

CITY OF HUNTSVILLE, TEXAS

Andy Brauning, Mayor

Keith D. Olson, Mayor Pro Tem, Position 4
Lydia Montgomery, Position 2 At-Large
Don H. Johnson, Position 3 At-Large



Joe Emmett, Ward 1
Tish Humphrey, Ward 2
Ronald Allen, Ward 3
Joe Rodriguez, Ward 4

HUNTSVILLE CITY COUNCIL AGENDA

TUESDAY, APRIL 5, 2016

4:00 P.M. WORK SESSION – 6:00 P.M. REGULAR SESSION

CITY COUNCIL CHAMBERS AND LARGE CONFERENCE ROOM
HUNTSVILLE CITY HALL, 1212 AVENUE M, HUNTSVILLE, TEXAS, 77340

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services are requested to contact the City Secretary's office (936.291.5403), two working days prior to the meeting for appropriate arrangements.

WORK SESSION [4:00 P.M.] The City Council will receive presentations and discuss eligible debt capacities, scenarios for a possible November 2016 election and potential quality of life projects.. [Joseph Wiggs, Director of Parks and Leisure]

MAIN SESSION [6:00 P.M.]

1. CALL TO ORDER

2. INVOCATION AND PLEDGES

U.S. Flag

Texas Flag: Honor the Texas Flag. I pledge allegiance to thee, Texas, one state, under God, one, and indivisible.

3. PRESENTATIONS AND PROCLAMATIONS

- Fair Housing Month
- Magda Castaneda Day
- National Public Safety Telecommunicator Week

4. CONSENT AGENDA

Public Comments will be called for by the presiding officer before action is taken on these items. *(Approval of Consent Agenda authorizes the City Manager to implement each item in accordance with staff recommendations. An item may be removed from the Consent Agenda and added to the Statutory Agenda for full discussion by request of a member of Council.)*

- a. Approve the minutes of the City Council meetings held on March 15, 2016 and March 29, 2016. [Lee Woodward, City Secretary]

5. STATUTORY AGENDA

- a. *Presentation, public comment, discussion, and possible action* to consider awarding the construction contract for the 30-Inch Water Transmission Main Surge Protection (Air/Vacuum Release Valves) Project (Project No. 14-11-11). [Y. S. "Ram" Ramachandra, City Engineer]
- b. **FIRST READING** - *Presentation, public comment, discussion, and possible action* to authorize the City Manager to sign a construction services agreement with Garney Companies, Inc. for construction services to complete the Town Creek drainage project, first reading. [Matt Benoit, City Manager; Dr. Sherry McKibben, Director of Neighborhood Resources; Y. S. Ram Ramachandra, City Engineer]
- c. *Presentation, public comment, discussion, and possible action* to consider authorizing the City Manager to sign a proposal with Burditt Consultants, LLC for Parks Master Plan Services. [Matt Benoit, City Manager; Joseph Wiggs, Director of Parks and Leisure]
- d. *Presentation, public comment, discussion, and possible action* to authorize the City Manager to apply for two (2) Transportation Investment Generating Economic Recovery (TIGER) Grants and adopt Resolution 2016-23 and Resolution 2016-24 in support of same. [Dr. Sherry McKibben, Director of Neighborhood Resources and Ram Ramachandra, City Engineer]
- e. *Presentation, public comment, discussion, and possible action* to consider a resolution accepting a bid for the sale of a City-owned 0.615 acre tract of land located north of 20th Street, south of 19th Street, west of Sam Houston Avenue, and east of Avenue L ½, located at 1930 A Sam Houston Avenue, and authorizing the City Manager, City Secretary, and City Attorney to execute all documents for the sale of said property. [Aron Kulhavy, Director of Community and Economic Development]

6. MAYOR/CITY COUNCIL/CITY MANAGER AND CITY ATTORNEY REPORT

- a. *Presentation, public comment, discussion, and possible action* to approve the Mayor's nominations to the County Uniform Truancy Policy Committee, required per Education Code 25.0916. [Mayor Brauning and Leonard Schneider, City Attorney]
 1. County Court at Law Judge Sorenson (appointed by both Judge Danny Pierce and Mayor Brauning)
 2. Municipal Judge John Gaines (appointed by both Judge Danny Pierce and Mayor Brauning)

3. Justice of the Peace Janie Farris
4. Superintendent of HISD's designee, Dr. Mina Schnitta, HISD Director of Secondary Teaching and Learning
5. Open-enrollment charter school, Kevin Nichols, Principal, Premier High School, or his designee
6. Municipal Court Prosecutor David Moorman
7. General public representative Marjetta Spriggs

- b. *Presentation, public comment, discussion, and possible action* to move Board of Adjustments-Zoning Alternate A, John Cromer, to an open position on the board, to move Alternate B, David Zuniga, to the Alternate A position, per the request of the Board, and to nominate Anthony Watkins to then-opened Alternate B position. [Mayor Brauningner]
- c. **FIRST READING** - *Presentation, public comment, discussion, and possible action* to hear the report of the Board and Commissions Review Ad Hoc Committee and to adopt Ordinance 2016-14 amending Ordinance 2002-18, Section 1 (d) *Duties of Board*. [Committee Chair Councilmember Montgomery]
- d. *Presentation, public comment, discussion, and possible action* on reappointment of Dennis Reed to the Cemetery Advisory Board. [Mayor Brauningner]
- e. *Presentation, public comment, discussion, and possible action* on a request by Councilmember Allen to discuss changes to the City policy for payments to construction companies, to ensure that the contractors provide written proof of payment to their subcontractors/vendors who worked or provided materials/equipment on the project (the written proof being provided before the contractors are paid by the City, to protect owners granting easements to the City from being threatened with a lien against their property by subcontractors/vendors who are not paid by the contractor). [Councilmember Allen]

7. REQUESTS FOR CITIZEN PARTICIPATION

An opportunity for citizens to be heard on any topic and for the City Council to participate in the discussion. No action will be taken.

No requests were received by noon on March 29, 2016.

8. MEDIA INQUIRIES RELATED TO MATTERS ON THE AGENDA

9. ITEMS OF COMMUNITY INTEREST

(Hear announcements concerning items of community interest from the Mayor, Councilmembers, and City staff for which no action will be discussed or taken.)

10. EXECUTIVE SESSION

- a. City Council will meet in Executive Session pursuant to Texas Government Code Section 551.074 – personnel matters regarding the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee, concerning City Secretary Lee Woodward.

11. RECONVENE

Take action, if necessary, on items addressed during Executive Session.

12. ADJOURNMENT

*If, during the course of the meeting and discussion of any items covered by this notice, City Council determines that a Closed or Executive session of the Council is required, then such closed meeting will be held as authorized by Texas Government Code, Chapter 551, Sections: 551.071 – consultation with counsel on legal matters; 551.072 – deliberation regarding purchase, exchange, lease or value of real property; 551.073 – deliberation regarding a prospective gift; 551.074 – personnel matters regarding the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; 551.076 – implementation of security personnel or devices; 551.087 – deliberation regarding economic development negotiation; and/or other matters as authorized under the Texas Government Code. If a Closed or Executive session is held in accordance with the Texas Government Code as set out above, the City Council will reconvene in Open Session in order to take action, if necessary, on the items addressed during Executive Session.

CERTIFICATE

I, Lee Woodward, City Secretary, do hereby certify that a copy of the April 5, 2016 City Council Agenda was posted on the City Hall bulletin board, a place convenient and readily accessible to the general public at all times, and to the City's website, www.huntsvilletx.gov, in compliance with Chapter 551, Texas Government Code.

DATE OF POSTING: _____

TIME OF POSTING: _____ am/pm

TAKEN DOWN: _____

Lee Woodward, City Secretary

MINUTES FROM THE HUNTSVILLE CITY COUNCIL REGULAR MEETING HELD ON THE 15th DAY OF MARCH 2016, IN THE CITY HALL, LOCATED AT 1212 AVENUE M, IN THE CITY OF HUNTSVILLE, COUNTY OF WALKER, TEXAS, AT 4:30 P.M.

The Council met in a regular session with the following:

COUNCILMEMBERS PRESENT: Andy Brauninger, Joe Emmett, Lydia Montgomery, Don H. Johnson, Keith Olson, , Ronald Allen, Joe P. Rodriguez

COUNCILMEMBERS ABSENT: Tish Humphrey

OFFICERS PRESENT: Matt Benoit, City Manager; Leonard Schneider, City Attorney; Lee Woodward, City Secretary

WORK SESSION [4:30 P.M.] – The City Council will hear presentation from PGAL representative Jeff Gerber on the proposed Visitor Center Renovation and Expansion plans.

The City Council discussed Visitors Center needs and uses and options for expansion.

MAIN SESSION [6:00 P.M.]

1. **CALL TO ORDER** - Mayor Brauninger called the meeting to order at 6:00 p.m.
2. **INVOCATION AND PLEDGES** – Councilmember Rodriguez gave an invocation and Alissa Wion of Huntsville Home School Organization led the pledges.
3. **PRESENTATIONS AND PROCLAMATIONS**
 - Sexual Assault Awareness Month
 - Autism Awareness Month

4. **CONSENT AGENDA**

Public Comments will be called for by the presiding officer before action is taken on these items. *(Approval of Consent Agenda authorizes the City Manager to implement each item in accordance with staff recommendations. An item may be removed from the Consent Agenda and added to the Statutory Agenda for full discussion by request of a member of Council.)*

- a. Approve the minutes of the City Council meeting held on March 1, 2016. [Lee Woodward, City Secretary]
- b. Authorize the City Manager to approve a request from the Tarrant County Historical Commission to place a Historical Marker in Oakwood Cemetery for Colonel John W. Thomason. [Matt Benoit, City Manager]
- c. Authorize the City Manager to apply for a Staffing for Adequate Fire & Emergency Response (SAFER) grant for \$238,596 and adopt Resolution 2016-22 in support of same. [Dr. Sherry McKibben, Director of Neighborhood Resources]
- d. Authorize purchase of tires to be used on all vehicles and equipment citywide. [Carol Reed, Director of Public Works]
- e. Authorize the City Manager to enter into a contract with McDonald Municipal and Industrial for installation of a replacement generator at the A. J. Brown Waste Water Treatment Plant for \$274,269.00 and adopt Ordinance 2016-13 for a budget amendment in support of same. [Dr. Sherry McKibben, Director of Neighborhood Resources]

Councilmember Olson moved to adopt the consent agenda; the motion was seconded by Councilmember Montgomery. The motion was adopted, 7-0.

5. **STATUTORY AGENDA**

- a. **Presentation, public comment, discussion, and possible action** to consider authorizing the City Manager to approve an agreement with PGAL Architects to complete design and provide construction observation services for a remodel and expansion to the Sam Houston Statue and Visitors Center and approve Ordinance 2016-12 amending the fiscal year 2015-2016 budget and CIP budget, second reading. [Matt Benoit, City Manager; Kimm Thomas, Director of Tourism and Cultural Services]

(Item was postponed to this meeting from the March 1, 2016 meeting.) Councilmember Johnson moved to consider authorizing the City Manager to approve an agreement with PGAL Architects to complete design and provide construction observation services for a remodel and expansion to the Sam Houston Statue and Visitors Center and approve Ordinance 2016-12 amending the fiscal year 2015-2016 budget and CIP budget; the motion was seconded by Councilmember Montgomery. Councilmember Emmett clarified that the vote was only to have the architect proceed with design, not to approve a finished project or budget for such. Jeanine Jacoby, Carl Overton, Sam Beard, and Ken Holland gave public comment. The motion was adopted, 6-1, Councilmember Allen voting against.

6. **CITY COUNCIL/CITY MANAGER/CITY ATTORNEY**

- a. **Presentation, public comment, discussion, and possible action** to consider nomination of Mac Woodward to an unexpired term on the Rita B. Huff Humane Society Board of Directors. [Mayor Brauninger]

Mayor Brauninger moved to approve his nomination of Mac Woodward to an unexpired term on the Rita B. Huff Humane Society Board of Directors. The motion was unanimously adopted, 7-0.

- b. **Presentation, public comment, discussion, and possible action** to adopt the City Council's 2016 Strategic Plan. [Matt Benoit, City Manager]

Mayor Brauninger moved to adopt the City Council's 2016 Strategic Plan; the motion was seconded by Councilmembers Montgomery and Olson. Councilmember Rodriguez moved to amend the Strategic Plan by including language stating that on the issues that will come before the Council in the coming year, there will be a [Council] workshop after the Long Range

Planning Committee has reviewed them, so that the entire Council can discuss them and have input, and, further, that the workshop is not on the same day the motion [to approve the issue] will come before the Council, the motion was seconded by Councilmember Montgomery. The motion to amend was unanimously adopted, 7-0. The original motion was unanimously adopted, 7-0.

7. MEDIA INQUIRIES RELATED TO MATTERS ON THE AGENDA

There were no media inquiries.

8. ITEMS OF COMMUNITY INTEREST

(Hear announcements concerning items of community interest from the Mayor, Councilmembers, and City staff for which no action will be discussed or taken.)

- The annual E-Waste Day will be held at the City's Disposal and Recycling Center on Saturday, April 2. Call 294-5712 for more information.
- The Main Street Music Festival will be returning in April. Watch the Main Street Facebook page for dates and performers.
- Mayor Pro Tem Olson has an HISD Minute!
- Stay tuned for more info. on the HISD Little Stinger Book Drive in early April. Start digging out your gently used Pre-K through 4th grade kids' books!
- SHSU's All Paws In will be Saturday, April 9. Contact Student Government for volunteer opportunities in our community!

9. EXECUTIVE SESSION

- a. **City Council will convene in closed session as authorized by Texas Government Code Chapter 551, Section 551.071 to receive legal advice on Charter Section 11.17.**
- b. **City Council will convene in closed session as authorized by Texas Government Code Chapter 551, Section 551.071 to receive legal advice on claims regarding the Americans with Disabilities Act.**
- c. **City Council will meet in Executive Session pursuant to Texas Government Code Section 551.074 – personnel matters regarding the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee, concerning City Secretary Lee Woodward.**

Councilmember Allen moved to discuss item 9a in open session, the motion failed for lack of a second. The Council adjourned into Executive Session at 6:47 p.m.

