

CITY OF SAN ANGELO, TEXAS
STANDARD PERFORMANCE CONTRACT TERMS AND CONDITIONS
Effective April 16, 2018

1. STATEMENT OF WORK:

A. Contractor agrees to perform all Work and furnish all of the material, supplies, tools, equipment, labor, site preparation, mobilization, preparatory cleanup work, for the completion of Work described in the contract documents. Contractor shall comply with all applicable Federal, State and Local regulations.

B. Contractor represents and warrants to City that: (i) it possesses all qualifications, licenses and expertise required under the specifications and price quote for the performance of Work; (ii) it is not delinquent in the payment of any sums due City, including payment of permit fees, occupational licenses, etc., nor in the work of any obligations to City; (iii) all personnel assigned to perform Work are and shall be, at all times during the term hereof, fully qualified and trained to perform the tasks assigned to each; and (iv) Work will be performed in the manner described in the Contract Documents.

2. TIME OF PERFORMANCE: Upon Contractor's receipt of the Notice to Proceed from City, Contractor will commence and complete Work in accordance with specifications and schedules as set out in Contract Documents. Contractor further agrees that approval for beginning Work on the project will not be given and that Work will not start until all required bonds and insurance certificates specified in the bid documents have been received and approved by City.

3. LIQUIDATED DAMAGES: City and Contractor recognize that bid documents may provide for liquidated damages. Contractor acknowledges that if liquidated damages are provided for in the Contract Documents that time of performance is of the essence in the Contract. The Parties agree that City will suffer financial loss if Work is not performed pursuant to schedules or substantially completed within the time specified in the contract documents, plus any extensions thereof allowed. Both parties to the contract also recognize the delays, expense, and difficulties involved in proving in a legal proceeding the actual loss suffered by City if Work is not performed pursuant to schedules or substantially completed on time. Accordingly instead of requiring such proof, City and Contractor agree that a reasonable estimate of liquidated damages for any delay is provided for in the bid documents (but not as a penalty). Therefore, Contractor shall pay City the designated liquidated damages for each calendar day that expires from and after the time specified in schedules for Work or for substantial completion of Work in the contract documents.

3. PAYMENT PROCEDURES: Within thirty (30) days of completion and acceptance of Work by City, and in accordance with the Owner's Construction General Conditions and Contract Documents, City shall pay the Contract Price to Contractor.

4. CONTRACT DOCUMENTS:

A. Contractor has familiarized itself with the nature and extent of the Contract Documents (collectively referred to herein as the "Contract"), Work, and with all local conditions and federal, state and local laws.

B. Contractor has made, or caused to be made, examinations and investigations of information as it deems necessary for the performance of Work at the Contract Price, within the Contract schedules and time and in accordance with the other terms and conditions of the Contract Documents; and no additional examinations, investigations or similar

data are, or will be required by Contractor for such purposes. City may make available to contractor information regarding worksite conditions; notwithstanding, Contractor understands and agrees that Contractor may or may not rely upon all or any part of such information and that Contractor shall make its own interpretations, independent evaluations and conclusions about worksite conditions.

C. Contractor has given City advanced written notice of all conflicts, errors, or discrepancies that it has discovered in Contract Documents prior to bidding and the written resolution thereof by City is acceptable to Contractor.

D. It is the intent of the Contract documents to describe a functionally complete project (or part thereof) to be constructed in accordance with the Contract Documents. Any labor, documentation, services, materials, or equipment that reasonably may be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the indicated result will be provided whether or not specifically called for, at no additional cost to City.

E. Contractor is skilled and experienced to responsibly perform the type of Work described in Contract Documents in a timely manner.

5. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS: Contractor understands that contracts between private entities and local governments are subject to certain laws and regulations, including laws pertaining to public records, conflict of interest, and recordkeeping. Contractor agrees to comply with and observe all applicable laws, codes and ordinances as they may be amended from time to time.

