

CITY OF PFLUGERVILLE
CONTRACT FOR OWNER’S REPRESENTATIVE SERVICES
for the
Pflugerville Community Library Expansion Project – Owner’s Representative Services

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

THIS CONTRACT FOR OWNER’S REPRESENTATIVE SERVICES (“Contract”) is made and entered into on this the ____ day of _____, 2010 by and between the CITY OF PFLUGERVILLE, a Texas home-rule municipal corporation, whose offices are located at 100 East Main Street, Pflugerville, Texas 78660, (hereinafter referred to as “City”), and H.R. Gray and Associates, Inc., Owner’s Representative, whose offices are located at 7320 North MoPac Expressway, Suite 308, Austin, Texas 78731 (hereinafter referred to as “Owner’s Representative”) and such Contract is for the purpose of contracting for professional engineering or architectural services.

RECITALS:

WHEREAS, V.T.C.A., Government Code §2254.002(2)(A)(vii) under Subchapter A entitled “Professional Services Procurement Act” provides for the procurement by municipalities of services of professional Owner’s Representatives; and

WHEREAS, City and Owner’s Representative desire to contract for such professional engineering Architectural Services; and

WHEREAS, City and Owner’s Representative wish to document their agreement concerning the requirements and respective obligations of the parties;

NOW, THEREFORE, WITNESSETH:

That for and in consideration of the mutual promises contained herein and other good and valuable considerations, and the covenants and agreements hereinafter contained to be kept and performed by the respective parties hereto, it is agreed as follows:

CONTRACT DOCUMENTS

The Contract Documents consist of this Contract and any exhibits attached hereto (which exhibits are hereby incorporated into and made a part of this Contract) and all Supplemental Contracts (as defined herein in Article 13) which are subsequently issued. These form the entire contract, and all are as fully a part of this Contract as if attached to this Contract or repeated herein.

ARTICLE 1
CITY SERVICES

City shall perform or provide services as identified in Exhibit A entitled “City Services.”

ARTICLE 2
OWNER’S REPRESENTATIVE SERVICES

Owner’s Representative shall perform Owner’s Representative Services as identified in Exhibit B entitled “Owner’s Representative Services”

Owner’s Representative shall perform the Engineer/ Architectural Services in accordance with the Work Schedule as identified in Exhibit C entitled “Work Schedule.” Such Work Schedule shall contain a complete schedule so that the Owner’s Representative Services under this Contract may be accomplished within the specified time and at the specified cost. The Work Schedule shall provide specific work sequences and definite review times by City and Owner’s Representative of all Owner’s Representative Services. Should the review times or Owner’s Representative Services take longer than shown on the Work Schedule, through no fault of Owner’s Representative, Owner’s Representative may submit a timely written request for additional time, which shall be subject to the approval of the City Manager.

ARTICLE 3
CONTRACT TERM

(1) Term. The Owner’s Representative is expected to complete the Owner’s Representative Services described herein in accordance with the above described Work Schedule. If Owner’s Representative does not perform the Owner’s Representative Services in accordance with the Work Schedule, then City shall have the right to terminate this Contract as set forth below in Article 20. So long as the City elects not to terminate this Contract, it shall continue from day to day until such time as the Owner’s Representative Services are completed. Any Engineer/ Architectural Services performed or costs incurred after the date of termination shall not be eligible for reimbursement. Owner’s Representative shall notify City in writing as soon as possible if he/she/it determines, or reasonably anticipates, that the Owner’s Representative Services will not be completed in accordance with the Work Schedule.

(2) Work Schedule. Owner’s Representative acknowledges that the Work Schedule is of critical importance, and agrees to undertake all necessary efforts to expedite the performance of Owner’s Representative Services required herein so that construction of the project will be commenced and completed as scheduled. In this regard, and subject to adjustments in the Work Schedule as provided in Article 2 herein, Owner’s Representative shall proceed with sufficient qualified personnel and consultants necessary to fully and timely accomplish all Owner’s Representative Services required under this Contract in a professional manner.

(3) Notice to Proceed. After execution of this Contract, Owner’s Representative shall not proceed with Owner’s Representative Services until authorized in writing by City to proceed as provided in Article 7.