10. RECONVENE

Take action, if necessary, on items addressed during Executive Session.

The Council reconvened at 8:49 p.m. Mayor Pro Tem Olson moved to authorize the City Attorney to enter into an agreement with Bill Helfand on the ADA issues in item 9b, the motion was seconded by Councilmember Johnson. The motion was unanimously adopted, 7-0.

11. ADJOURNMENT

Mayor Brauningher adjourned the meeting at 8:49 p.m.

Lee Woodward, City Secretary

MINUTES FROM THE HUNTSVILLE CITY COUNCIL SPECAIL SESSION MEETING HELD ON THE 29TH DAY OF MARCH 2016, IN THE CITY HALL, LOCATED AT 1212 AVENUE M, IN THE CITY OF HUNTSVILLE, COUNTY OF WALKER, TEXAS, AT 6:00 P.M.

The Council met in a regular session with the following:

COUNCILMEMBERS PRESENT: Andy Brauninger, Joe Emmett, Lydia Montgomery, Don H. Johnson, Keith Olson, Ronald Allen, Joe P. Rodriquez, Tish Humphrey

COUNCILMEMBERS ABSENT: None

OFFICERS PRESENT: Matt Benoit, City Manager; Leonard Schneider, City Attorney; Lee Woodward, City Secretary

MAIN SESSION [6:00 P.M.]

1. **CALL TO ORDER** - Mayor Brauninger called the meeting to order at 6:00 p.m.
2. **INVOCATION AND PLEDGES** – Mayor Brauninger gave the invocation and led the pledges.
3. **MEDIA INQUIRIES RELATED TO MATTERS ON THE AGENDA**

There were no media inquiries.

4. EXECUTIVE SESSION

- a. **City Council will convene in closed session as authorized by Texas Government Code Chapter 551, Section 551.071 to receive legal advice and 551.072 – deliberation regarding purchase, exchange, lease or value of real property on Town Creek Drainage Project implementation.**

The Council adjourned into Executive Session at 6:02 p.m.

5. RECONVENE

Take action, if necessary, on items addressed during Executive Session.

The Council reconvened at 7:00 p.m. No action was taken.

6. ADJOURNMENT

Mayor Brauninger adjourned the meeting at 7:00 p.m.

Lee Woodward, City Secretary





CITY COUNCIL AGENDA

4/5/2016

Agenda Item: 5a

Item/Subject: Consider awarding the construction contract for the 30-Inch Water Transmission Main Surge Protection (Air/Vacuum Release Valves) Project (Project No. 14-11-11).

Initiating Department/Presenter: Engineering

Presenter: Y. S. "Ram" Ramachandra, City Engineer

Recommended Motion: Move to award the construction contract to 5-T Utilities, Inc., for the construction of the 30-Inch Water Transmission Main Surge Protection Project (Air/Vacuum Release Valves) in the amount of \$188,863.62.

Strategic Initiative: Goal #4 - Infrastructure - Ensure the quality of the City utilities, transportation and physical structures so that the City's core services can be provided in an effective and efficient manner.

Discussion: In view of upgrading of high service pumps with the TRA water treatment plant expansion, the City completed an engineering evaluation of the 30-inch treated water transmission line (between the TRA water treatment plant and the City) last year for its adequacy to handle higher pressures. The study mainly recommended the following surge protection measures to continue to maintain the integrity of 30-inch water transmission main:

1. Replacement/addition of existing air/vacuum release valves
2. Installation of hydropneumatic tank

The above measures will mainly protect the water main from "water hammer" effects and avoid accumulation of air and vacuums at high points along the water main.

The staff has completed the detailed design of both items 1 and 2 above. This agenda item is pertaining to item 1 – Replacement/addition of the existing air/vacuum release valves.

Bidding of item 2 – Installation of the hydropneumatic tank is yet to be scheduled and will be presented to the Council upon completion of the bidding process.

Alan Plummer Associates, Inc., Fort Worth, provided design services for the 30-inch Water Transmission Main Surge Protection (Air/ Vacuum Release Valves) project. The project mainly consists of:

- a) Adding two (2) new Surge Critical Air/Vacuum Release valves on 30-inch water main in the vicinity of the Palm Street Water Plant
- b) Replacing six (6) existing Air/Vacuum Release valves on 30-inch water main at various locations between TRA Water Treatment Plant and Palm Street Water Plant.

Notice to Bidders was advertised on March 6, 2016 upon completion of the design. All work will be accomplished in the City right-of-way or existing waterline easement. Hence, no utility easement acquisition was required. Notice to Bidders was posted on the Huntsville Item and the City of Huntsville web sites. In addition, project drawings and contract documents were posted on Electronic State

Business Daily (ESBD), the City of Huntsville, and Public Purchases web sites. Hard copies of the bid document were sent to potential bidders upon request.

A non-mandatory pre-bid meeting was held on March 15, 2016 to allow all responders access to the City staff for questions, comments and clarifications on the scope of work. The bids were opened on March 22, 2016. Only one (1) bid was received for this project. The certified bid tabulation is attached to this agenda item. The bid amount is \$188,863.62, from 5-T Utilities, Inc., Huntsville. Engineer's estimate was in the \$170,000 range.

5-T Utilities has previously worked on numerous City projects for water and wastewater construction, meeting the project requirements. Staff recommends award of construction contract to 5-T Utilities, Inc.

The construction contract period will be one hundred and twenty (120) calendar days from the date of Notice to Proceed (NTP).

Previous Council Action: The project was funded with \$390,000 during FY 2014-2015 and \$290,000 during FY 2015-2016 to provide design and construction of 30-Inch Water Transmission Main Surge Protection (to cover installations of both air/vacuum release valves and hydropneumatic tank). The City Council approved engineering agreement with Alan Plummer Associates for a fee of \$72,598 in 7/7/2015 meeting for design of air/vacuum replacements/additions and installation of hydropneumatic tank.

Financial Implications:

There is no financial impact associated with this item.

Item is budgeted: 701-7247-62300 Current account balance is \$316,201
701-7250-62300 Current account balance is \$290,000

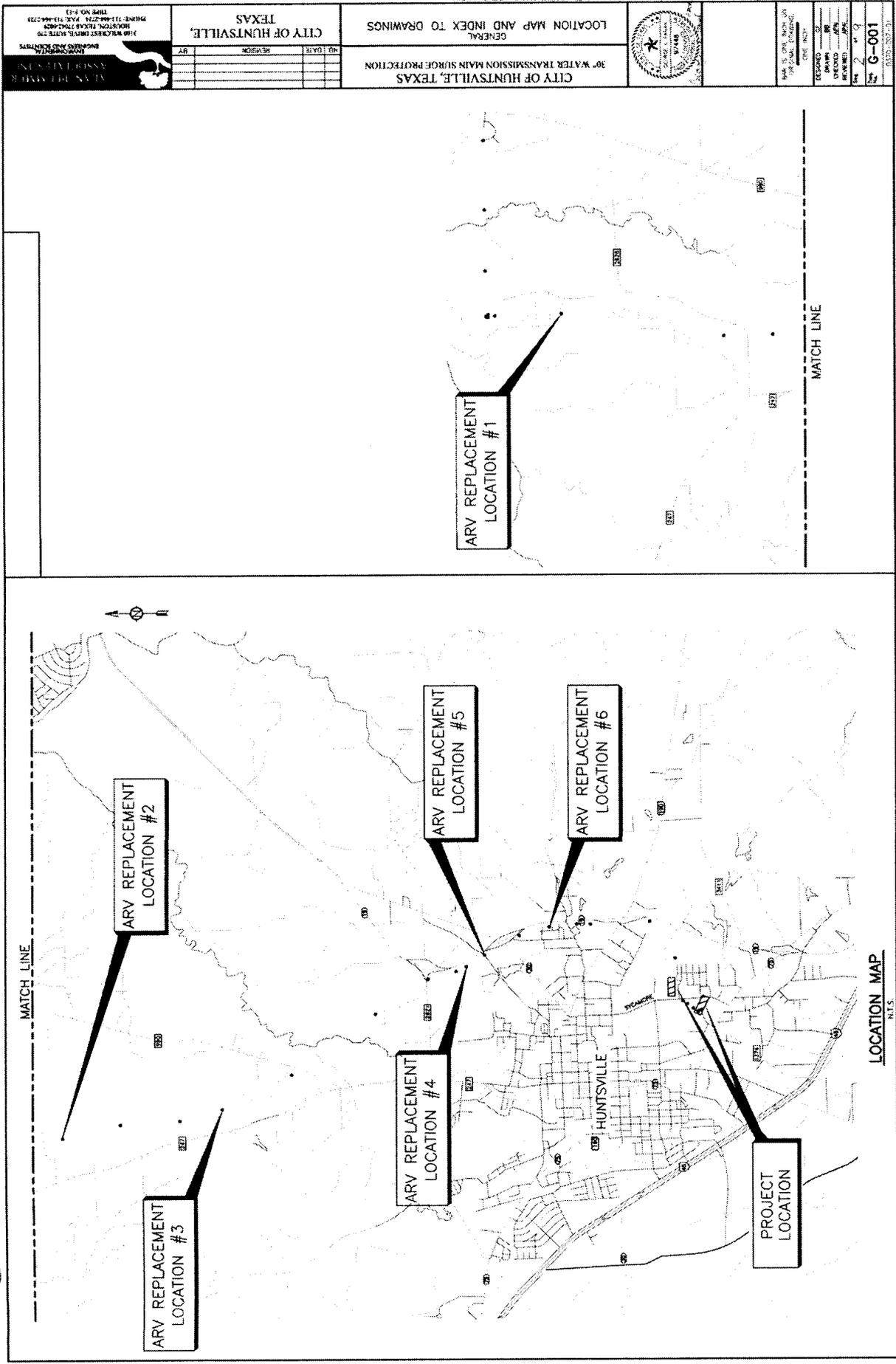
Item is not budgeted:

Item is estimated to generate additional revenue:

Approvals: City Attorney Director of Finance City Manager

Associated Information:

- Project location map (page 3)
- Certified bid tabulations (pages 4)



Bid Tabulation

Bid Date: Tuesday, March 22, 2016, Time: 2:00 P.M. Central Standard Time



30-Inch Water Transmission Main Surge Protection Project# 14-11-11

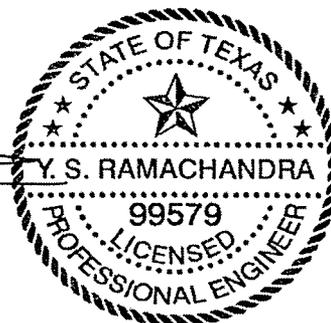
Item No.	Description	Quantity	Unit of Measure	5-T Utilities, Inc.	
				Unit Price	Total
1	4-inch Surge Critical Air/Vacuum Valves with Slow-Closing Air Release Valves Complete in Place	2	EA	\$ 3,238.70	\$ 6,477.40
2	24-inch blind flange with 4-inch opening Complete In Place	1	EA	\$ 2,585.47	\$ 2,585.47
3	24-Inch hot tap Ex. 30-inch PCCP Complete In place	1	EA	\$ 77,100.00	\$ 77,100.00
4	4-Inch hot tap Ex. 30-inch PCCP Complete In Place	1	EA	\$ 11,610.00	\$ 11,610.00
5	6-ft. Diameter Concrete Manhole Complete In Place per Each.	1	EA	\$ 6,477.41	\$ 6,477.41
6	24" Gate Valve Complete In Place	1	EA	\$ 22,465.52	\$ 22,465.52
7	Remove and replace Ex. ARV at Various Locations, including isolation Valves Complete In Place	6	EA	\$ 4,738.34	\$ 28,430.04
8	Concrete Vault (7'x6') Complete In Place	1	LS	\$ 7,406.66	\$ 7,406.66
9	Bollards Complete In Place	8	EA	\$ 264.39	\$ 2,115.12
10	Pipeline Markers Complete In Place	4	EA	\$ 624.00	\$ 2,496.00
11	Excavation and Backfill Complete In Place	1	LS	\$ 6,000.00	\$ 6,000.00
12	Site Restoration Complete In Place	1	LS	\$ 6,000.00	\$ 6,000.00
13	SWPPP Complete In Place	1	LS	\$ 500.00	\$ 500.00
14	Traffic Control Planning Complete In Place	1	LS	\$ 3,000.00	\$ 3,000.00
15	Trench Safety Plan Complete In Place	1	LS	\$ 5,000.00	\$ 5,000.00
16	Misc. Asphalt Road Repair Complete in Place	20	SY	\$ 40.00	\$ 800.00
17	Misc. Gravel Road Repair Complete in Place	10	SY	\$ 40.00	\$ 400.00
Total Base Bid				\$188,863.62	
Percentage over Low Bidder				Only one bidder	

Note: Item #9 mathematical error response lists unit total as \$2,915.12 actual unit total should read \$2,115.12
 Item#17 mathematical error response lists unit total as \$800.00 actual unit total should read \$400.00

I hereby certify that the bid tabulations contained herein were prepared by me or under my direct supervision. The individual contractor's Unit Bid prices and Bid Amounts are the actual amounts placed on the Bid Sheet for the bidding process. Any discrepancies in the Unit Bid price and Bid Amounts are noted above.

Signed, Sealed and dated this 23rd day of March year 2016 by Y.S. Ramachandra, P.E.

Y.S. Ramachandra





CITY COUNCIL AGENDA

4/5/2016

Agenda Item: 5b

Item/Subject: Authorize the City Manager to sign a construction services agreement with Garney Companies, Inc. for construction services to complete the Town Creek drainage project.

Initiating Department/Presenter: City Manager

Presenter: Matt Benoit, City Manager; Dr. Sherry McKibben, Director of Neighborhood Resources; Ram Ramachandra, City Engineer

Recommended Motion: **FIRST READING** - Move to authorize the City Manager to sign a construction services agreement with Garney Companies, Inc. for construction services to complete the Town Creek Drainage Project, first reading.