6. OWNERSHIP OF DOCUMENTS: Contractor understands and agrees that any information, document, report or any other material whatsoever which is given by City to Contractor or which is otherwise obtained or prepared by Contractor pursuant to or under the terms of the Contract is and shall at all times remain the property of City. Contractor agrees not to use any such information, document, report or material for any other purpose whatsoever without the written consent of City, which may be withheld or conditioned by City in its sole discretion.

7. AUDIT AND INSPECTION RIGHTS:

A. City may, at reasonable times, and for a period of up to three (3) years following the date of final payment by City to Contractor under the Contract, audit, or cause to be audited, those books and records of Contractor which are related to Contractor's performance under the Contract. Contractor agrees to maintain all such books and records at its principal place of business for a period of three (3) years after final payment is made under the Contract.

B. City may, at reasonable times during the term hereof, inspect Contractor's work, worksite and facilities and perform such tests, as City deems reasonably necessary, to determine whether the goods or services required to be provided by Contractor under the Contract conform to the Contract terms and applicable codes and regulations. Contractor shall make Contractor's work, worksite and facilities available to City's representatives at reasonable times to facilitate the performance of such inspections and/or tests.

8. AWARD OF CONTRACT: Contractor represents and warrants to City that it has not employed or retained any person or company employed by City to solicit or secure the Contract and that it has not offered to pay, paid, or agreed to pay any person any fee, commission, percentage of cost, brokerage fee, or gift of any kind contingent upon or in connection with the award of the Contract.

9. PUBLIC RECORDS: Contractor understands that the public shall have access, at all reasonable times, to all documents and information pertaining to City contracts, and agrees to allow access by City and the

public to all documents subject to disclosure under applicable law. Contractor's failure or refusal to comply with the provisions of this section shall be considered a material breach of the Contract and may result in the immediate termination of the Contract by City.

10. DEFAULT:

A. If Contractor fails to comply with any term or condition of the Contract, or fails to perform any of its obligations the Contract, then Contractor shall be in default. Upon the occurrence of a default, City, in addition to all remedies available to it by law, may immediately, upon written notice to Contractor, terminate the Contract whereupon all unpaid contract funds shall be available to City to complete the construction and/or remedy any defective performance by Contractor. Should Contractor default, any advances for work to be performed or materials to be ordered which have been paid by City to Contractor shall be immediately returned to City. Should the costs to complete the construction and/or remedy any defective performance by Contractor exceed the remaining Contract balance, Contractor shall be liable to City for all costs and expenses to complete the construction and/or remedy any defective performance, to include any cost associated with re-procurement, and for any consequential and incidental damages suffered by City. Contractor understands and agrees that termination of the Contract under this section shall not release Contractor from any obligation accruing prior to the effective date of termination.

B. Before City shall be liable to Contractor or any of its successors or assigns for any alleged breach of the Contract, notice must first be given City no later than ninety-one (91) days of the date Contractor alleges the breach occurred. Such notice shall be given in accordance with Contract provisions for service of notice and shall state the date, time, and circumstances of the alleged breach.

11. TERMINATION RIGHTS OF CITY:

A. City shall have the right to terminate the Contract, in its sole discretion, at any time, for any reason, by giving written notice to Contractor at least five (5) business days prior to the effective date of such termination. In such event, City shall pay to Contractor compensation for Work rendered and expenses incurred prior to the effective date of termination. In no event shall City be liable to Contractor for any additional compensation, other than that provided in the Contract, or for any consequential or incidental damages.

B. City shall have the right to terminate the Contract, without notice or liability to Contractor, upon the occurrence of an event of default under the Contract. In such event, City shall not be obligated to pay any amounts to Contractor and Contractor shall reimburse to City all amounts received while Contractor was in default under the Contract.