ARTICLE 4
COMPENSATION

City shall pay and Owner's Representative agrees to accept the amount shown below as full compensation for the Owner's Representative Services performed and to be performed under this Contract.

The maximum amount payable under this Contract, without modification of the Contract as provided herein, is the sum of Two Hundred Forty Eight Thousand Ninety Four Dollars (\$ 248,094.00) as shown in Exhibit D. The cost-plus, not to exceed payable shall be revised equitably only by written Supplemental Amendment to the Contract in the event of a change in Owner's Representative Services as authorized by City.

Owner's Representative shall prepare and submit to City monthly progress reports in sufficient detail to support the progress of the Owner's Representative Services and to support invoices requesting monthly payment. Any preferred format of City for such monthly progress reports shall be identified in Exhibit B. Satisfactory progress of Owner's Representative Services shall be an absolute condition of payment.

The fee herein referenced may be adjusted for additional Owner's Representative Services requested and performed only if approved by written Supplemental Contract.

ARTICLE 5
METHOD OF PAYMENT

Payments to Owner's Representative shall be made while Owner's Representative Services are in progress. Owner's Representative shall prepare and submit to City, not more frequently than once per month, a progress report as referenced in Article 4 above. Such progress report shall state the percentage of completion of Owner's Representative Services accomplished during that billing period and to date. Simultaneous with submission of such progress report, Owner's Representative shall prepare and submit one (1) original and one (1) copy of a certified invoice in a form acceptable to City. This submittal shall also include a progress assessment report in a form acceptable to City.

Progress payments shall be made in proportion to the percentage of completion of Owner's Representative Services identified in Exhibit D. Progress payments shall be made by City based upon Owner's Representative Services actually provided and performed. Upon timely receipt and approval of each statement, City shall make a good faith effort to pay the amount which is due and payable within thirty (30) days. City reserves the right to withhold payment pending verification of satisfactory Owner's Representative Services performed. Owner's Representative has the responsibility to submit proof to City, adequate and sufficient in its determination, that tasks were completed.

The certified statements shall show the total amount earned to the date of submission and shall show the amount due and payable as of the date of the current statement. Final payment does not relieve Owner's Representative of the responsibility of correcting any errors and/or omissions resulting from his/her/its negligence.

ARTICLE 6
PROMPT PAYMENT POLICY

In accordance with Chapter 2251, V.T.C.A., Texas Government Code, payment to Owner's Representative will be made within thirty (30) days of the day on which the performance of / Architectural Services was complete, or within thirty (30) days of the day on which City receives a correct invoice for / Architectural Services, whichever is later. Owner's Representative may charge a late fee (fee shall not be greater than that which is permitted by Texas law) for payments not made in accordance with this prompt payment policy; however, this policy does not apply in the event:

- A. There is a bona fide dispute between City and Owner's Representative concerning the supplies, materials, or equipment delivered or the / Architectural Services performed that causes the payment to be late; or
- B. The terms of a federal contract, grant, regulation, or statute prevent City from making a timely payment with federal funds; or
- C. There is a bona fide dispute between Owner's Representative and a subcontractor or between a subcontractor and its supplier concerning supplies, materials, or equipment delivered or the Owner's Representative Services performed which causes the payment to be late; or
- D. The invoice is not mailed to City in strict accordance with instructions, if any, on the purchase order, or this Contract or other such contractual agreement.

City shall document to Owner's Representative the issues related to disputed invoices within ten (10) calendar days of receipt of such invoice. Any non-disputed invoices shall be considered correct and payable per the terms of Chapter 2251, V.T.C.A., Texas Government Code.

ARTICLE 7
NOTICE TO PROCEED

The Owner's Representative shall not proceed with any task listed on Exhibit B until the City has issued a written Notice to Proceed regarding such task. The City shall not be responsible for work performed or costs incurred by Owner's Representative related to any task for which a Notice to Proceed has not been issued.

ARTICLE 8
PROJECT TEAM

City's Designated Representative for purposes of this Contract is as follows:

Trey Fletcher
Managing Director of Operations
100 E. Main, Suite 400
Pflugerville, Texas 78660
Telephone Number (512) 990-6301
Fax Number (512) 251-8525
treyf@cityofpflugerville.com

City's Designated Representative shall be authorized to act on City's behalf with respect to this Contract. City or City's Designated Representative shall render decisions in a timely manner pertaining to documents submitted by Owner's Representative in order to avoid unreasonable delay in the orderly and sequential progress of Owner's Representative Services.