Strategic Initiative: Goal #4 - Infrastructure - Ensure the quality of the City utilities, transportation and physical structures so that the City's core services can be provided in an effective and efficient manner.

Executive Summary: In November 2015, the City Council approved a Construction Manager at-Risk contract with Garney Construction to assist with the elements such as design review, cost-estimating and project reviews with property owners along the Town Creek drainage project. Garney's involvement with the project has been most helpful and their staff has worked well with the team and engineering design consultants. The project has reached the 95% design level. With that, it is appropriate to consider the next phase of services from Garney to complete construction of the project. This contract will secure their services to construct the project a monthly amount of \$87,405 and not to exceed \$1,048,860. These amounts are reasonable and customary for the work and complexity of this project.

Discussion: On November 17, 2015, the City Council authorized the City Manager to sign an agreement for Construction Manager At-Risk (CMAR) services with Garney Companies, Inc. (Garney). The services to be provided by Garney included only those services associated with design (such as design reviews, cost estimating and working with land-owners). At present, the project design is 95% complete. With that, this item recommends a new contract with Garney to complete the construction phase of Town Creek.

This contract contains five primary services to be provided by Garney. They include:

1. Solicit interest of subcontractors to perform the various trades needed to complete this project. It is estimated that 15 separate trades and 10 material suppliers will be needed to complete this project. It is to the City's and Garney's benefit to create as much interest as possible for each of these trades.
2. Once subcontractor proposals are received, Garney is to interview and make a recommendation to the City of the subcontractor they wish to employ for this project.
3. After the Council's approval of the total project, coordinate every phase of the work, including regular and routine updates to landowners on project progress, as well as to the City. This includes completing pay estimates and ensuring the project schedule is managed properly.
4. Although it is not anticipated, if a subcontractor does not perform the necessary services, it is Garney's responsibility to either find another qualified party to complete the work or complete the work themselves (at no additional cost).

5. Closeout the project, including complying with all grant conditions.

The fee for Garney's services is \$87,405/month. This fee includes all of the General Conditions, overhead and profit (i.e., items required by the general conditions of the construction plans). General Conditions include providing a Superintendent, a job trailer, utilities, and all of the back-office services necessary to pay employees and subcontractors and comply with grant requirements and audit requirements. The only expense not covered in that fee is the cost of performance and payment bonds and insurance (which is likely in the neighborhood of 2% to 2.5% of the total project cost).

A few other important notes about the fee. First, it is capped at \$1,048,860 (or 12 months of work). This is important because several phases of work will be highly dependent on and subject to the weather. If it requires 18 months to complete the project, the City will only pay for 12. Second, the fee is reasonable and appropriate given the scope of work and complexity of the project. Although the grant does not allow basing the fee as a percentage of project cost, that method is still a good way to review the reasonableness of the fee. With an estimated construction budget of \$9,000,000, Garney's fee is approximately 11.6% (less bonds and insurance). For smaller projects (without the economies of scale), the City has paid between 10% and 15% for approximately the same services.

Finally, this phase of the work does not proceed forward unless or until the City provides a written notice to proceed. Therefore, the fee does not commence until the cost estimates meet the construction budget. There is no financial risk until there is reasonable certainty that the project is ready to proceed to the proposal (bidding) phase.

Previous Council Action: A Council workshop was held on May 5, 2015, to give Council an update on the project. On May 5, 2015, the City Council approved amending Klotz's contract to include Phase II engineering in the amount of \$360,351. In July 2015, the Council accepted Phase II funding from FEMA/TDEM and amended the budget for the matching funds required. On November 17, 2015, the City Council authorized the City Manager to sign an agreement for design services review Construction Manager At-Risk (CMAR) services with Garney Companies, Inc. (Garney). On March 1, 2016, a Council workshop was held to give the Council an update on the progress of the project.

Financial Implications:

Item is budgeted: The budget for the Town Creek Drainage Project was most recently updated and approved by the City Council on July 7, 2015, when the Council accepted the grant and the total cash budget for the project was approved at \$11,454,877 (with \$8,591,157 being grant funds and \$2,863,720 being City cash match).

Approvals: City Attorney Director of Finance City Manager

Associated Information:

- Proposed Construction Services Contract with Garney (pages 3-29)

*Note, the section numbering on this document needs to be revised, and will occur before City Manager's signature.

AGREEMENT FOR CONSTRUCTION MANAGER-AT-RISK SERVICES

THIS AGREEMENT FOR CONSTRUCTION MANAGER-AT-RISK SERVICES (the "Contract") is made this _____ (the "Contract Date"), between **THE CITY OF HUNTSVILLE, TEXAS** (hereinafter the "Owner") and Garney **COMPANIES, INC.** (hereinafter "Construction Manager")

WHEREAS, the Owner requires the performance of certain construction management services, as hereinafter described, for construction of the **Town Creek** (the "Project"); and

WHEREAS, Construction Manager is prepared and able to perform the construction manager-at-risk services required by the Owner;

THEREFORE, in consideration of the mutual promises hereinafter set out, the Owner and Construction Manager agree as follows:

1. GENERAL PROVISIONS

1.1 The Contract Documents. The Contract Documents consist of this Contract, Exhibits, drawings, specifications, addenda issued prior to the execution of this Contract, other documents listed in this Contract, and modifications issued after execution of this Contract, all of which form the Contract and are as fully a part of the Contract as if attached hereto or repeated herein. Upon the Owner's acceptance of the Construction Manager's Guaranteed Maximum Price proposal, the Contract Documents will also include the documents described in Section 2.4.1.3 and identified in the Executed Guaranteed Maximum Price Proposal. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.

1.2 Relationship of the Parties. The Construction Manager accepts the relationship of trust and confidence established by this Contract and covenants with the Owner to furnish the construction management services set forth herein; to provide efficient administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Construction Manager and to make payments to the Construction Manager in accordance with the requirements of this Contract.

2.3 Construction Phase Services

2.3.1 The Construction Phase of this project may occur in phases. Any phase will commence upon the Owner's issuance of a written Notice to Proceed.

2.3.2 Those portions of the Work that the Construction Manager does not customarily perform with the Construction Manager's own personnel shall be performed under subcontracts or by other appropriate agreements with the Construction Manager. The Owner may designate specific persons

from whom, or entities from which, the Construction Manager shall obtain proposals. The Construction Manager shall prepare and review with the Owner Requests for Proposal ("RFP") for major elements of the Work. Upon the Owner's approval of the RFPs, the Construction Manager shall issue the RFPs and obtain proposals from Subcontractors and from suppliers of materials or equipment and shall deliver such proposals to the Owner. The Owner shall then determine, with the advice of the Construction Manager, which proposals will be accepted. The Construction Manager shall not be required to contract with anyone to whom the Construction Manager has reasonable objection.

- 2.3.3 If the Guaranteed Maximum Price has been established and when a specific proposal submitter (1) is recommended to the Owner by the Construction Manager, (2) is qualified to perform that portion of the Work, and (3) has submitted a proposal that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another proposal be accepted, then the Construction Manager may require that a Change Order be issued to adjust the Contract Time and the Guaranteed Maximum Price be adjusted by the difference between the proposal of the person or entity recommended to the Owner by the Construction Manager and the amount and time requirement of the subcontract or other agreement actually signed with the person or entity designated by the Owner.
- 2.3.4 Subcontracts or other agreements shall conform to the applicable payment provisions of this Agreement, and shall not be awarded on the basis of cost plus a fee without the prior consent of the Owner. If the Subcontract is awarded on a cost-plus a fee basis, the Construction Manager shall provide in the Subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Construction Manager in Section 2.4.13.
- 2.3.5 The Construction Manager shall schedule and conduct meetings to discuss such matters as procedures, progress, coordination, scheduling, and status of the Work. The Construction Manager shall prepare and promptly distribute minutes to the Owner.
- 2.3.6 Upon the execution of an Executed Guaranteed Maximum Price Proposal as provided in Section 2.4.1, the Construction Manager shall prepare and submit to the Owner a final construction schedule for the Work and submittal schedule.
- 2.3.7 The Construction Manager shall record the progress of the Project. On a monthly basis, or otherwise as agreed to by the Owner, the Construction Manager shall submit written progress reports to the Owner, showing percentages of completion and other information required by the Owner. The Construction Manager shall also keep, and make available to the Owner, a daily log containing a record for each day of weather, portions of the Work in progress, number of workers on site, identification of

equipment on site, problems that might affect progress of the work, accidents, injuries, and other information required by the Owner.

2.3.8 The Construction Manager shall develop a system of cost control for the Work, to include a forecast of anticipated costs and regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes. The Construction Manager shall identify variances between actual and estimated costs and report the variances to the Owner and shall provide this information in its monthly reports to the Owner.

2.4 Compensation for Construction Phase Services

2.4.1 Guaranteed Maximum Price Proposal

2.4.1.1 Following review and approval by Owner of Subcontractor proposals, the Construction Manager shall prepare a Guaranteed Maximum Price proposal for the Owner's review and acceptance. The Guaranteed Maximum Price in the proposal shall be the sum of the Construction Manager's estimate of the Cost of the Work, including all costs and contingencies described in this Section, and shall also include a determination of the Construction Manager's Fee according to Section 2.4.2.

2.4.1.2 To the extent that the Drawings and Specifications are anticipated to require further development, the Construction Manager shall provide in the Guaranteed Maximum Price for such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

2.4.1.3 The Construction Manager shall include with the Guaranteed Maximum Price proposal a written statement of its basis, which shall include the following:

1. A list of the Drawings and Specifications, including all Addenda thereto;
2. A list of the clarifications and assumptions made by the Construction Manager in the preparation of the Guaranteed Maximum Price proposal, including assumptions under Section 2.4.1.2, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
3. A statement of the proposed Guaranteed Maximum Price, including a statement of the estimated Cost of the Work

organized by trade categories or systems, allowances, contingency, and the Construction Manager's Fee;

4. The anticipated date of Substantial Completion upon which the proposed Guaranteed Maximum Price is based; and
5. A date by which the Owner must accept the Guaranteed Maximum Price.

2.4.1.5 The Construction Manager shall meet with the Owner to review the Guaranteed Maximum Price proposal. In the event that the Owner discovers any inconsistencies or inaccuracies in the information presented, it shall promptly notify the Construction Manager, who shall make appropriate adjustments to the Guaranteed Maximum Price proposal, its basis, or both.

2.4.1.6 If the Owner notifies the Construction Manager that the Owner has accepted the Guaranteed Maximum Price proposal in writing before the date specified in the Guaranteed Maximum Price proposal, the Guaranteed Maximum Price proposal shall be deemed effective. Promptly thereafter, Owner and Construction Manager shall both sign the Guaranteed Maximum Price proposal (hereinafter, the "Executed Guaranteed Maximum Price Proposal"). The Executed Guaranteed Maximum Price Proposal shall set forth the agreed upon Guaranteed Maximum Price with the information and assumptions upon which it is based.

2.4.1.7 The Construction Manager shall not incur any cost to be reimbursed as part of the Cost of the Work prior to the commencement of the Construction Phase, unless the Owner provides prior written authorization for such costs.

2.4.1.8 The Owner shall authorize the Construction Manager to provide the revisions to the Drawings and Specifications to incorporate the agreed-upon assumptions and clarifications contained in the Executed Guaranteed Maximum Price Proposal. The Construction Manager shall notify the Owner of any inconsistencies between the Executed Guaranteed Maximum Price Proposal and the revised Drawings and Specifications.

2.4.2 Construction Manager's Fee. For the Construction Manager's performance of the Work as described in Section 2.3, the Owner shall pay the Construction Manager the Contract Sum in current funds for the Construction Manager's performance of the Contract. The Contract Sum is the Cost of the Work as defined in this Section plus the Construction Manager's Fee as defined in this Section. The Construction Manager's Fee shall be calculated as follows:

2.4.2.1 The Construction Manager's Fee shall be \$87,405 monthly.

2.4.2.1 The Construction Manager's Fee shall include the following:

1. Gross Margin and/or Profit
2. Taxes on Income
3. Principal Office Overhead
4. Insurance (Workers Compensation, General Liability, Completed Operations, and Builder's Risk)
5. Other "General Condition" items that are standard practice for similar projects, as described in Section 2.4.11.

2.4.2.2 The monthly fee, in Section 2.4.2.1, shall not exceed \$1,048,860 no matter the duration of the project.

2.4.2.3 The monthly fee, in Section 2.4.2.1, does not include the cost for performance and payment bonds.

2.4.3 Guaranteed Maximum Price

2.4.3.1 The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Executed Guaranteed Maximum Price Proposal, as it is amended from time to time. To the extent the Cost of the Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner. To the extent the Cost of the Work is less than the Guaranteed Maximum Price, 100% of the savings shall be retained by the Owner.

2.4.3.2 The Guaranteed Maximum Price is subject to additions and deductions by Change Order as provided in the Contract Documents and the Date of Substantial Completion shall be subject to adjustment as provided in the Contract Documents.

2.4.4 Discounts, Rebates and Refunds. Cash discounts obtained on payments made by the Construction Manager shall accrue to the Owner if (1) before making the payment, the Construction Manager included them in an Application for Payment and received payment from the Owner, or (2) the Owner has deposited funds with the Construction Manager with which to make payments; otherwise, cash discounts shall accrue to the Construction Manager. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Construction Manager shall make provisions so that they can be obtained.

2.4.5 Accounting Records. The Construction Manager shall keep full and detailed records and accounts related to the project and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda and other data relating to this Contract. The Construction Manager shall preserve these records for a period of three years after final payment, or for such longer period as may be required by law.

3. OWNER'S RESPONSIBILITIES

3.3 Owner's Responsibilities During Construction Phase

3.3.1 The Owner shall furnish information or services required of the Owner by the Contract Documents with reasonable promptness. The Owner shall also furnish any other information or services under the Owner's control and relevant to the Construction Manager's performance of the Work with reasonable promptness after receiving the Construction Manager's written request for such information or services

3.3.2 The Owner shall at once report to the Construction Manager any errors, inconsistencies or omissions that the Owner discovers in the Construction Documents. Failure by the Owner to report to the Construction Manager any such errors, inconsistencies or omissions shall not relieve the Construction Manager of any of its responsibilities with respect to such errors, inconsistencies or omissions.