12. RESOLUTION OF CONTRACT DISPUTES:

A. Contractor understands and agrees that all disputes between Contractor and City concerning or relating to the denial or partial denial of a change, change order or extra work under paragraphs 2.17, 2.18 or 2.19 of the Owner's Construction General Conditions of the Contract shall be held for resolution until the Project has been substantially completed. Contractor shall make a written request for resolution of the dispute (the "Request") to City's designated official (the City Manager or his designee) for determination of the matter in dispute. The Request shall clearly state the disputed issue and include or incorporate by specific reference all information or documents that Contractor wants the official to consider in reaching a determination. The official shall issue a written notice of decision upon Contractor's Request within the thirty (30) days of receipt of Contractor's Request. If the official cannot issue a decision within thirty (30) days of the

receipt of Contractor's Request, the official shall notify Contractor the date upon which a decision shall be issued. Submission of a Contractor's Request for determination of the dispute is a condition precedent to Contractor's ability to engage in litigation against City. If a decision is not issued by the date indicated by the official or within ninety (90) days after the submission of Contractor's written Request for determination, whichever occurs first, Contractor will be deemed to have met the condition precedent required by this provision. Should the dispute be resolved through the submission of Contractor's Request, the resolution of the dispute will be documented, if necessary, through a change to the Contract in accordance with the provisions contained in the Contract, to include but not limited to, Owner's Construction General Conditions, paragraphs 2.17, 2.18 and 2.19. Should the dispute fail to reach resolution through the submission by Contractor's Request, the dispute may be submitted to mediation at the sole discretion of City. City agrees that it shall make an election within no later than sixty (60) days after the issuance of a determination by the official in response to a Contractor's Request, final completion, abandonment or termination of the Project, whichever is later. Such mediation shall be conducted by and between the parties in accordance with the AAA Rules of Mediation for Construction Cases then in effect. Contractor understands and agrees that it shall continue to perform Work under the Contract unless further performance has been excused by termination of Contractor or stopping Work is specifically allowed under the laws of the State of Texas. Contractor understands that should a settlement be reached at mediation it is subject to the approval of the City Council. If either mediation is unsuccessful or City elects not to proceed to mediation, then the dispute shall be submitted to litigation in keeping with the terms of the Contract and the laws of the State of Texas.

B. Contractor understands and agrees that any and all other disputes arising between Contractor and City not related to changes, change orders or extra work, may be submitted to mediation at the sole discretion of City. City agrees that it shall make such an election within no later than sixty (60) days from the date of final completion, abandonment or termination, whichever is later. Such mediation shall be conducted by and between the parties in accordance with the AAA Rules of Mediation for Construction Cases then in effect. Contractor understands and agrees that it shall continue to perform Work under the Contract unless further performance has been excused by termination of Contractor or is specifically allowed under the laws of the State of Texas. Contractor understands that should a settlement be reached at mediation it is subject to the approval of the City Council. If either mediation is unsuccessful or City elects not to proceed to mediation, then the dispute shall be submitted to litigation in keeping with the terms of the Contract and the laws of the State of Texas.

13. **INSURANCE:** Contractor shall, at all times during the term of the Contract, maintain such insurance coverage as may be required by City of the types and in the amounts specified in the Special Insurance Rider and pursuant to terms and conditions relating to insurance requirements included in OWNER'S CONSTRUCTION GENERAL CONDITIONS and Contract Documents.

14. **INDEMNIFICATION:**

A. **GENERAL INDEMNIFICATION.** Contractor shall indemnify, defend and hold harmless City and its officials, employees and agents (collectively referred to as "Indemnitees") and each of them from and against all loss, costs, penalties, fines, damages, claims, expenses (including reasonable attorney's fees) or liabilities (collectively