Owner's Representative's Designated Representative for purposes of this Contract is as follows:

Scott A. Swiderski, P.E.
Austin Office Manager
Telephone Number 512-340-0680
Fax Number 512-340-0688
Cell Number 512-627-0793
Email Address sswiderski@hrgray.com

ARTICLE 9

PROGRESS EVALUATION

Owner's Representative shall, from time to time during the progress of the Owner's Representative Services, confer with City at City's election. Owner's Representative shall prepare and present such information as may be pertinent and necessary, or as may be requested by City, in order for City to evaluate features of the Owner's Representative Services. At the request of City or Owner's Representative, conferences shall be provided at Owner's Representative's office, the offices of City, or at other locations designated by City. When requested by City, such conferences shall also include evaluation of the Owner's Representative Services.

Should City determine that the progress in Owner's Representative Services does not satisfy the Work Schedule, then City shall review the Work Schedule with Owner's Representative to determine corrective action required.

Owner's Representative shall promptly advise City in writing of events which have or may have a significant impact upon the progress of the Owner's Representative Services, including but not limited to the following:

- (1) Problems, delays, adverse conditions which may materially affect the ability to meet the objectives of the Work Schedule, or preclude the attainment of project Owner's Representative Services units by established time periods; and such disclosure shall be accompanied by statement of actions taken or contemplated, and City assistance needed to resolve the situation, if any; and
- (2) Favorable developments or events which enable meeting the Work Schedule goals sooner than anticipated.

ARTICLE 10 **SUSPENSION**

Should City desire to suspend the Owner's Representative Services, but not to terminate this Contract, then such suspension may be effected by City giving Owner's Representative thirty (30) calendar days' written notification followed by written confirmation to that effect. Such thirty-day notice may be waived in writing by agreement and signature of both parties. The Owner's Representative Services may be reinstated and resumed in full force and effect within sixty (60) days of receipt of written notice from City to resume the Owner's Representative Services. Such sixty-day notice may be waived in writing by agreement and signature of both parties. If this Contract is suspended for more than thirty (30) days, Owner's Representative shall have the option of terminating this Contract.

If City suspends the Owner's Representative Services, the contract period as determined in Article 3, and the Work Schedule, shall be extended for a time period equal to the suspension period.

City assumes no liability for Owner's Representative Services performed or costs incurred prior to the date authorized by City for Owner's Representative to begin Owner's Representative Services, and/or during periods when Owner's Representative Services is suspended, and/or subsequent to the contract completion date.

ARTICLE 11 **ADDITIONAL OWNER'S REPRESENTATIVE SERVICES**

If Owner's Representative forms a reasonable opinion that any work he/she/it has been directed to perform is beyond the scope of this Contract and as such constitutes extra work, he/she/it shall promptly notify City in writing. In the event City finds that such work does constitute extra work and exceeds the maximum amount payable, City shall so advise Owner's Representative and a written Supplemental Contract will be executed between the parties as provided in Article 13. Owner's Representative shall not perform any proposed additional work nor incur any additional costs prior to the execution, by both parties, of a written Supplemental Contract. City shall not be responsible for actions by Owner's Representative nor for any costs incurred by Owner's Representative relating to additional work not directly associated with the performance of the Owner's Representative Services authorized in this Contract or any amendments thereto.

ARTICLE 12

CHANGES IN OWNER'S REPRESENTATIVE SERVICES

If City deems it necessary to request changes to previously satisfactorily completed Owner's Representative Services or parts thereof which involve changes to the original Owner's Representative Services or character of Owner's Representative Services under this Contract, then Owner's Representative shall make such revisions as requested and as directed by City. Such revisions shall be considered as additional Owner's Representative Services and paid for as specified under Article 11.

Engineer/Architect shall make revisions to Engineering / Architectural Services authorized hereunder as are necessary to correct errors appearing therein, when required to do so by City. No additional compensation shall be due for such Engineering / Architectural Services.