3.4 Owner's Designated Representative. The Owner shall identify a representative authorized to act on behalf of the Owner with respect to the Project. The Owner's representative shall render decisions promptly and furnish information expeditiously, so as to avoid unreasonable delay in the services or Work of the Construction Manager

3.5 Legal Requirements. The Owner shall furnish all legal and accounting services, including auditing services, that may be reasonably necessary at any time for the Project to meet the Owner's needs and interests.

4. CONTRACTOR'S RESPONSIBILITIES

4.1 Conduct of Services

4.1.1 Construction Manager represents and warrants to the Owner that Construction Manager is competent to perform and provide the services required by this Contract, and the Construction Manager has the necessary permits, licenses and qualifications to perform such services. When applicable law requires that services be performed by licensed professionals, the Construction Manager shall provide those services through the performance of qualified persons or entities duly licensed to practice their professions, including but not limited to, lawfully licensed architects, engineers or other design professionals. Construction Manager shall exercise skill, care and diligence in the performance and provision of the Work required by this Contract. Construction Manager shall perform the services promptly and in full conformity with all requirements of this Contract, and shall carry out its obligations under this Contract in accordance with customarily accepted practices. In the event that Construction Manager should fail to comply with any of the foregoing requirements or standards, Construction Manager shall perform at its own costs and without reimbursement from the Owner, the services necessary to correct deficiencies in the services or work which are so caused.

4.1.2 The Construction Manager shall be responsible to the Owner for acts and omissions of the Construction Manager's employees, architects, contractors, subcontractors, engineers, design professionals, and their agents and employees, and other persons or entities, including the architect, engineer and other design professionals, performing any portion of the Construction Manager's obligations under the Contract Documents.

4.1.3 The Construction Manager shall obtain from each of the Construction Manager's professionals and furnish to the Owner certifications with respect to the documents and services provided by such professionals (a) that, to the best of their knowledge, information and belief, the documents or services to which such certifications relate (i) are consistent with the Contract Documents and the Design Documents, except to the extent specifically identified in such certificate, (ii) comply with applicable industry and professional practice standards, and (iii) comply with applicable laws, ordinances, codes, rules and regulations governing the design of the Project; and (b) that the Owner and its consultants shall be entitled to rely upon the accuracy of the representations and statements contained in such certifications.

4.2 Construction Schedule

4.2.1 Construction Manager shall prepare and maintain a detailed schedule (the "Construction Schedule") to construct the Project. The Construction Schedule shall accurately represent and reflect, to the best of Construction Manager's knowledge, experience and ability, the total time

required to complete each task and the progress of the Work relative to the Substantial Completion Date (as hereinafter defined). The Construction Manager shall promptly revise the Construction Schedule as the scope of the Project changes and report any revisions in the Construction Schedule to "Owner's Representative" (hereinafter defined).

4.2.2 Time is of the essence of this Contract. In the event that the Construction Schedule as regularly revised indicates that the Substantial Completion Date will not be met, Construction Manager shall, at its sole cost and expense, implement remedial actions that are reasonably necessary to achieve Contract compliance. In addition, in the event the Owner determines that the Work to achieve the Substantial Completion Date has not progressed or reached the level of completion required by this Contract, the Owner shall have the right to order the Construction Manager to take corrective measures necessary to expedite the progress of the Work, including, without limitation, (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment and facilities, and (iii) other similar measures (collectively, the "Extraordinary Measures"). Such Extraordinary Measures shall continue until the progress of the Work complies with the Construction Schedule. The Owner's right to require Extraordinary Measures is solely for the purpose of ensuring the Construction Manager's compliance with the Construction Schedule. The Construction Manager shall not be entitled to an adjustment in the Contract Price or Construction Schedule in connection with Extraordinary Measures required by the Owner under or pursuant to this paragraph unless this Contract otherwise expressly permits the same and Owner may exercise the rights furnished the Owner under or pursuant to this paragraph as frequently as the Owner deems necessary to ensure that the Construction Manager's performance of the Work will comply with any completion date set forth in the Construction Schedule.

4.2.3 Substantial Completion. As used in this Contract, the term "Substantial Completion" or "Substantially Completed" shall mean the stage in the progress of the Work when the Work is sufficiently complete in accordance with the Contract Documents and verified by both Owner and Construction Manager, in order that the Owner can occupy or utilize the Project for its intended use.

4.2.4 Certificate of Substantial Completion

4.2.4.1 When the Construction Manager considers the Work to be substantially complete, the Construction Manager shall provide written notice to Owner. Promptly following Owner's receipt of such notice, Construction Manager and Owner's Representative shall meet at the Site, inspect the Work and review test results if any, in order for the Owner to determine whether the Work is substantially complete. Construction Manager and Owner's Representative shall also complete a comprehensive list of all items to be completed or corrected (the "Punchlist") by the Construction Manager. Failure to

include an item on the Punchlist shall not alter the Construction Manager's responsibility to complete all Work in accordance with this Contract. Construction Manager shall commence with the correction and/or completion of any item on the Punchlist immediately thereafter. If the items set forth on the Punchlist are not corrected within the agreed upon timeframe, Owner shall have the right to hire an independent contractor to complete the work on Construction Manager's behalf and shall have the right to deduct the costs of such work from the Final Payment, or bill Construction Manager for such costs, including the cost of any supervision. If an item cannot reasonably be corrected within a fourteen (14) day timeframe, the reasons therefore shall be explained in writing on the Punchlist to Owner's satisfaction. The Punchlist shall in no way waive or alter any other rights of Owner under this Contract pertaining to warranties, latent defects, or otherwise.

4.2.4.2 When the Owner approves the Work as substantially complete, the Owner shall prepare a Certificate of Substantial Completion to be executed by Construction Manager and Owner establishing the date of Substantial Completion, and the time within which Construction Manager shall finish the Punchlist items accompanying the Certificate. The Punchlist shall be attached to the Certificate of Substantial Completion. Warranties required by this Contract shall commence on the date of Substantial Completion unless otherwise provided in the Certificate of Substantial Completion.

4.2.5 Certificate of Substantial Completion

4.2.5.1 Promptly following issuance of the Certificate of Substantial Completion, Construction Manager shall commence and complete all remaining Punchlist items as provided in the Certificate of Substantial Completion.

4.2.5.2 Upon completion of the Punchlist, the Construction Manager shall provide written notice to Owner and request an inspection by the Owner to determine whether the Project is "Complete." When the Owner determines that all Punchlist items are complete, it shall deem the Project "Complete". When the Project is Complete, Owner shall release the Retainage to Construction Manager as provided in Section 7.3.

4.3 Materials and Engineering, etc.

4.3.1 Construction Manager warrants to Owner that materials and equipment furnished under this Contract are of good quality and new, except as otherwise expressly required or permitted by this Contract, that the Work will be free from material defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the

Contract. Work not conforming to these requirements, including substitutions not properly approved or authorized by the Owner, shall be considered defective. Cure of such defect shall be by correction or replacement of the Work, at the Construction Manager's sole cost. If required by Owner, Construction Manager shall supply satisfactory evidence as to the kind and quality of materials and equipment.

- 4.3.2 The Construction Manager agrees that all materials incorporated by it during the Work and all materials delivered by it for incorporation in the Project shall be free of any and all liens, claims, chattel mortgages, security interests, and conditional sales agreements of third parties, that any monies it shall receive in payment for Work performed under this Contract shall be received in trust and used to discharge its financial obligations with respect to the Work, that it will not file or cause to be filed any mechanic's lien for materials furnished or to be furnished and/or for labor performed or to be performed. If any subcontractor or any materialman or anyone claiming by or through such subcontractor or materialman shall file or cause to be filed any lien, Construction Manager will upon notice from Owner, cause such lien to be canceled and discharged (by payment, bonding or otherwise) within ten (10) days from such notice; and in the event of Construction Manager's failure to observe any of the foregoing, Owner shall have the right to cause such lien to be canceled and the cost thereof, including the premiums upon any bond furnished for such cancellation and discharge and reasonable attorneys fees and disbursements, shall be paid by Construction Manager or at the option of Owner shall be deducted from any payment then due or thereafter becoming due from Owner to Construction Manager. Nothing contained in the preceding sentence or otherwise in this Contract shall be deemed to create a relationship between Owner and Construction Manager other than that of Owner and independent contractor. Said right shall be cumulative and shall be in addition to any and all other rights and remedies herein or otherwise by law given to Owner. Upon receipt of evidence of Construction Manager's default hereunder with respect to its obligations to make payments to its subcontractors and suppliers, Owner reserves the right (but not the obligation) to, after three (3) business days prior written notice, retain any money due Construction Manager and pay directly for labor, materials, equipment, tools, plant, facilities, services and all other obligations of Construction Manager and to deduct the amount of any such direct payments from any payments or amounts then due or thereafter to become due to Construction Manager.

4.5 Supervision of the Work

- 4.5.1 Construction Manager's Representative: Prior to the commencement of the Work, Construction Manager shall provide to Owner Construction Manager's address, office and mobile telephone numbers, and other contact information for Construction Manager's Representative. Any changes to such information shall be provided in advance to Owner. Construction Manager's Representative shall be in attendance at the

Project site during the performance of the Work, accessible to the Owner at all times, and shall at all times maintain good discipline and order with its employees, subcontractors, suppliers, materialmen, and laborers. Construction Manager's Representative shall not be replaced or reassigned to any other project prior to the Substantial Completion Date without Owner's prior written consent. Construction Manager shall supplement its staff with whatever additional supervisory personnel are required to assure that the Work shall be finished by the Substantial Completion Date.

4.5.2 Changes to Supervisory Authority: Neither Construction Manager's Representative nor Owner's Representative shall be changed without five (5) business days' written notice to the other party.

4.6 Compliance with Laws

4.6.1 Construction Manager shall comply with all laws, ordinances, rules, regulations and lawful orders of public authority as bearing on the performance of the Work. The Construction Manager shall confirm that any information received from the Owner and any information in the Contract Documents complies with applicable laws, regulations and codes and the Construction Manager shall immediately notify Owner in writing if the Contract Documents are observed to be at variance with such laws, ordinances, rules, regulations and lawful orders of any public authority. In the event that a specific requirement of the Contract Documents conflicts with applicable laws, regulations and codes, the Construction Manager shall furnish Work which complies with such laws, regulations and codes.

4.7 Permits and Licenses

4.7.1 Upon the Owner's approval of the Design Documents, the Construction Manager shall make application for such permits and licenses as have been identified by Construction Manager as necessary for the design and/or construction of the Project.

4.8 Job Site Safety/Hazardous Materials

4.8.1 Job-Site Safety/Control of Work: Construction Manager shall use best efforts to maintain and protect the Work from damage and the elements and shall protect and take all reasonable precautions to protect Owner, the Project, any third party and the property of any third party from injury or loss during the course of the Work.

4.8.2 Construction Manager shall comply with all applicable rules and regulations of any public authority having jurisdiction for the safety of persons or property. Construction Manager shall erect and maintain as required by existing conditions and progress of the Work all reasonable safeguards for safety and protection, including posting danger signs, promoting safety regulations and notifying Owner and users of adjacent

utilities and properties. The Construction Manager shall promptly report in writing to the Owner all accidents arising out of or in connection with the Work that cause death, personal injury, or property damage, giving full details and statements of any witnesses. In addition, if death, serious personal injuries, or serious damages are caused, the accident shall be reported immediately by telephone or messenger to the Owner's Representative.

- 4.8.3 If the severity of the elements makes it impossible to continue operations in a safe manner in spite of all reasonable precautions, Construction Manager shall cease work and immediately notify Owner. Anything damaged due to Construction Manager's negligence shall be promptly removed and replaced with new work at Construction Manager's cost and expense.
- 4.8.4 Construction Manager shall keep the Project and surrounding area free from accumulation of debris or rubbish. At the completion of the Work, Construction Manager shall remove all waste materials, rubbish, tools, construction equipment, machinery and surplus materials from the Project.
- 4.8.5 Disposal of Hazardous Samples/Materials and Contaminated Equipment: All samples and materials produced in the course of Construction Manager's work pursuant to this Contract containing or potentially containing hazardous constituents are the property and responsibility of Construction Manager and shall be handled and disposed of properly and lawfully by Construction Manager at its cost and expense. All laboratory and field equipment that cannot readily and adequately be cleansed of its hazardous contaminants shall be the property and responsibility of Construction Manager and shall be properly and lawfully disposed of at Construction Manager's expense. Alternate arrangements to turn such equipment, materials and/or samples directly over to a licensed hazardous waste disposal facility may be made at Construction Manager's direction and expense. Construction Manager shall indemnify and hold Owner harmless from any liability, loss, expense, claim or damage caused by or resulting from Construction Manager's creation, maintenance, removal and disposal of any such hazardous materials.
- 4.8.6 Notification of Hazardous Materials: Owner hereby warrants that, if it knows or has any reason to assume or suspect that hazardous materials may exist at the project site, it has so informed Construction Manager. Owner shall furnish to Construction Manager all documents and information known to Owner that relate to the identity, location, quantity, nature or characteristics of any hazardous materials or suspected hazardous materials, on or under the site.

5. SUBCONTRACTORS

- 5.1 Definitions. A subcontractor is a person or entity who has a direct contract with the Construction Manager to perform a portion of the Work at the Site. A sub-

subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the Site.