referred to as "Liabilities") by reason of any injury to or death of any person or damage to or destruction or loss of any property arising out of, resulting from, or in connection with (i) the performance or non-performance of Services contemplated by the Contract but only to the extent caused by the negligent acts, errors or omissions, intentional torts, intellectual property infringement, or a failure to pay a subcontractor or supplier committed by Contractor or Contractor's agent, consultant under contract, or another entity over which Contractor exercises control, or its employees, agents or subcontractors (collectively referred to as "Contractor") (ii) the failure of Contractor to comply with any of the paragraphs or provisions of this contract or contract documents, or the failure of Contractor to conform services or work to statutes, ordinances, or other regulations or requirements of any governmental authority, federal, state or local, in connection with the performance of the Contract. Contractor expressly agrees to indemnify and hold harmless the Indemnitees, or any of them, from and against all liabilities which may be asserted by an employee or former employee of Contractor, or any of its subcontractors, as provided above, for which Contractor's liability to such employee or former employee would otherwise be limited to payments under State Workers' Compensation or similar laws. Nothing herein shall require Contractor to indemnify, defend, or hold harmless any Indemnitee for the Indemnitee's own gross negligence or willful misconduct. Any and all indemnity provided for in the Contract shall survive the expiration of the Contract and the discharge of all other obligations owed by the parties to each other hereunder and shall apply prospectively not only during the term of the Contract but thereafter so long as any liability could be asserted in regard to any acts or omissions of Contractor in performing Services under the Contract.

B. ENVIRONMENTAL INDEMNIFICATION. [THIS PROVISION IS APPLICABLE ONLY WHEN SPECIAL INSURANCE RIDER REQUIRES ENVIRONMENTAL LIABILITY COVERAGE.] Contractor agrees to indemnify, defend and hold City and its council members, board and commission members, officials, agents, guests, invitees, consultants and employees free and harmless from and against any and all claims, demands, proceedings, suits, judgments, costs, penalties, fines, damages, losses, attorneys' fees and expenses asserted by local, state or federal environmental agencies or private individuals or entities in connection with or resulting from or arising out of Contractor's handling, collection, transportation, storage, disposal, treatment, recovery, and/or reuse by any person under Contractor's direction or control of waste collected, transported or landfilled or any cleanup associated with environmental contamination, whether such cleanup is of air, soil, structure, ground water or surface water contamination. Contractor specifically agrees to indemnify, defend and hold harmless City against all claims, damages and liabilities of whatever nature asserted under CERCLA caused by acts or omissions of contractor regardless of when such incident is discovered. Contractor shall be responsible and liable for any spill, underground pollution or any other environmental impairment incident caused by acts or omissions of Contractor regardless of when such incident is discovered. It is the intent of the parties that this section shall in no way limit other coverage required under the Contract as it may relate to any environmental claim, damage, loss or liability of any kind. The environmental indemnification provisions of the Contract extend to claims and assessments relating to runoff, leachate, or other infiltration that may occur or has occurred at or near the site of landfills, transfer stations, or other solid waste facilities and surrounding areas which are or were used by Contractor, during the term

of the Contract or previous agreements between City and Contractor. This section does not make Contractor liable for any site it has never used, closed, managed or monitored.

C. PROSPECTIVE APPLICATION. Any and all indemnity provided for in the Contract shall survive the expiration of the Contract and the discharge of all other obligations owed by the parties to each other hereunder and shall apply prospectively not only during the term of the Contract but thereafter so long as any liability (including but not limited to liability for closure and post closure costs) could be asserted in regard to any acts or omissions of Contractor in performing under the Contract.

15. WARRANTY:

A. The Contractor warrants and guarantees to the Owner that all Materials or Equipment will be new unless otherwise specified, free from faults or defects, and that all Work will be performed in a workmanlike manner, and in accordance with the specifications and requirements of the Contract Documents as well as of any required or applicable regulations, codes, inspections, tests, or required approvals. All unsatisfactory, faulty or un-workman like Work and all Work not conforming to the requirements of the Contract Documents or of such inspections, tests, or approvals shall be considered defective. Notice of all defective Work shall be given to the Contractor promptly after discovery. All defective Work, whether or not in place, may be rejected.