ARTICLE 13 SUPPLEMENTAL CONTRACTS

The terms of this Contract may be modified by written Supplemental Contract if City determines that there has been a significant change in (1) the scope, complexity or character of the Owner's Representative Services, or (2) the duration of the Owner's Representative Services. Any such Supplemental Contract must be duly authorized by the City. Owner's Representative shall not proceed until the Supplemental Contract has been executed. Additional compensation, if appropriate, shall be identified as provided in Article 4.

It is understood and agreed by and between both parties that Owner's Representative shall make no claim for extra work done or materials furnished until the City provides written authorization to proceed by the City Manager of the City of Pflugerville. City reserves the right to withhold payment pending verification of satisfactory Owner's Representative Services performed.

ARTICLE 14 USE OF DOCUMENTS

All documents, including but not limited to drawings, specifications and data or programs stored electronically, (hereinafter referred to as "Instruments of Service") prepared by Owner's Representative and its subcontractors are related exclusively to the Owner's Representative Services described in this Contract and are intended to be used with respect to this Project. However, it is expressly understood and agreed by and between the parties hereto that all of Owner's Representative's designs under this Contract (including but not limited to tracings, drawings, estimates, specifications, investigations, studies and other documents, completed or partially completed), shall be the property of City to be thereafter used in any lawful manner as City elects. Any such subsequent use made of documents by City shall be at City's sole risk and without liability to Owner's Representative, and, to the extent permitted by law, City shall indemnify, defend and hold harmless Owner's Representative from all claims, damages, losses and expenses, including but not limited to attorneys fees, resulting therefrom.

By execution of this Contract and in confirmation of the fee for Owner's Representative Services to be paid under this Contract, Owner's Representative hereby conveys, transfers and

assigns to City all rights under the Federal Copyright Act of 1976 (or any successor copyright statute), as amended, all common law copyrights and all other intellectual property rights acknowledged by law in the Project designs and work product developed under this Contract. Copies may be retained by Owner's Representative. Owner's Representative shall be liable to City for any loss or damage to any such documents while they are in the possession of or while being worked upon by Owner's Representative or anyone connected with Owner's Representative, including agents, employees, Owner's Representatives or subcontractors. All documents so lost or damaged shall be replaced or restored by Owner's Representative without cost to City.

Upon execution of this Contract, Owner's Representative grants to City permission to reproduce Owner's Representative's work and documents for purposes of constructing, using and maintaining the Project, provided that City shall comply with its obligations, including prompt payment of all sums when due, under this Contract. Owner's Representative shall obtain similar permission from Owner's Representative's subcontractors consistent with this Contract. If and upon the date Owner's Representative is adjudged in default of this Contract, City is permitted to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections or additions to the work and documents for the purposes of completing, using and maintaining the Project.

City shall not assign, delegate, sublicense, pledge or otherwise transfer any permission granted herein to another party without the prior written contract of Owner's Representative. However, City shall be permitted to authorize the contractor, subcontractors and material or equipment suppliers to reproduce applicable portions of the Instruments of Service appropriate to and for use in their execution of the Work. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is permitted. Any unauthorized use of the Instruments of Service shall be at City's sole risk and without liability to Owner's Representative and its Owner's Representatives.

Prior to Owner's Representative providing to City any Instruments of Service in electronic form or City providing to Owner's Representative any electronic data for incorporation into the Instruments of Service, City and Owner's Representative shall by separate written contract set forth the specific conditions governing the format of such Instruments of Service or electronic data, including any special limitations not otherwise provided in this Contract. Any electronic files are provided by Owner's Representative for the convenience of City, and use of them is at City's sole risk. In the case of any defects in electronic files or any discrepancies between them and any hardcopy of the same documents prepared by Owner's Representative, the hardcopy shall prevail. Only printed copies of documents conveyed by Owner's Representative shall be relied upon.

Owner's Representative shall have no liability for changes made to the drawings by other Owner's Representatives subsequent to the completion of the Project. Any such change shall be sealed by the Owner's Representative making that change and shall be appropriately marked to reflect what was changed or modified.