5.2 Award of Subcontracts and Other Contracts for Portions of the Work

- 5.2.1 As soon as practicable after acceptance of the Construction Manager's Guaranteed Maximum Price, the Construction Manager shall furnish in writing to the Owner the names of subcontractors (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Owner may reply within five (5) days to the Construction Manager in writing stating (1) whether the Owner has reasonable objection to any such proposed person or entity or (2) that the Owner requires additional time for review. Failure of the Owner to reply within the five (5) day period shall constitute acceptance by the Owner of the subcontractors.
- 5.2.2 The Construction Manager shall not contract with a proposed person or entity to whom the Owner has made reasonable and timely objection.
- 5.2.3 If the Owner has reasonable objection to a person or entity proposed by the Construction Manager, the Construction Manager shall propose another to whom the Owner has no reasonable objection.
- 5.2.4 The Construction Manager shall not substitute a person or entity previously selected if the Owner makes reasonable objection to such substitution.
- 5.2.5 If the proposed but rejected subcontractor was reasonably capable of performing the Work, the Contract Price may be increased or decreased by the difference, if any, occasioned by such change with an appropriate Change Order to be issued before commencement of work by the subcontractor.
- 5.2.6 The Owner has preferred relationships with specific vendors (the "Preferred Vendors") and reserves the right to require that the Construction Manager use the Preferred Vendors for certain portions of the Work. If the Owner chooses to exercise this right, it shall identify the name and contact information for any Preferred Vendors and a description of the scope of the Work that such Preferred Vendors will perform in Exhibit A hereto (the Scope of Work). After execution of this Contract, the Construction Manager shall promptly execute written subcontracts with any Preferred Vendors for such work identified in Exhibit A.

- 5.3 Subcontractual Relations. By appropriate written agreement, the Construction Manager shall require each subcontractor, to the extent of the Work to be performed by the subcontractor, to be bound to the Construction Manager by terms of this Contract, and to assume toward the Construction Manager all the

obligations and responsibilities, including the responsibility for safety of the subcontractor's Work, which the Construction Manager, by this Contract, assumes toward the Owner. Each subcontract agreement shall preserve and protect the rights of the Owner under this Contract with respect to the Work to be performed by the subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Construction Manager that the Construction Manager, by this Contract, has against the Owner. The Construction Manager shall require each subcontractor to enter into similar agreements with sub-subcontractors. The Construction Manager shall make available to each proposed subcontractor, prior to the execution of the subcontract agreement, copies of the Contract to which the subcontractor will be bound, and, upon written request of the subcontractor, identify to the subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with this Contract. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed sub-subcontractors.

5.4 Contingent Assignment of Subcontracts

5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Construction Manager to the Owner, provided that:

1. assignment is effective only after termination of this Contract by the Owner for cause pursuant to Section 9.3 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Construction Manager in writing; and
2. assignment is subject to the prior rights of the surety, if any, obligated under bond relating to this Contract.

When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Construction Manager's rights and obligations under the subcontract.

5.4.2 Upon such assignment to the Owner under this Section, the Owner may further assign the subcontract to a successor contractor or other entity.

6. CHANGES

6.1 Changes to Work by Owner. Owner shall have the right to make changes to the Work, without invalidating this Contract. All such changes shall be performed under the conditions of this Contract, except that no extra work or modification shall be done without prior written authorization from Owner's Representative, and shall not be paid for without a written Change Order from Owner's Representative in accordance with this Section ("Change Order"). In order for the Owner to manage and track Change Orders and their impact on the total cost of the Work, Construction Manager must provide to the Owner prior to the issuance of a Change Order a cost breakdown for the item of extra work. Any

Change Order which decreases the Work shall inure to the benefit of Owner and the Contract Price shall be reduced by the actual cost savings to Construction Manager. If a Change Order which increases the cost of the Work then the Contract Sum and Guaranteed Maximum Price shall be increased accordingly. Notwithstanding anything to the contrary in this Contract, if the Owner decides to increase or decrease the Work or otherwise alter the Work by deductions or additions, including without limitation the elimination of any one or more of the items as provided in the Contract, Construction Manager shall perform the Work as so altered. Agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Work that is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such change and any and all adjustments to the Contract Price and the Construction Schedule.

- 6.2 Change Order Required. Any extension of time for the completion of the Work as a result of a Change Order shall be agreed to by the parties and set forth within such Change Order. If a Change Order does not expressly provide for an extension of time, no time extension shall be given for such Change Order. No order, statement or conduct of Owner or its representatives shall be treated as a Change Order, or entitle Construction Manager to an equitable adjustment in the Contract Price or extension of the Contract Period, unless pre-approved in writing by Owner or Owner's Representative. Change Orders are intended to be all inclusive and exhaustive as to primary and foreseeable collateral conditions, situations and effect. Unless documented by a Change Order or written authorizations of Owner or Owner's Representative, any claims for additional work performed by Construction Manager shall be deemed waived. Accordingly, no course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is, in fact, any unjust enrichment to the Work, shall be the basis of any claim to an increase in any amounts due under this Contract or a change in any time period provided for in this Contract.
- 6.4 Differing Site Conditions. If the Construction Manager encounters conditions at the Project site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract, the Construction Manager shall promptly provide written notice to the Owner before conditions are disturbed. The Owner will promptly investigate such conditions and, if the Owner determines that the conditions differ materially and cause an increase or decrease in the Construction Manager's cost of, or time required for, performance of any part of the Work, will issue a Change Order adjusting the Contract Price and/or the Contract Period. If the Owner determines that the conditions at the site are not materially different and that no change in the terms of the Contract is justified, the Owner will notify the Construction Manager in writing. If Construction Manager disputes the Owner's determination, it may proceed as provided in Section 9.1.

7. METHOD OF PAYMENT

7.1 Invoicing

7.1.1 Throughout the course of this Contract, Construction Manager shall invoice Owner pursuant to a format agreed to by Owner.

7.1.2 Any invoices from Construction Manager's contractors, subcontractor(s) or other third parties will not be paid directly by the Owner, and Construction Manager shall be responsible for and reimburse Owner for any charges associated with the transmittal and rejection of such invoices. Construction Manager shall be responsible for and indemnify and hold Owner harmless from any losses with respect to its contractors, agents, or subcontractor(s) utilized in the performance of the Work.

7.2 Progress Payments

7.2.1 Upon satisfactory progress of the Work and receipt by Owner, or its representative, if any, of an approved Invoice including all supporting documentation described below, Owner will make progress payments on this Contract as set forth in Section 7.2.2, except when in Owner's opinion it is necessary to withhold an amount to protect Owner from loss due to:

7.2.1.1 defective work not remedied;

7.2.1.2 claims or liens filed on the Project;

7.2.1.3 failure of Construction Manager to make payment promptly to subcontractors or material suppliers for labor, materials or equipment;

7.2.1.4 damage to Owner or another contractor;

7.2.1.5 reasonable evidence that the Work will not be completed in accordance with the Construction Schedule;

7.2.1.6 a persistent failure by the Construction Manager to carry out the Work in accordance with this Contract; or

7.2.1.7 reasonable evidence demonstrating that the unpaid balance of the Contract Sum is insufficient to cover the cost to complete the Work.

7.2.2 Supporting Documentation. In addition to other required items, each Invoice shall be accompanied by the following, all in form and substance reasonably satisfactory to Owner:

- 7.2.2.1 Documentation that the Work performed for which the Invoice is sent is complete and has been inspected for compliance with the Contract.
- 7.2.2.2 A duly executed and acknowledged Construction Manager's sworn statement (an "Affidavit of Payment"), showing all subcontractors with whom Construction Manager has entered into subcontracts, the amount of such subcontract, the amount requested for any subcontractor in the Invoice and the amount to be paid to Construction Manager from such progress payment, together with similar statements from all subcontractors and, where appropriate, from sub-subcontractors and suppliers of materials;
- 7.2.2.3 Duly executed waivers and releases of mechanics' and materialmen's liens from Construction Manager and all such subcontractors, suppliers or sub-subcontractors or suppliers who may have or claim to have valid lien rights in accordance with applicable law (and sub-subcontractors and suppliers of materials, to each tier), establishing payment or claim to have or satisfaction of the payment requested by Construction Manager in the Invoice, which at a minimum, shall comply with the requirements of the law.
- 7.2.3 Right to Full Compliance. If Owner elects to make any progress payment without receipt of all required supporting documentation, any such payment shall not be deemed a waiver of Owner's right to demand the required documentation and Owner shall have the right to insist upon full compliance with the requirements hereof as a condition to any and all future payments.
- 7.2.4 Inspection of Work in Place. Upon 24 hours written notice, Owner may from time to time inspect the progress and sufficiency of the Work in place at Construction Manager's place of business or such other locations where the Work is being manufactured or assembled.
- 7.2.5 Retainage. The Owner may withhold from each progress payment a sum representing 5% of the payment amount to be held as Retainage and payable as provided herein.
- 7.2.6 Timing of Progress Payments. Construction Manager shall submit Invoices to Owner for progress payments of Work achieved, including any Change Order. Owner shall pay the amount due within thirty (30) days after receipt of an original Invoice and the satisfaction of all other requirements set forth in this Section. Submission of an Invoice and the satisfaction of all requirements set forth in this Section are conditions precedent to payment from the Owner to the Construction Manager. Additionally, if there is a dispute as to the amount due, Owner shall pay the undisputed portion of the Invoice and the parties shall cooperate in

good faith to promptly resolve the dispute with respect to the unpaid amount.

7.3 Final Payment

7.3.1 Timing of Final Payment

7.3.1.1 Owner shall make the final payment (the "Final Payment") to the Construction Manager, including all Retainage, within thirty (30) days after: (1) the Owner deems the Project complete as set forth in the Contract Documents, (2) receipt of a final Invoice; and (3) the satisfaction of all other requirements set forth in Section 7.3.4. Each of these three requirements are conditions precedent to Final Payment. Additionally, if there is a dispute as to the amount due, Owner shall pay the undisputed portion of the Final Payment and the parties shall cooperate in good faith to promptly resolve the dispute with respect to the unpaid amount.

7.3.1.2 In the event Construction Manager does not timely comply with any of the requirements set forth above for the Final Payment, Construction Manager agrees that Owner shall retain all of the remainder of the Contract Sum to protect Owner against any lien rights or claims, until all requirements for the Final Payment have been satisfied.

7.3.2 The Final Payment shall constitute a waiver of all claims by Construction Manager relating to the Work, but shall in no way relieve Construction Manager of liability for the obligations assumed under this Contract or for any faulty or defective work or services discovered after the Final Payment. Construction Manager shall include the terms of this Section in its agreement with all of its subcontractors and suppliers.

7.3.3 Payment by Owner to Construction Manager of any sums due pursuant to this Contract does not constitute or imply acceptance of any portion of the Work.

7.3.4 Prior to Final Payment, and as a condition precedent thereto, Construction Manager shall furnish Owner with the following:

7.3.4.1 All operating, safety and maintenance manuals;

7.3.4.2 Marked sets of the construction documents reflecting "as built" conditions; including the location of any concealed utilities, mechanical or electrical systems and components;

7.3.4.3 An assignment and/or transfer of all guaranties and warranties from subcontractors, vendors, suppliers and manufacturers;

- 7.3.4.4 A list of the names, addresses and phone numbers of all subcontractors and other persons providing guaranties or warranties;
- 7.3.4.5 An Affidavit of Payment and a duly executed Final Payment Certification, Release and Lien Waiver from all subcontractors, suppliers or sub-tier subcontractors or suppliers who may have or claim to have valid lien rights in accordance with the law;
- 7.3.4.6 All permits, including, but not limited to, municipality controlled inspections, certificates of occupancy, certificates of completion or similar certification, all licenses and permits necessary for use, occupancy or maintenance of the Project; and
- 7.3.4.7 Certification of any other item or material and any other document reasonably requested by Owner.

7.4 Taxes

7.4.1 The rates or prices stated in this Contract have been prepared by Construction Manager and make provision for an amount relating to taxes or duties payable with respect to this Contract. Accordingly, any taxes, duties or other similar amounts eligible shall be paid by Construction Manager, but may be reimbursed by Owner as a Cost provided that Construction Manager has included such taxes in its Guaranteed Maximum Price proposal and in the Contract Sum pursuant to Section 2.4.1.

8. INSURANCE AND BONDS

8.1 Construction Manager agrees at all times during this Contract to maintain in full-force and effect at least the following insurance coverages:

Workers' Compensation

Coverage A	Statutory
Coverage B	- \$1,000,000 each Bodily Injury by Accident
Employers Liability	\$1,000,000 policy limit Bodily Injury by Disease
	\$1,000,000 each occurrence Bodily Injury by Disease

Automobile Liability

Bodily Injury/Property Damage	\$1,000,000
Combined Limit	- Single Coverage is to apply to all owned, non-owned, hired and leased vehicles

Commercial General Liability

Bodily Injury/Property Damage	\$2,000,000 each occurrence
Combined Limit	- Single \$2,000,000 general aggregate
	\$2,000,000 products/completed operations aggregate

Limit

Excess/Umbrella

Liability

Bodily Injury/Property \$10,000,000

Damage

- 8.2 Performance, Payment, Other Bonds. Construction Manager will provide Owner with payment and performance bonds or such other bonds as Owner may request in an amount equal to the Contract Price naming Construction Manager as Obligor and Owner as Oblige and containing requirements in accordance with the terms of this Contract. Such bonds shall be on a form and with a surety company approved by Owner. The cost of the premium shall be paid by Owner, however, Construction Manager warrants and represents that the premium charged to Owner is the lowest rate available to Construction Manager from such surety.

9. CLAIMS, DEFAULT, TERMINATION, AND SUSPENSION

- 9.1 Claims. A claim is a demand or assertion by Construction Manager seeking, as a matter of right, the payment of money, or an extension of time or other relief with respect to the terms of this Contract (hereinafter "Claim"). Written notice of a Claim for an increase in the Contract Price or for an extension of time must be given to Owner's Representative by Construction Manager within ten (10) calendar days after occurrence of the event giving rise to such Claim. Claims must be made by written notice which shall describe the claim with reasonable specificity. Failure to give notice in the manner and within the time specified in this paragraph shall constitute a waiver of the Claim by the Construction Manager. Construction Manager shall bear the burden and responsibility of substantiating Claims. Pending final resolution of a Claim, unless otherwise agreed to in writing by Owner, Construction Manager shall proceed diligently with performance of this Contract and Owner shall continue to make payments in accordance with this Contract. Claims not resolved between the parties shall be resolved by litigation as provided in Section 12.