B. If required by the Owner prior to approval of final payment the Contractor will promptly, without cost to the Owner, either correct any defective Work, whether or not fabricated, installed, or completed, or remove it from the site and replace it with non-defective Work. The Contractor will also bear the expenses of making good all work of others destroyed or damaged by its correction, removal, or replacement of Contractor's defective Work. If the Contractor does not diligently proceed to correct such defective Work or remove and replace such rejected Work within a reasonable time, as required by written notice from the Owner, the Owner may have the deficiency corrected or the rejected Work removed and replaced. All direct or indirect costs of such correction or removal and replacement, including compensation for additional professional services, shall be charged to the Contractor, and an appropriate Change Order shall be issued deducting all such costs from the Contract Price or otherwise paid by Contractor.

C. Prior to the expiration of one (1) year after the date of Final Completion (or such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee or warranty provided or required by the Contract Documents), if any Work is found to be defective, the Contractor will promptly without cost to the Owner and in accordance with the Owner's written instruction, either correct such defective Work, or, if it has been rejected by the Owner, remove it from the site and replace it with non-defective Work. Any such corrected or replaced defective work shall be warranted by the Contractor for one year from and after such correction or replacement of work.

D. If the Contractor does not promptly comply with the terms of such instructions to correct or replace defective Work, the Owner may have the defective Work corrected or the rejected Work removed and replaced, and all direct and indirect costs of such removal and replacement, including compensation for additional professional services, will be paid by the Contractor. In such case, a Change Order shall be issued incorporating the necessary revisions in the Contract Documents, including appropriate reduction in the Contract Price. Should the remaining contract balance be insufficient to complete the works, Owner will seek reimbursement from the Contractor and/or its surety for the

damages in excess of the remaining contract balance. If the acceptance occurs after approval of final payment, an appropriate amount shall be paid by the Contractor within thirty (30) days of written demand for payment accompanied by supporting documentation.

16. INDEPENDENT CONTRACTOR: Nothing contained in the Contract is intended to, or shall be construed in any manner, as creating or establishing the relationship of employer/employee between the parties. Contractor shall at all times remain an independent contractor with respect to Work to be performed under the Contract. City shall be exempt from payment of all unemployment compensation, FICA, retirement, life and/or medical insurance and workers' compensation insurance on Contractor's employees.

17. NONDISCRIMINATION: Contractor represents and warrants to City that Contractor does not and will not engage in discriminatory practices and that there shall be no discrimination in connection with Contractor's performance under the Contract on account of race, color, sex, religion, age, handicap, marital status or national origin. Contractor further covenants that no otherwise qualified individual shall, solely by reason of his/her race, color, sex, religion, age, handicap, marital status or national origin, be excluded from participation in, be denied services, or be subject to discrimination under any provision of the Contract.

18. VERIFICATION OF EMPLOYMENT ELIGIBILITY: Contractor must comply with the Immigration Reform and Control Act (IRCA) and may not knowingly obtain labor or services of an unauthorized alien. Contractor, not City, must verify eligibility for employment as required by IRCA.

19. AMENDMENTS: City and Contractor may amend the Contract at any time provided that such amendment makes specific reference to the Contract, and is executed in writing, signed by a duly authorized representative of contracting parties, and approved by City Council when required pursuant to law or City policy. Such amendments shall only address the items or issues dealt with in the amendment and shall not invalidate any other portion or provision of the Contract, nor relieve or release City or Contractor from their respective obligations under the Contract except as may be specifically set forth in the amendment.

20. ASSIGNMENT: No assignment by a party hereto of any rights under, or interest in, the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically, but without limitation, moneys that may become due, and moneys that are due, may not be assigned without such prior consent (except to the extent that this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

21. SUCCESSORS AND ASSIGNS: This Contract shall be binding upon the parties hereto, their heirs, executors, legal representatives, successors, or assigns.

22. NOTICES: Communications and details concerning the Contract shall be directed in writing to the authorized agent of the party as set forth on the face of the Contract. Designation of authorized agent or address for notice may be changed by written notice to the other party. Any notice required or permitted to be given to a party under the Contract shall be in writing and shall be deemed given (i) on the day it is delivered personally (with receipt); or (ii) the day after it is deposited with a nationally recognized courier service for next-day delivery; or (iii) three (3) days after it is deposited in the U.S. certified mail, postage prepaid, return receipt requested, addressed to the party's authorized agent.

