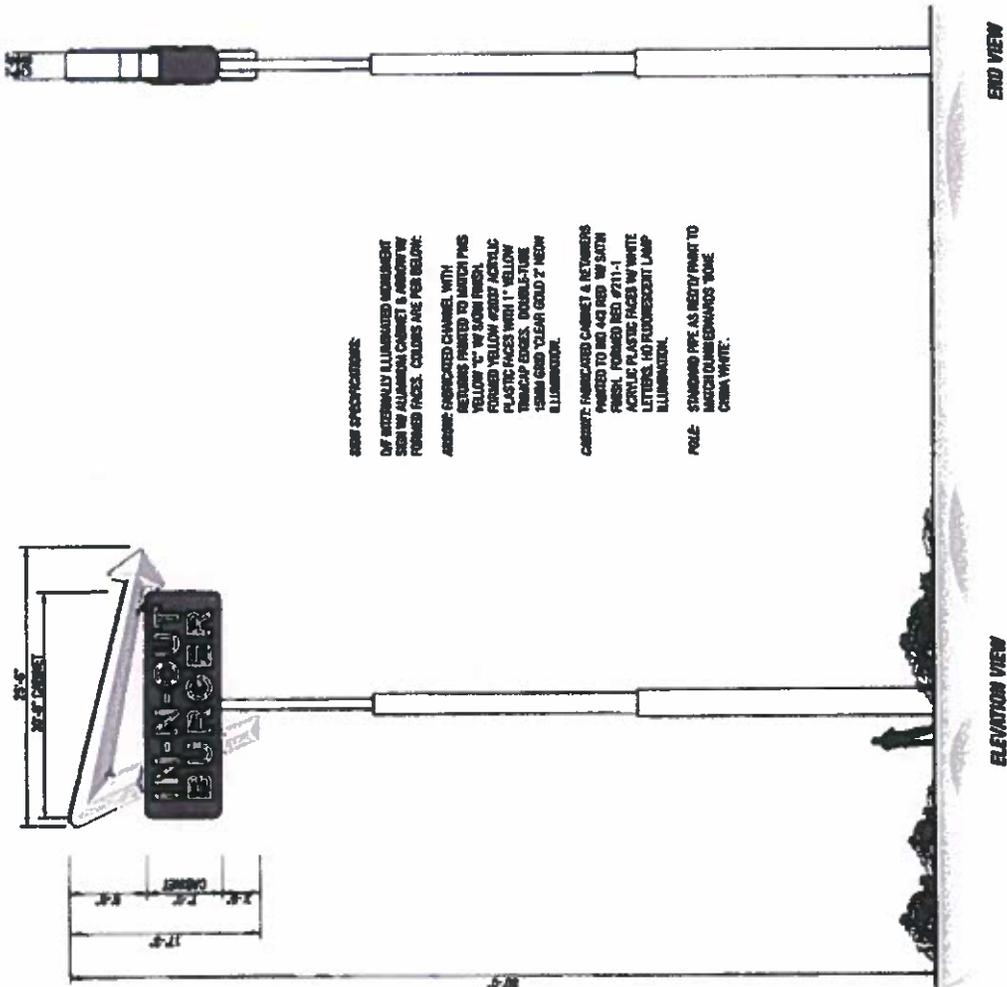
NOTES: 1. ALL SIGNAGE SHALL BE MANUFACTURED BY THE SIGNAGE SPECIALISTS COMPANY. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE.

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NO.	10-785	REV.	08/20/10
DATE	2	BY	08/20/10

NO.	10-785	REV.	08/20/10
DATE	2	BY	08/20/10

DATE: 08/21/10



**SIGN SPECIFICATIONS:**  
 THE SIGN SHALL BE MANUFACTURED BY THE SIGNAGE SPECIALISTS COMPANY. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE.

**ASSEMBLY SPECIFICATIONS:**  
 THE SIGN SHALL BE MANUFACTURED BY THE SIGNAGE SPECIALISTS COMPANY. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE.

**PAINT SPECIFICATIONS:**  
 THE SIGN SHALL BE MANUFACTURED BY THE SIGNAGE SPECIALISTS COMPANY. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE.

**POLE SPECIFICATIONS:**  
 THE SIGN SHALL BE MANUFACTURED BY THE SIGNAGE SPECIALISTS COMPANY. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE. THE SIGNAGE SPECIALISTS COMPANY SHALL BE RESPONSIBLE FOR THE DESIGN, FABRICATION, INSTALLATION, AND MAINTENANCE OF THE SIGNAGE.

Planning & Zoning  
 Department  
 MAR 27 2011  
 Received  
 Accepted NB

D/F INTERNALLY ILLUMINATED 7'-0" X 21'-6" PYLON SIGN @ 80'-0" OAH  
 SCALE: 3/8" = 1'-0"