9.2 Default

9.2.1 Default by Construction Manager. Should the Construction Manager (a) become insolvent or make an assignment for the benefit of creditors; (b) refuse or fail to supply enough properly skilled workers or proper materials; (c) refuse to diligently prosecute the Work; (d) fail to make payments to subcontractors for material or labor in accordance with the respective agreements between the Construction Manager and subcontractors; (e) disregard the law; and/or (f) breach or violate the terms, conditions, provisions or obligations of this Contract, Construction Manager shall be deemed in default of this Contract.

9.2.2 Remedies. If Construction Manager fails within ten (10) days after written notification of default from Owner to commence and continue satisfactory

correction of the default with diligence and promptness until completion, then Owner, without prejudice, shall have the right to exercise any and all legal and equitable remedies available including but not limited to:

- 9.2.2.1 supply workers, materials, equipment and facilities as Owner deems necessary for the completion of the Work or any part which Construction Manager has failed to complete or perform, and charge the cost, including reasonable overhead, profit, attorneys' fees, costs and expenses to Construction Manager;
- 9.2.2.2 contract with one or more additional contractors to perform such part of the Work as Owner determines will provide the most expeditious completion of the Work, and charge the cost to Construction Manager;
- 9.2.2.3 withhold any payments due or to become due Construction Manager pending corrective action in amounts sufficient to cover losses and compel performance to the extent required by and to the satisfaction of Owner; and/or
- 9.2.2.4 terminate this Contract.

9.2.3 Upon termination of this Contract, all Work in progress, including all design and engineering associated with the Work, shall become the property of Owner. Construction Manager shall immediately release all such Work in progress to Owner. Owner may also take possession of the Project site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by Construction Manager and may finish the Work by whatever reasonable method Owner deems expedient. Construction Manager shall not be entitled to receive further payment until the Work is completed. If the unpaid balance of the Contract Price exceeds the cost of fully completing the Work, such excess shall be paid to Construction Manager, less ten percent (10%) which shall be retained by Owner. If such costs exceed the unpaid balance of the Contract Price, the Construction Manager shall pay the difference to the Owner within fifteen (15) days of receipt of a written demand for payment from the Owner.

9.3 Termination or Suspension

9.3.1 Without Cause. Owner may, without cause, order the Construction Manager, in writing, to suspend, delay, interrupt or terminate the Work in whole or in part for such period as the Owner may determine. In the event Owner suspends or terminates the Work under this Paragraph, Construction Manager shall be entitled to recover from the Owner, as its sole remedy, payment for Work properly performed in connection with the suspended or terminated portion of the Work prior to the effective date of suspension or termination and for items properly and timely fabricated or partially fabricated off the Site including finished goods and work in

progress of subcontractors and suppliers, delivered and stored in accordance with the Owner's instructions, as well as actual costs for demobilization. The Construction Manager hereby waives and forfeits all other claims for payment and damages, including, without limitation, anticipated profits. The Owner shall be credited for (i) payments previously made to Construction Manager for the terminated portion of the Work, (ii) claims that the Owner has against the Construction Manager under the Contract, and (iii) the value of the materials, supplies, equipment or other items that are to be disposed of by the Construction Manager that are part of the Contract Price.

- 9.3.2 Equipment and Subcontracts. Owner shall also pay Construction Manager fair compensation, either by purchase or rental at the election of Owner, for any equipment owned by Construction Manager that Owner elects to retain. To the extent that Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), as provided in Section 5.4, Construction Manager shall, as a condition of receiving the payments referred to in this Contract, execute and deliver all such papers and take all such steps as Owner may require for the purpose of fully vesting in the Owner the rights and benefits of Construction Manager under such subcontracts or purchase orders.
- 9.3.3 Financial Responsibility of Construction Manager. At Owner's election, Construction Manager shall furnish Owner (within five (5) business days of Owner requests as same are made from time to time) with information deemed necessary by Owner to show that Construction Manager is financially solvent and capable of fully performing under this Contract. If, in Owner's judgment, Construction Manager is determined not to be financially responsible or capable, then Owner may, by written notice, terminate this Contract without further obligation to Construction Manager other than to pay Construction Manager only for the unpaid value of the Work completed at the time of termination.
- 9.3.4 Owner Inspections and Right to Stop the Work. Owner's Representative or his delegate shall have the right to inspect the Work, whether at the Site or at the Construction Manager's or a subcontractor's facility, at any time during the course of the Work. Owner may reject any aspect of the Work which does not conform to the Contract. If Construction Manager fails to correct defective work or fails to supply materials or equipment in accordance with this Contract, Owner may order Construction Manager to stop the Work until it is corrected and Construction Manager shall not be entitled to an extension for time. Owner also has the authority to stop the Work for the purpose of performing special inspections or testing of the Work. Should any work be found faulty as a result of special inspections or tests, Construction Manager shall repair the Work immediately and pay the fees for said inspections or tests. Should the Work be satisfactory, Owner will bear such costs, and will grant the appropriate extension of time to Construction Manager.

10. WARRANTIES

- 10.1 Construction Manager Warranty. Construction Manager warrants that all of the Work shall be done in a first class, workmanlike manner and in accordance with the Contract with new, quality materials and further warrants all work and materials against defects in the material or the workmanship for a period of one (1) year from the date of Substantial Completion, unless stated otherwise in this Contract. With respect to the Design Documents and any portion of the Work performed by Licensed Professionals, the Construction Manager and Licensed Professionals warrant that they shall perform their services consistent with the professional skill and care ordinarily provided by professionals practicing in the same or similar locality under similar circumstances. The Construction Manager and Licensed Professionals shall perform their services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project. If a defect in design, material or workmanship or a deviation from the Contract is latent, hidden or not readily observable, Construction Manager's warranty shall be extended for one (1) year from the date of discovery of the defect or deviation. Within a reasonable time after written notice of a defect or deviation, Construction Manager shall (without expense to Owner) remedy and repair same and any damage to other work resulting there from in a manner that does not interfere with Owner's operations. Construction Manager acknowledges that Owner may be liable for liquidated damages in the event that the Project's operations are suspended or shut down. If, within the warranty period, Owner's operations are suspended or shut down as a result of a defect or deviation in material or workmanship, and Construction Manager has failed to respond to Owner's written notice of the suspension or shutdown within 24 hours of receipt of the notice, and cure the defect such that the Project returns to normal operation, then Construction Manager may be liable for Owner's lost production revenues and liquidated damages caused by the suspension or shutdown.
- 10.2 Warranty Deficiencies. Construction Manager agrees to meet with Owner at least fifteen (15), but not more than thirty (30), days prior to the expiration of one (1) year from the start date of the commencement of the warranty period for a warranty inspection of the Work. All warranty deficiencies not caused by Owner shall be noted and the list of deficiencies shall be given to Construction Manager. Construction Manager agrees to correct all such deficiencies within thirty (30) days after the date of the meeting. If the deficiencies are not timely corrected, Owner may hire an independent contractor to do the work and shall be reimbursed promptly by Construction Manager for all costs thereof. If any item cannot, with reasonable diligence, be corrected within thirty (30) days, Construction Manager agrees to set forth in writing a reasonable schedule for completion of the work. If the schedule is not met, Owner may immediately upon notice to Construction Manager, complete the work and be entitled to prompt reimbursement from Construction Manager for all costs thereof.
- 10.3 Acts or Omissions. No act or omission of Owner or Owner's Representative shall relieve Construction Manager of Construction Manager's responsibility to correct deficient workmanship and materials.

- 10.4 Subcontractor Warranties. Construction Manager shall cause all of the subcontractors and sub-subcontractors to execute and deliver to Owner upon completion of the Work a written warranty (reasonably satisfactory to Owner) covering all work performed by such subcontractors and sub-subcontractors. Such warranty shall be for at least the same period of time as Construction Manager's warranty to the Owner and begin at the date of Substantial Completion, unless a warranty for a longer period of time is required pursuant to this Contract. All warranties included in or as part of the Project and supplied to Construction Manager shall be assigned to Owner. Those subcontractors required to supply warranties to Owner include, but are not limited to: electricians, welders, roofers, HVAC suppliers and installers.

11. NOTICES

- 11.1 All notices to be delivered under this Contract shall be in writing, signed by the parties serving same and delivered personally or by registered or certified U.S. Mail postage prepaid, or by reputable private delivery service postage prepaid and providing a receipt to sender. Each such notice shall be deemed delivered upon actual delivery or refusal or forty-eight (48) hours after mailing whichever is earlier to the pertinent address as set forth below.

Notices shall be addressed as follows:

To Owner: Matt Benoit, City Manager
 City of Huntsville, Texas
 1212 Avenue M
 Huntsville, Texas 77340
 (936) 291-5401
 mbenoit@huntsvilletx.gov

To Construction Manager: Matt Foster, Principal
 Garney Construction
 1333 NE Vivion Road
 Kansas City, MO 64118
 (816) 746-7219
 mfoster@garney.com

12. MISCELLANEOUS PROVISIONS

- 12.1 This Contract is not assignable by Construction Manager without the prior written consent of Owner which consent shall not be unreasonably withheld, in its sole and absolute discretion, and Construction Manager shall not factor or pledge this Contract.
- 12.2 No right or remedy conferred upon or reserved to Owner in this Contract is intended to be exclusive of any other right or remedy herein or by law provided,

but each shall be cumulative and in addition to every other right or remedy given herein or now or hereafter existing at law or in equity.

- 12.3 In the event of any inconsistencies within or between parts of the Contract, including the Contract Documents, or between the Contract and applicable laws, the Construction Manager shall (i) provide the better quality or greater quantity of Work, or (ii) comply with the more stringent requirement; either or both in accordance with Owner's interpretation.
- 12.4 In the event any provision of this Contract is found to be invalid or unenforceable, the remainder of this Contract shall continue in full force and effect.
- 12.5 This Contract shall be governed by and construed in accordance with the laws of the State of Texas. The parties irrevocably consent to the jurisdiction of the federal and state courts situated in Texas and agree that any lawsuit arising out of or related to this Contract shall be brought only in such courts. The parties hereby waive any claim that any proceedings brought in such courts have been brought in an inconvenient forum.
- 12.6 Owner and Construction Manager hereby irrevocably waive any right to a trial by jury in any legal proceedings or to have a jury participate in resolving any disputes or claims, whether any such disputes or claims relate to or arise in contract, tort or otherwise, whether in respect to the Contract or any other documents or instruments delivered in connection with the Contract.
- 12.7 Construction Manager hereby warrants, and covenants that (i) Construction Manager does not and will not during the course of the Work discriminate against any employee or applicant for employment based on race, color, sex, national origin, religion, age handicap, or other unlawful basis, and (ii) Construction Manager and all of its subcontractors, consultants and suppliers are and will be properly licensed and permitted with all governmental authorities having jurisdiction.
- 12.8 The parties expressly agree that this Contract was jointly drafted, and they both had opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms prior to execution. Therefore, this Contract shall be construed in a neutral manner.
- 12.9 Construction Manager waives claims against Owner for consequential damages arising out of or relating to this Contract, including damages for principal office expenses and the compensation of personnel stationed there; loss of financing, business and reputation; and for loss of profit.
- 12.10 Owner shall have the right to let other contracts in connection with the Work, and Construction Manager shall properly cooperate with any such other contractors in furtherance of the Work; however Construction Manager shall not be relieved hereunder by any subcontract or similar agreement.

- 12.11 Payments due and unpaid to Owner or Construction Manager under this Contract for a period of thirty (30) days after written demand shall bear interest from the date payment was due at the rate of six percent (6%) per annum.
- 12.12 The Owner represents and warrants to Construction Manager that Owner is financially solvent, able to pay its debts as they mature and is possessed of sufficient capital to perform its obligations hereunder.
- 12.13 Entire Agreement. This Contract represents the entire agreement between the parties and supersedes all prior or contemporaneous written or oral communications with regard to the Project. This Contract may be amended or modified only by an instrument in writing signed by a duly authorized representative of both Owner and Construction Manager. This Contract shall not be construed to create a contractual relationship of any kind between any persons or entities other than Owner and Construction Manager. Notwithstanding any other provision herein, all subcontracts shall be in writing and shall specifically provide that the Owner is an intended third party beneficiary of such subcontract.
- 12.14 Attorney's Fees. In the event of any controversy arising hereunder or relating to the interpretation or implementation of this Contract or any breach thereof, the prevailing party shall be entitled to payment for all costs and attorney's fees (both trial and appellate) incurred in connection therewith.
- 12.15 Severability. The invalidity, in whole or in part, of any provision of this Contract will not affect the validity of any other provision of this Contract.
- 12.16 Captions. The captions contained in this Contract are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Contract or the intent of any provision contained in this Contract.
- 12.17 Counterparts. This Contract may be executed in one or more counterparts each of which shall be deemed an original and all of which shall be deemed one and the same agreement.
- 12.18 Waiver. The waiver by either party of any failure on the part of the other party to perform in accordance with any of the terms or conditions of this Contract shall not be construed as a waiver of any future or continuing failure, whether similar or dissimilar thereto. Except as otherwise expressly provided herein, no waiver of any right shall be implied by any delay by a party in enforcing or acting under such right. Waivers shall be effective only if specifically set forth in writing signed by the party to be charged with such waiver.
- 12.19 This Contract is binding upon the parties, their heirs, successors and approved assignees.
- 12.20 Remedies Cumulative. No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

IN WITNESS WHEREOF the parties hereto have, by and through their duly authorized officers in that regard, made and executed this Contract as of the date first written above.

SIGNED and DELIVERED

City of Huntsville, Texas
Owner

By: _____
Matt Benoit, City Manager

By: _____
Matt Foster, Vice President





CITY COUNCIL AGENDA

4/5/2016

Agenda Item: 5c

Item/Subject: Consider authorizing the City Manager to sign a proposal with Burditt Consultants, LLC for Parks Master Plan Services.

Initiating Department/Presenter: City Manager

Presenter: Matt Benoit, City Manager; Joseph Wiggs, Director of Parks and Leisure

Recommended Motion: Move to authorize the City Manager to sign a proposal with Burditt Consultants, LLC for Parks Master Plan Services.