ARTICLE 15
PERSONNEL, EQUIPMENT AND MATERIAL

Owner's Representative shall furnish and maintain, at its own expense, quarters for the performance of all Owner's Representative Services, and adequate and sufficient personnel and equipment to perform the Owner's Representative Services as required. All employees of Owner's Representative shall have such knowledge and experience as will enable them to perform the duties assigned to them. Any employee of Owner's Representative who, in the opinion of City, is incompetent or whose conduct becomes detrimental to the Owner's Representative Services shall immediately be removed from association with the project when so instructed by City in writing. Owner's Representative certifies that it presently has adequate qualified personnel in its employment for performance of the Owner's Representative Services required under this Contract, or will obtain such personnel from sources other than City. Owner's Representative may not change the Project Manager without prior written consent of City.

ARTICLE 16
SUBCONTRACTING

Owner's Representative shall not assign, subcontract or transfer any portion of the Owner's Representative Services under this Contract without prior written approval from City. All subcontracts shall include the provisions required in this Contract and shall be approved as to form, in writing, by City prior to Owner's Representative Services being performed under the subcontract. No subcontract shall relieve Owner's Representative of any responsibilities under this Contract.

ARTICLE 17
EVALUATION OF OWNER'S REPRESENTATIVE SERVICES

City, or any authorized representatives of it, shall have the right at all reasonable times to review or otherwise evaluate the Owner's Representative Services performed or being performed hereunder and the premises on which it is being performed. If any review or evaluation is made on the premises of Owner's Representative or a subcontractor, then Owner's Representative shall provide and require its subcontractors to provide all reasonable facilities and assistance for the safety and convenience of City or other representatives in the performance of their duties.

ARTICLE 18
SUBMISSION OF REPORTS

All applicable study reports shall be submitted in preliminary form for approval by City before any final report is issued. City's comments on Owner's Representative's preliminary reports shall be addressed in any final report.

ARTICLE 19
VIOLATION OF CONTRACT TERMS/BREACH OF CONTRACT

Violation of contract terms or breach of contract by either Party shall be grounds for termination of this Contract, and any increased costs arising from either Party's default, breach of contract, or violation of contract terms shall be paid by the breaching Party.

ARTICLE 20
TERMINATION

This Contract may be terminated as set forth below.

- (1) By mutual agreement and consent, in writing, of both parties.
- (2) By City, by notice in writing to Owner's Representative, as a consequence of failure by Owner's Representative to perform the Owner's Representative Services set forth herein in a satisfactory manner upon not less than thirty (30) days' written notice to Owner's Representative.
- (3) By either party, upon the failure of the other party to fulfill its obligations as set forth herein upon not less than thirty (30) days' written notice to Owner's Representative.
- (4) By City, for reasons of its own and not subject to the mutual consent of Owner's Representative, upon not less than thirty (30) days' written notice to Owner's Representative.
- (5) By satisfactory completion of all Owner's Representative Services and obligations described herein.

Should City terminate this Contract as herein provided, no fees other than fees due and payable at the time of termination shall thereafter be paid to Owner's Representative.. Compensation for Owner's Representative Services at termination will be based on a percentage of the Owner's Representative Services completed at that time.

If Owner's Representative defaults in the performance of this Contract or if City terminates this Contract for fault on the part of Owner's Representative, then City shall give consideration to the actual costs incurred by Owner's Representative in performing the Owner's Representative Services to the date of default, the amount of Owner's Representative Services required which was satisfactorily completed to date of default, the value of the Owner's Representative Services which are usable to City, the cost to City of employing another firm to complete the Owner's Representative Services required and the time required to do so, and other factors which affect the value to City of the Owner's Representative Services performed at the time of default.

The termination of this Contract and payment of an amount in settlement as prescribed above shall extinguish all rights, duties, and obligations of City and Owner's Representative under this Contract, except the obligations set forth herein in Article 21 entitled "Compliance with Laws." If the termination of this Contract is due to the failure of Owner's Representative to fulfill his/her/its contractual obligations, then City may take over the project and prosecute the Owner's Representative Services to completion. In such case, Owner's Representative shall be liable to City for any additional and reasonable costs incurred by City.

ARTICLE 21

COMPLIANCE WITH LAWS

(1) Compliance. Owner's Representative shall comply with all applicable federal, state and local laws, statutes, codes, ordinances, rules and regulations, and the orders and decrees of any court, or administrative bodies or tribunals in any manner affecting the performance of this Contract, including without limitation, minimum/maximum salary and wage statutes and regulations, and licensing laws and regulations. Owner's Representative shall furnish City with satisfactory proof of his/her/its compliance.