23. MISCELLANEOUS PROVISIONS:

A. Remedies: In the event of default by Contractor under the Contract Documents, City shall have all rights and remedies afforded to it at law or in equity to enforce the terms of the Contract. City's exercise of any one right or remedy shall be without prejudice to the enforcement of any other right or remedy allowed at law or in equity that may be available to City against either Contractor or its Surety.

B. Attorneys' Fees: If any action at law or in equity is necessary by either City or Contractor to enforce or interpret the terms of the Contract Documents, the party prevailing on the majority of issues shall be entitled to reasonable attorneys' fees and costs and any necessary disbursements in addition to any other relief to which the prevailing party is entitled.

C. Conflicts: This Contract, the documents required to be provided, and the Contract Documents constitute the entire Contract between the parties hereto and supersede any prior written or oral agreements and understandings between the parties. If any provision within a Contract Document conflicts with, or is inconsistent with any other provision of a Contract Document, then clarification and interpretation of Contract Documents necessary for resolution of the conflict shall be made by City.

D. Severability: If any provision of the Contract is held invalid or unenforceable, the remainder of the Contract shall not be affected thereby and all other parts of the Contract shall nevertheless be in full force and effect.

E. Venue: This Contract, including the Contract Documents, is governed by the laws of the State of Texas. Venue for any suit or claim or cause of action arising out of or related to Work covered by the Contract shall be in Tom Green County, Texas.

F. Counterparts: This Contract may be executed in two or more counterparts, each of which shall constitute an original but all of which, when taken together, shall constitute one and the same Contract. By affixing their signature to the Contract, each individual is representing that he or she has the authority to sign the Contract and to bind the party that they represent to the Contract.

G. Enforcement: This Contract shall be construed and enforced according to the laws of the State of Texas.

H. Headings: Titles and paragraphs are for convenient reference and are not a part of the Contract.

I. No Waiver: No waiver or breach of any provision of the Contract shall constitute a waiver of any subsequent breach of the same or any other provision hereof, and no waiver shall be effective unless made in writing.

J. Governing Laws: Should any provision, paragraph, sentence, word or phrase contained in the Contract be determined by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable under the laws of the State of Texas or the City of San Angelo, such provision, paragraph, sentence, word or phrase shall be deemed modified to the extent necessary in order to conform with such laws, or if not modifiable, then same shall be deemed severable, and in either event, the remaining terms and provisions of the Contract shall remain unmodified and in full force and effect or limitation of its use.

K. Applicable Law: This Contract and the Contract Documents are subject to all applicable federal and state laws, statutes, codes, rules and regulations and local ordinances, rules and regulations.

L. Survival of Remedies: Anything in the Contract Documents to the contrary notwithstanding, the provisions of the Contract relating to indemnity and any other provisions which by their nature should survive termination or expiration of the Contract shall so survive.

24. CONTINGENCY CLAUSE: Funding for the Contract is contingent on the availability of funds and continued authorization for program activities and the Contract is subject to amendment or termination for convenience due to lack of funds, reduction of funds and/or change in regulations, upon thirty (30) days' notice.

25. ENTIRE CONTRACT: The Contract, inclusive of the Contract Documents, constitutes the sole and entire agreement between the parties hereto. No modification or amendment of the Contract shall be valid unless in writing and executed by properly authorized representatives of the parties hereto.

25. REAFFIRMATION OF REPRESENTATIONS/WARRANTY OF AUTHORITY: By the execution of the Contract, Contractor reaffirms all of the representations contained in Contract Documents. Each person executing the Contract on behalf of Contractor by the execution thereof warrants that he or she has the authority of the governing body of Contractor to lawfully bind Contractor to the Contract. At the time of execution of the Contract, Contractor shall execute and provide to City/Owner such disclosures as required by law and the verified certification in a form provided by City in compliance with Chapter 2270 of the Texas Government Code and Subchapter "F" of Chapter 2252 of the Texas Government Code.