Strategic Initiative: Goal #1 - City Appearance - Provide policies, amenities, and events that enhance the City's already beautiful and historic natural environment.

Executive Summary: This item has been placed on the agenda at the request of Mayor Brauning after a written update from the City Manager. Completing a Parks and Recreation Master Plan has been reflected in the City Council's 2015 and 2016 Strategic Plans. The old Parks and Recreation Master Plan is outdated and no longer eligible for grants. A total of \$100,000 was budgeted in the 2014-2015 budget. The first price offered to the City for this project was \$95,000. City staff has completed a significant amount of work on the public engagement phase of writing a plan, and has obtained a new cost of \$48,500. The remainder of the work to be performed by the consultant is the most efficient and effective way to complete the plan.

Discussion: Hiring a consultant to complete the Parks and Recreation Master Plan was one of many projects budgeted in the 2014-2015 annual budget. It was also included in the City Council's 2015 Strategic Plan and is identified for completion in the Council's 2016 Strategic Plan. The primary purpose of having an adopted Parks and Recreation Master Plan is to ensure eligibility for various grants. The State of Texas Parks and Wildlife Department provides grant funds annually that require an adopted plan in order to receive priority points. No funding under these grants has been awarded to an organization without a master plan. Occasionally, City staff will review other grants that require or suggest a reference to an adopted project with a master plan and/or the narrative justification for a grant is bolstered with an adopted master plan reference.

A secondary reason is the master plan serves as the City's Capital Improvement Plan for parks and recreation projects. It may not get the same funding emphasis as other CIP items, but it does offer some guidance and objectivity when reviewing these sorts of projects in the event there is a desire to phase or undertake a significant project.

In 2015, a group of City staff interviewed firms to complete the master plan. At the conclusion of their review, the selected firm provided with a scope of services totaling \$95,000. After reviewing the proposal, City staff decided to complete the public interaction portion of the plan in-house. This approach was reviewed and endorsed by the Parks and Recreation Advisory Board.

Through most of 2015, Joseph Wiggs and his staff used "clicker" technology to survey almost 200 participants in small and large groups regarding their desires for Parks and Recreation services and

amenities. There were small and large groups ranging from those who use city facilities very regularly (like the youth sports leagues) to those who may have a casual interest (like Rotary, Lions Club and advisory board members). The survey included questions about the importance of various projects and matched projects "head-to-head" to see how respondents viewed projects when asked to make a choice. By using the "clicker" technology, the City was able to objectively measure and capture people's perceptions and desires.

Recently, City staff took the additional step of contacting the firm originally selected to get another proposal to complete the Master Plan (i.e., put meat and skin on the bones). The proposal includes:

- Writing narrative summaries of the process undertaken to gather the data.
- Writing narrative summaries and gathering images and conceptual drawings of the projects that rose to the top of the City's survey efforts.
- Conduct more detailed analysis of the projects to include possible locations, opportunities to partner with other agencies (most likely HISD and/or SHSU) and cost-estimating.
- Create a bound and professionally-produced document for the City (and to submit with grant applications).

The total cost of the proposal is \$48,500. A total of \$100,000 was budgeted in 2015. The scope is estimated to be completed in 90 to 120 days. It is unlikely City staff could complete the work as efficiently or effectively as this consultant will.

Previous Council Action: As described above, the City Council's 2015 and 2016 Strategic Plans both identified this item for completion. The 2014-2015 budget included an approved Decision Package for this item.

Financial Implications:

Item is budgeted: 101-113-55070

Approvals: City Attorney Director of Finance City Manager

Associated Information:

- Proposal from Burditt Consultants, LLC (pages 3-9)

March 9, 2016

Ms. Billie Smith
Purchasing Director
City of Huntsville
1212 Avenue M
Huntsville, Texas 77320

RE: Proposal for Parks Master Plan Services

Dear Ms. Smith:

After meetings last week with both Mr. Joseph Wiggs and Mr. Aron Kulhavy, and also following their advisement to forward this proposal to you, the following is our revised Proposal for Parks Master Plan services. You'll note that the document is generally the same as was provided previously in September 2014 with revisions in scope and fee per staff direction last week. These revisions relate to the removal of prior task for Public Involvement Planning and Workshops; with a reduction in total project fees commensurate with task reductions.

The following represents our proposal for services along with professional fees:

PROJECT UNDERSTANDING

The Parks Master Plan represents a unique opportunity to study and integrate a diverse array of recreation facilities and programs with the goal of addressing current and future needs, renovations, expansions, and future construction efforts that address an expanding and changing population. The project requires the assessment and evaluation of all facilities with further analysis of input the City obtained from user organization leaders, activity groups, department staff (who operate and maintain facilities), as well as the City's elected officials. This information will form much of the basis from which to develop an ambitious, yet executable master plan with budgets, design intentions, and identified hierarchy of options to carry the citizens of Huntsville through the next ten years and beyond.

The primary objective of the proposed Master Plan is to develop a "citywide approach" that allows the department to operate efficiently and with more future-certain goals. It will also allow for financing options to be explored relating to alternative funding means available to the City.

The planning process provides an opportunity to resolve long standing operational, functional, environmental and aesthetic issues that periodically confront cities, their elected officials, and staff. The planning process will become the backbone of understanding and commitment within the community towards the future indoor and outdoor facilities and programs offered to its citizenry.

Data Collection and Needs Assessment Components

Needs Assessment is a critical component of the parks master planning effort. An assessment of what deficiencies exist in the parks system is vital so that actions can be developed that address those deficiencies. It is also important to determine future needs and develop the necessary action plan to handle these efficiently.

The assessment is an analytical way of determining what facilities are most needed and desired by the citizens of Huntsville, and determining which needs are most critical. The identified needs are then prioritized to form the basis for recommending an action plan to the City.

Methods of Assessing Park Needs

Various methods will be used in evaluating the City's current and future park and facility needs. These techniques follow general methodologies accepted by TPWD for local park master plans and by the Department of the Interior for local park system Recovery Action Plans (RAP).

Proposal for Parks Master Plan Services;
City of Huntsville, Texas

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March 9, 2016

1. Standard-Based Approach – uses standards established by the local jurisdiction (Huntsville) to determine the quantity of park facilities required to meet the City's needs a given population. Standards are usually expressed as the quantity of park facilities needed to adequately serve every 1,000 citizens of the City.

Standards are established to provide the level of service that the particular jurisdiction believes is most responsive to the amount of use and interests of its citizens. This plan establishes individual standards for the City.

2. Demand-Based Approach – uses participation rates, league usage data, and surveys to determine how much the population uses and desires certain types of recreation facilities.

3. Resource-Based Approach – is based on the usefulness of available physical resources to provide recreation opportunities. For example, the City's creeks, floodplains, and drainage corridors provide opportunities for trail connections.

All three methods are important in their own manner, but individually do not represent the entire picture. The assessment component of the project will utilize all three methods to determine what types of recreation facilities and park requirements are needed.

Typical assessments evaluate Level of Service (LOS). While this is important, we believe it is also critical to also understand and evaluate the Quality of Service. QOS evaluation requires intense community involvement and yields critical information of how the facility or park amenity is performing according to the expectations of citizens overall. By ranking and developing a quantifying rating for each component of the park system, we are better able to understand the assets and constraints of any local system.

As national guidelines and standards are based on demographic trends rather than specific local desires, they must be fine-tuned to meet local conditions. It is important to recognize that national standards are simply guidelines or benchmarks that are intended to serve as a starting point for park planning. Each city has its own unique geographic, demographic, and socio-economic composition, and as such, the arbitrary application of national standards, as is often done, would not necessarily meet the needs of Huntsville.

We will utilize a variety of standards in the master plan process. These include:

Spatial or Park Acreage Standards – these define the acres of park land needed, and are usually expressed as a ratio of park acreage to population.

Facility Standards – these define the number of facilities recommended to serve each particular recreation need. Facility standards are usually expressed as a ratio of units of a particular facility per population size. For example, a facility standard for trails might be one mile for every 1,000 residents in a city.

Development Standards – these define the exact spatial requirements of a specific recreation area, i.e., a neighborhood park versus a community park.

SCOPE OF BASIC SERVICES

Services provided will proceed according to the tasks outlined below and as identified in a Burditt work plan to be developed upon commencement of the project.

Task 1 Project Initiation

Activities: Establish project understanding and objectives with Client's Project Manager and the Consultant Team:

- Define objectives;
- Confirm schedule;
- Identify all team members (including City staff, officials, administration, boards, committees and organizations) and roles;

- Identify decision makers, milestones and target deliverables;
- Identify base information to be examined by team and arrange with staff to obtain;
- Identify critical community information to identify relevant issues that affect the physical planning for the project (including identification of facilities and programs to be considered).

Additional tasks to be completed in Task 1:

- Study and review current Parks Master Plan to formulate understanding of prior planning and requirements and/or new data to be collected or formalized.
- Review and analyze codes, general plan and zoning regulations, compile planning and design criteria critical to the development of the Master Plan.

Key Deliverables: **Project Kickoff Memo, Identification of Data Required to Develop Master Plan Opportunities and Constraints/Site or Facility Evaluation Commencement**

Prerequisites: Receipt of authorization by CITY. CITY shall identify a Project Manager to be Consultant's point of contact for all matters. City will provide copies of prior studies and documents relative to policies, regulations, standards, criteria, etc. as may be pertinent to the assigned work.

Task 2 Stakeholder Involvement Analysis

Activities: Burditt will, in cooperation with City's Project Manager, obtain and evaluate prior Stakeholder involvement, Public Workshops and Public Input Summary Data as previously collect by the Parks and Recreation Department and other City staff. This information will be used to reaffirm the preferences as gathered from prior citizen audience input. The purpose of this task is the following:

- Document processes within the final document that respect;
- Document the transparency of public decision-making processes created by ensuring citizen trust in accessible, open, and understandable exchange of information;
- Document the public's opportunity to recommend projects and issues for government consideration;
- Document identification by the public of issues and opportunities for city policies, and programs that relate to parks, facilities and open spaces;

Key Deliverables: **Utilize Stakeholder and Public Involvement Data in Planning Efforts to Respond to Citizen Input.**

Prerequisites: Availability of base information and participation of City staff.

Task 3 Develop Prioritization of Needs

Key Activities: Burditt will, based on the Public Input Summary and Demand Analysis, develop the following:

- Conduct prioritization process incorporating results from previous analysis of all phases;
- Written narrative summarizing results documenting the PROCESS followed by project team, public and CITY participants;
- Obtain approval of priorities from Staff, Council, Park Board and, if deemed appropriate, Cemetery Board.

Key Deliverables: **Prepare written narrative summarizing results and identification of Prioritized Needs**

Prerequisites: Appropriate input from City Project Manager, Staff, Council, Boards, and other City designated participants (if any).

Task 4 Preliminary Draft Document Preparation – Ten (10) Year Action Plan

Key Activities: Based on evaluation of City and Community input, departmental input, facility evaluation, prior Draft Plan review, and edited version with deletions of extraneous data, Burditt will begin revisions and create additional content of narrative, supporting graphics, and budgets. This will include supplementing plan or editing plan to include the following:

- Land Acquisition;
- Programming changes or additions;
- Improvements to facilities- renovations;
- New facilities;
- Opportunities for natural resource/wildlife habitat based recreation (trails, education, etc.);
- Opportunities for historical based recreation;
- Interlocal, joint participation use with other public agencies, HGAC, TFWD, Texas Recreation and Parks Society;
- Joint participation use with private recreation providers;
- Recommend new ordinances or policies to facilitate master plan implementation;
- Consider and Document Existing Plans, Studies, Land Use;
- Consider the City Workshop and Stakeholder Input;
- Consider survey data as available (if conducted);
- Provide written narrative summarizing master plan recommendations, using charts, graphs, tables, photos (sketches, renderings);
- Seek / obtain input of staff, recreation commission or parks board, additional stakeholder visits as directed by City Council @ 50% and 95% completion;
- Develop Implementation Strategies;
- Create Actionable Item Hierarchy with dated goals and accomplishments to be used by City for monitoring progress.

Additional tasks to be completed include:

- Prepare Budget and Expenditure Plan with probable costs recommendations for renovation and improvements to existing facilities;
- Identify funding sources (public/private) and other agencies and recreation providers;
- Projected expenditure forecast.

Applicable sections and/or components of the plan will be submitted to respective department staff for review and comment prior to completion and submittal as a preliminary document for City review and edit.

Burditt will develop a draft version for review by City Project Manager and entire City Team.

Key Deliverables: **Preliminary Parks Master Plan**
Make Formal and Informal Presentations to Groups or Council at Strategic Milestones of Project

Prerequisites: Review and approval of Preliminary Parks Master Plan sections by appropriate departmental staff and City Project Manager.

Task 5 Final Park Master Plan Document, Council Adoption and Approval

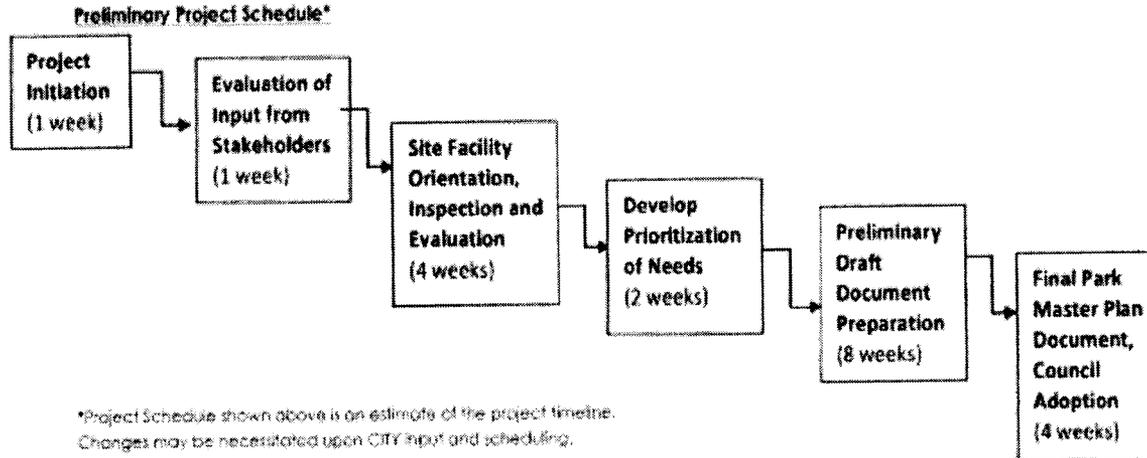
Key Activities: Burditt will further refine the Preliminary Draft Document by incorporating comments, revisions and edits recommended by the City.