Owner's Representative shall further obtain all permits and licenses required in the performance of the Owner's Representative Services contracted for herein.

(2) Taxes. Owner's Representative will pay all taxes, if any, required by law arising by virtue of the Owner's Representative Services performed hereunder. City is qualified for exemption pursuant to the provisions of Section 151.309 of the Texas Limited Sales, Excise, and Use Tax Act.

ARTICLE 22

INDEMNIFICATION

The Owner's Representative shall indemnify and does hereby hold harmless, the City, its agents and employees for and against all claims, damages, losses and expenses, including attorney's fees, arising out of or resulting from the negligent performance of the services on this project performed by the Owner's Representative, its employees, sub-contractors, agents and representatives and others from whom the Owner's Representative is legally liable.

ARTICLE 23

OWNER'S REPRESENTATIVE'S RESPONSIBILITIES

Owner's Representative shall be responsible for the accuracy of his/her/its Owner's Representative Services and shall promptly make necessary revisions or corrections to its work product resulting from errors, omissions, or negligent acts, and same shall be done without compensation. City shall determine Owner's Representative's responsibilities for all questions arising from design errors and/or omissions. Owner's Representative shall not be relieved of

responsibility for subsequent correction of any such errors or omissions in its work product, or for clarification of any ambiguities until after the construction phase of the project has been completed.

ARTICLE 24
ENGINEER'S SEAL

The responsible engineer shall sign, seal and date all appropriate engineering submissions to City in accordance with the Texas Engineering Practice Act and the rules of the State Board of Registration for Professional Engineers.

ARTICLE 25
NON-COLLUSION, FINANCIAL INTEREST PROHIBITED

(1) **Non-collusion.** Owner's Representative warrants that he/she/it has not employed or retained any company or persons, other than a bona fide employee working solely for Owner's Representative, to solicit or secure this Contract, and that he/she/it has not paid or agreed to pay any company or Owner's Representative any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, City reserves and shall have the right to annul this Contract without liability or, in its discretion and at its sole election, to deduct from the contract price or compensation, or to otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

(2) **Financial Interest Prohibited.** Owner's Representative covenants and represents that Owner's Representative, his/her/its officers, employees, agents, consultants and subcontractors will have no financial interest, direct or indirect, in the purchase or sale of any product, materials or equipment that will be recommended or required for the construction of the project.

ARTICLE 26
INSURANCE

(1) **Insurance.** Owner's Representative, at Owner's Representative's sole cost, shall purchase and maintain during the entire term while this Contract is in effect professional liability insurance coverage in the minimum amount of One Million Dollars per claim from a company authorized to do insurance business in Texas and otherwise acceptable to City. Owner's Representative shall also notify City, within twenty-four (24) hours of receipt, of any notices of expiration, cancellation, non-renewal, or material change in coverage it receives from its insurer.

(2) **Subconsultant Insurance.** Without limiting any of the other obligations or liabilities of Owner's Representative, Owner's Representative shall require each subconsultant performing work under this Contract to maintain during the term of this Contract, at the subconsultant's own expense, the same stipulated minimum insurance required in Article 26, Section (1) above, including the required provisions and additional policy conditions as shown below in Article 26, Section (3).

Owner's Representative shall obtain and monitor the certificates of insurance from each subconsultant in order to assure compliance with the insurance requirements. Owner's Representative must retain the certificates of insurance for the duration of this Contract, and shall have the responsibility of enforcing these insurance requirements among its subconsultants. City shall be entitled, upon request and without expense, to receive copies of these certificates of insurance.

(3) Insurance Policy Endorsements. Each insurance policy shall include the following conditions by endorsement to the policy:

- (a) Each policy shall require that thirty (30) days prior to the expiration, cancellation, non-renewal or reduction in limits by endorsement a notice thereof shall be given to City by certified mail to:

City Manager, City of Pflugerville
100 East Main Street
Pflugerville, Texas 78660

- (b) The policy clause "Other Insurance" shall not apply to any insurance coverage currently held by City, to any such future coverage, or to City's Self-Insured Retentions of whatever nature.

(4) Cost of Insurance. The cost of all insurance required herein to be secured and maintained by Owner's Representative shall be borne solely by Owner's Representative, with certificates of insurance evidencing such minimum coverage in force to be filed with City. Such Certificates of Insurance are evidenced as Exhibit E herein entitled "Certificates of Insurance."

ARTICLE 27 **COPYRIGHTS**

City shall have the royalty-free, nonexclusive and irrevocable right to reproduce, publish or otherwise use, and to authorize others to use, any reports developed by Owner's Representative for governmental purposes.

ARTICLE 28 **SUCCESSORS AND ASSIGNS**

This Contract shall be binding upon and inure to the benefit of the parties hereto, their successors, lawful assigns, and legal representatives. Owner's Representative may not assign, sublet or transfer any interest in this Contract, in whole or in part, by operation of law or otherwise, without obtaining the prior written consent of City.

ARTICLE 29
SEVERABILITY

In the event any one or more of the provisions contained in this Contract shall for any reason be held to be invalid, illegal or unenforceable in any respect, then such invalidity, illegality or unenforceability shall not affect any other provision thereof and this Contract shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

ARTICLE 30
PRIOR AGREEMENTS SUPERSEDED

This Contract constitutes the sole agreement of the parties hereto, and supersedes any prior understandings or written or oral contracts between the parties respecting the subject matter defined herein. This Contract may only be amended or supplemented by mutual agreement of the parties hereto in writing.

ARTICLE 31
OWNER'S REPRESENTATIVE'S ACCOUNTING RECORDS

Records pertaining to the project, and records of accounts between City and Owner's Representative, shall be kept on a generally recognized accounting basis and shall be available to City or its authorized representatives at mutually convenient times. The City reserves the right to review all records it deems relevant which are related to this Contract.

ARTICLE 32
NOTICES

All notices to either party by the other required under this Contract shall be personally delivered or mailed to such party at the following respective addresses:

City:

City of Pflugerville
Attention: City Manager
100 East Main Street
Pflugerville, TX 78660

and to:

Floyd Akers
City Attorney
P.O. Box 679
1611 E. Pfennig
Pflugerville, TX 78691-0679

Owner's Representative:

H.R. Gray
Attention: Scott A. Swiderski, P.E.
7320 North MoPac Expressway
Suite 308
Austin, TX 78731

ARTICLE 33
GENERAL PROVISIONS

(1) Time is of the Essence. Owner's Representative understands and agrees that time is of the essence and that any failure of Owner's Representative to complete the Owner's Representative Services for each phase of this Contract within the agreed Work Schedule may constitute a material breach of this Contract. Owner's Representative shall be fully responsible for his/her/its delays or for failures to use his/her/its reasonable efforts in accordance with the terms of this Contract and the Owner's Representative's standard of performance as defined herein. Where damage is caused to City due to Owner's Representative's negligent failure to perform City may accordingly withhold, to the extent of such damage, Owner's Representative's payments hereunder without waiver of any of City's additional legal rights or remedies.

(2) Force Majeure. Neither City nor Owner's Representative shall be deemed in violation of this Contract if prevented from performing any of their obligations hereunder by reasons for which they are not responsible or circumstances beyond their control. However, notice of such impediment or delay in performance must be timely given, and all reasonable efforts undertaken to mitigate its effects.

(3) Enforcement and Venue. This Contract shall be enforceable in Pflugerville, Travis County, Texas, and if legal action is necessary by either party with respect to the enforcement of any or all of the terms or conditions herein, exclusive venue for same shall lie in Travis County, Texas. This Contract shall be governed by and construed in accordance with the laws and court decisions of the State of Texas.

(4) Standard of Performance. The standard of care for all professional Owner's Representative, consulting and related services performed or furnished by Owner's Representative and its employees under this Contract will be the care and skill ordinarily used by members of Owner's Representative's profession practicing under the same or similar circumstances at the same time and in the same locality. Excepting Articles 25 and 34 herein, Owner's Representative makes no warranties, express or implied, under this Contract or otherwise, in connection with the Owner's Representative Services.

(5) Opinion of Probable Cost. Any opinions of probable project cost or probable construction cost provided by Owner's Representative are made on the basis of information available to Owner's Representative and on the basis of Owner's Representative's experience and qualifications and represents its judgment as an experienced and qualified professional Owner's Representative. However, since Owner's Representative has no control over the cost of labor, materials, equipment or services furnished by others, or over the contractor(s') methods of determining prices, or over competitive bidding or market conditions, Owner's Representative does not guarantee that proposals, bids or actual project or construction cost will not vary from opinions of probable cost Owner's Representative prepares.

(6) Opinions and Determinations. Where the terms of this Contract provide for action to be based upon opinion, judgment, approval, review, or determination of either party hereto, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious, or unreasonable.

(7) Representations and Warranties by OWNER'S REPRESENTATIVE. If OWNER'S REPRESENTATIVE is a corporation, partnership or a limited liability company, OWNER'S REPRESENTATIVE warrants, represents, covenants, and agrees that it is duly organized, validly existing and in good standing under the laws of the state of its incorporation or organization and is duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary power and has received all necessary approvals to execute and deliver the Agreement, and the individual executing the Agreement on behalf of OWNER'S REPRESENTATIVE has been duly authorized to act for and bind OWNER'S REPRESENTATIVE.

(8) Franchise Tax Certification. A corporate or limited liability company OWNER'S REPRESENTATIVE certifies that it is not currently delinquent in the payment of any Franchise Taxes due under Chapter 171 of the *Texas Tax Code*, or that the corporation or limited liability company is exempt from the payment of such taxes, or that the corporation or limited liability company is an out-of-state corporation or limited liability company that is not subject to the Texas Franchise Tax, whichever is applicable.

(9) Eligibility Certification. OWNER'S REPRESENTATIVE certifies that the individual or business entity named in the Agreement is not ineligible to receive the award of or payments under the Agreement and acknowledges that the Agreement may be terminated and payment withheld if this certification is inaccurate.

(10) Payment of Debt or Delinquency to the State or Political Subdivision of the State. Pursuant to Chapter 38, *City of Pflugerville Code of Ordinances*, OWNER'S REPRESENTATIVE agrees that any payments owing to OWNER'S REPRESENTATIVE under the Agreement may be applied directly toward any debt or delinquency that OWNER'S REPRESENTATIVE owes the City of Pflugerville, State of Texas or any political subdivision of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.

(11) Texas Family Code Child Support Certification. OWNER'S REPRESENTATIVE certifies that no partner or officer of the partnership/corporation is delinquent in child support obligations and therefore OWNER'S REPRESENTATIVE is not

ineligible to receive the award of or payments under the Agreement and acknowledges that the Agreement may be terminated and payment may be withheld if this certification is inaccurate.

(12) Funding. If funding for the entire Agreement is not appropriated at the time this Agreement is entered into, City retains the right to terminate this Agreement at the expiration of each of City’s budget periods, and any subsequent contract period is subject to and contingent upon such appropriation.

ARTICLE 34
SIGNATORY WARRANTY

The undersigned signatory for Owner’s Representative hereby represents and warrants that the signatory is an officer of the organization for which he/she has executed this Contract and that he/she has full and complete authority to enter into this Contract on behalf of the firm. The above-stated representations and warranties are made for the purpose of inducing City to enter into this Contract.

IN WITNESS WHEREOF, the City of Pflugerville has caused this Contract to be signed in its corporate name by its duly authorized City Manager or Mayor, as has Owner’s Representative, signing by and through its duly authorized representative(s), thereby binding the parties hereto, their successors, assigns and representatives for the faithful and full performance of the terms and provisions hereof.

CITY OF PFLUGERVILLE, TEXAS

APPROVED AS TO FORM:

By: _____
Brandon Wade, City Manager

Floyd Akers, City Attorney

ATTEST:

By: _____
Karen Thompson, City Secretary

(NAME OF FIRM)

By: _____
Signature of Principal
Printed Name: _____

LIST OF EXHIBITS ATTACHED

- | | |
|---------------|---------------------------------|
| (1) Exhibit A | City Services |
| (2) Exhibit B | Owner's Representative Services |
| (3) Exhibit C | Work Schedule |
| (4) Exhibit D | Fee Schedule |
| (5) Exhibit E | Certificates of Insurance |