- Create 10 year Action Plan/Expenditure Plan;
- Finalize written narrative and supporting documentation to reflect revisions;
- Plan shall, as feasible under the basic scope described be formatted to accommodate submittal for Awards as may be available from TRAPS, APA, NRPA.

Additional tasks related to Adoption and Approval

- The document will be created in both bound and electronic format for additional printing. Ten (10) hard copies will be provided when adopted by City Council or prior to adoption if previously authorized by City's Project Manager;
- Burditt Team will attend Council Meeting and/or Workshop in preparation for adoption;
- Ensure compliance with TPWD regarding all grant eligibility (indoor/outdoor/trails).

Key Deliverables: **Final Parks Master Plan (suitable for Web Publishing)**
10 Bound Copies of the Final Master Plan Document



*Project Schedule shown above is an estimate of the project timeline. Changes may be necessitated upon CITY input and scheduling.

A preliminary project timeline has been considered with approximately 20 weeks (150 days) considered necessary to conduct Data Collection, Demand Analysis, Facility Assessments, Preliminary Parks Master Plan Draft and Final Parks Master Plan for City Council Adoption.

While we believe this timeframe is generally appropriate, the City's input or schedule may dictate potential adjustments to the schedule. Upon project initiation, we will develop a revised schedule reflecting the actual milestones, meeting dates, etc.

Project Schedule – March 23, 2016 through August 2016. A detailed Work Plan will be determined upon approval of proposal, professional services agreement execution and project initiation.

Proposed Compensation

Basic Services For the basic services described in **Tasks 1 through 5** of this document we propose a lump sum fee of **FORTY EIGHT THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$48,500.00)**.

Our proposed compensation for this scope of work is inclusive of estimated reimbursable expenses for travel, internal renderings, production printing or plotting, reproductions, etc. A total of Ten (10) Final Copies of the Master Plan Document will be provided to the CITY.

ADDITIONAL SERVICES: Additional services, as may be received by written request, will be provided at hourly rates by discipline according to Burditt Consultants 2016 Hourly Billing Rates attached hereto.

INVOICING AND REIMBURSABLE EXPENSES: For the scope of services stated herein, CITY agrees to pay CONSULTANT the compensation stated in this Agreement. CONSULTANT agrees to submit invoices monthly for services rendered. Invoices shall be forwarded monthly based upon percentage of completion and a final invoice upon completion of the project. Invoices are due and payable within 30 days of invoice date.

REIMBURSABLE EXPENSES: Reimbursable Expenses have been calculated into the Basic Services Fees with agreement between both CONSULTANT and CITY that any printing of additional document copies above the agreed upon number or color plottings for use by CITY in marketing or other presentations shall be a reimbursable expense to CONSULTANT.

RISK ALLOCATION: CONSULTANT agrees to carry out and perform the services herein agreed to in a professional and competent manner. In recognition of the relative risks, rewards, and benefits of the project both to the CITY and CONSULTANT, the risks have been allocated so that the CITY agrees that, CONSULTANT'S total liability to the Client, for any and all claims, losses, expenses, damages or claim expenses arising out of this agreement, from any cause or causes, shall not exceed the total amount of CONSULTANT'S fee.

**BURDITT CONSULTANTS
EFFECTIVE JANUARY 2016
HOURLY BILLING RATES**

Should the project require additional services as instructed by Owner to be based upon hourly rates, following is a 2016 rate by classifications. Professional services for planning, architecture, landscape architecture, engineering and other related project work shall be on an hourly basis at the following rates.

CLASSIFICATION	HOURLY RATE
Principal	\$170
Senior Project Manager	\$150
Project Architect	\$135
Project Landscape Architect	\$135
Project Engineer	\$135
Senior Planner	\$135
Licensed Irrigator	\$125
Geographic Information Systems (GIS) Planner	\$125
Wildlife Biologist / Wetland Scientist	\$135
Natural Resource Planner	\$100
Planner I	\$100
Landscape Designer	\$100
CAD Designer II	\$ 80
CAD Designer I	\$ 70
Administrative II	\$ 70
Administrative I	\$ 55

ENTIRE AGREEMENT

This Proposal Agreement constitutes the complete and final expression of the agreement of the parties and is intended as a complete and exclusive statement of the terms of their agreements.

The parties agree that this CONTRACT is performable in Walker County, Texas and in the event that any legal proceedings are instituted by either party under this contract, the parties hereto agree that venue for all purposes shall be in Walker County, Texas.

Approved by Consultant: _____ Date: _____

BURDITT CONSULTANTS, LLC

By: _____
Title: Charles Burditt, President
Federal I.D. #: 36-4604937

Approved by Owner:

CITY OF HUNTSVILLE

By: _____ Date: _____

Title: _____

Purchase Order # _____





CITY COUNCIL AGENDA

4/5/2016

Agenda Item: 5d

Item/Subject: Consider authorizing the City Manager to apply for two (2) Transportation Investment Generating Economic Recovery (TIGER) Grants and adopt Resolution 2016-23 and Resolution 2016-24 in support of same.

Initiating Department/Presenter: Neighborhood Resources and Engineering

Presenter: Sherry McKibben and Ram Ramachandra

Recommended Motion: Move to authorize the City Manager to apply for two (2) Transportation Investment Generating Economic Recovery (TIGER) Grants and adopt Resolution 2016-23 and Resolution 2016-24 in support of same.

Strategic Initiative: Goal #4 - Infrastructure - Ensure the quality of the City utilities, transportation and physical structures so that the City's core services can be provided in an effective and efficient manner.

Discussion: The Federal Department of Transportation has announced funding available for rural transportation projects. The minimum award is \$1 million, with \$100 million available. Staff has identified two independent street projects that qualify for funding under this source, requiring two separate grant applications.

Project 1 (Ravenwood Village Drive Extension) consists of extending Ravenwood Village Drive from its current dead-end toward Veterans Memorial in order to provide circulation from I-45 and Highway 30. Additionally, Financial Plaza will be extended to Ravenwood Village Drive for additional circulation of traffic. Conceptual cost estimate of this project is in the \$2,850,000 range.

Project 2 (Veterans Memorial Parkway Expansion) consists of adding two lanes from FM 1374 to I-45 to Veterans Parkway, which will provide dedicated lanes for southbound lanes. The addition of these two lanes will enable traffic to exit Highway 30 and utilize Veterans Parkway as an alternative route to south I-45. The current wayfinding signage directs visitors who are traveling east on Highway 30 to the Statue Visitors Center to turn onto Veterans Parkway. Completing this as a four-lane street will increase safety and allow more travelers to exit the interstate. Conceptual cost estimate of this project is in the \$6,150,000 range.

While this grant has a zero percent (0%) match, the projects will require city funding for engineering, surveying, and the environmental clearance package services. This is estimated to be approximately 15% of the construction costs (Project 1 = \$427,500 and Project 2 = \$922,500).

Previous Council Action: No Council action has been taken.

Financial Implications:

There is no financial impact associated with this item.

Item is budgeted: _____ - _____ - _____ In the amount of \$ _____

Item is not budgeted: If the project is approved for funding, a budget amendment will be brought to Council for the engineering of the project.

Item is estimated to generate additional revenue:

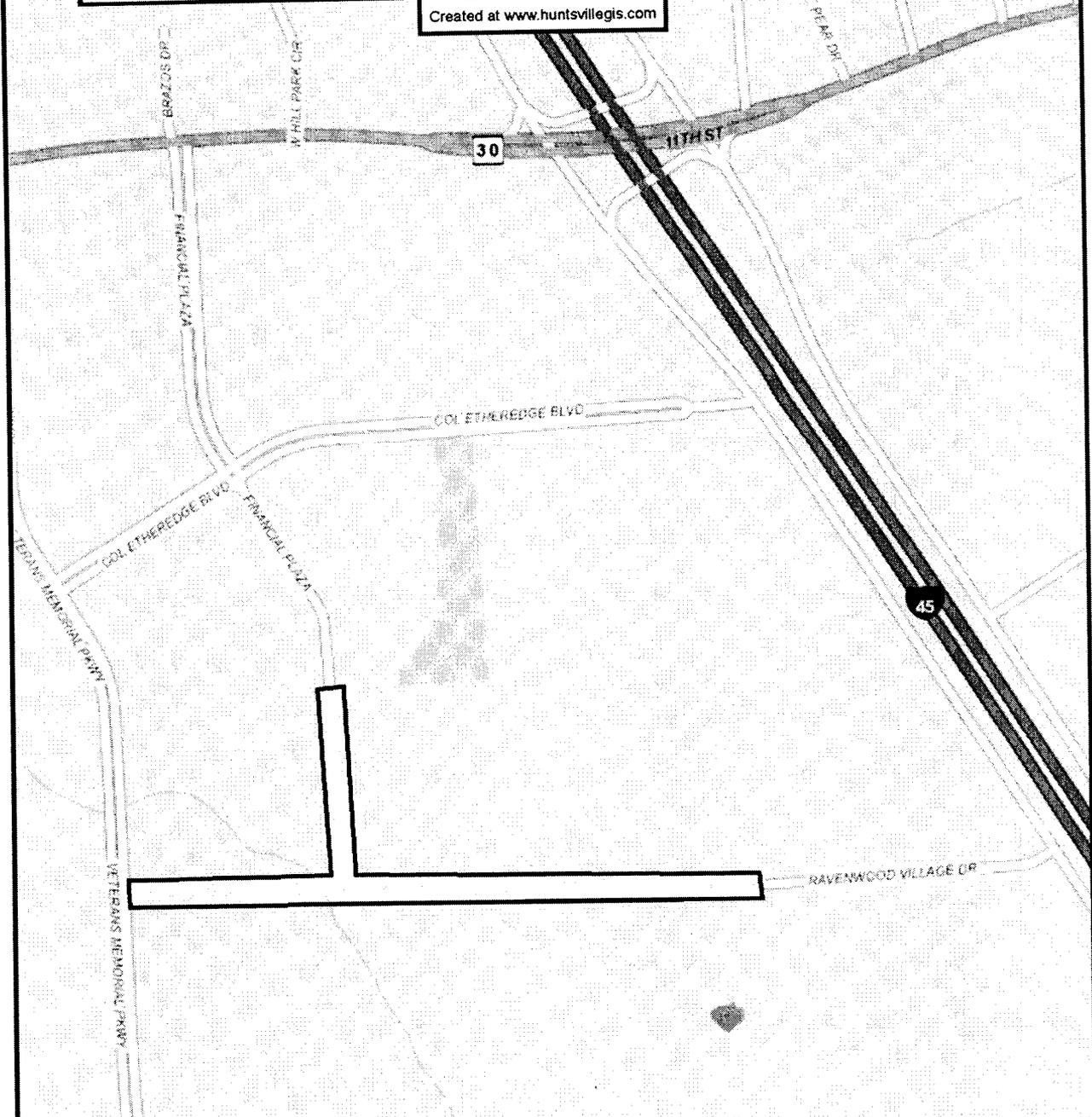
Approvals: City Attorney Director of Finance City Manager

Associated Information:

- Project Map – Ravenwood Drive Extension (page 3)
- Resolution 2016-23 (page 4)
- Project Map – Veterans Memorial Parkway Expansion (page 5)
- Resolution 2016-24 (page 6)

TIGER Grant - Ravenwood Village Dr & Financial Plaza Extensions

Created at www.huntsvillegis.com



Layout: Letter (8.5 x 11) - Portrait

1 in = 500 ft

On 8.5 x 11 inch Print

On Any Print Size

Coordinate System: NAD 1983 StatePlane Texas Central FIPS 4203 Feet

DISCLAIMER: These data are to be used for graphical representation only. The accuracy is not to be taken as data produced for engineering purposes or by a Registered Professional Land Surveyor for the State of Texas. For this level of detail, supervision and certification of the produced data by a Registered Professional Land Surveyor for the State of Texas would have to be performed. The City of Huntsville assumes no responsibility for the accuracy of said data.

March 27, 2016
City of Huntsville
GIS Division
Map Created At
www.huntsvillegis.com

RESOLUTION NO. 2016-23

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, TEXAS, AUTHORIZING THE SUBMISSION OF A TRANSPORTATION INVESTMENT GENERATING ECONOMIC RECOVERY (TIGER) GRANT THROUGH THE FEDERAL DEPARTMENT OF TRANSPORTATION; AND AUTHORIZING THE CITY MANAGER TO ACT AS THE CITY'S EXECUTIVE OFFICER AND AUTHORIZED REPRESENTATIVE IN ALL MATTERS PERTAINING TO THE CITY'S PARTICIPATION IN THE TIGER GRANT PROGRAM

WHEREAS The City desires to develop a viable urban community, including decent housing and a suitable living environment and expanding the economic opportunities, principally for persons of low and moderate income; and

WHEREAS Certain conditions exist which represent a threat to public safety; and

WHEREAS It is necessary and in the best interests of Huntsville to avail itself of the Transportation Investment Generating Economic Recovery (TIGER) Grant Program;

NOW, THEREFORE, be it resolved by the City Council of the City of Huntsville, Texas, that:

SECTION 1: A Transportation Investment Generating Economic Recovery (TIGER) Grant Program application is hereby authorized to be filed on behalf of the City and be placed in competition for funding.

SECTION 2: The requested amount of TIGER funding is \$2,850,000 for the Ravenwood Village Drive and Financial Plaza Extensions.

SECTION 4: The City Council directs and designates the City Manager as the City's Chief Executive Officer and Authorized Representative to act in all matters in connection with this application and the City's participation in the Transportation Investment Generating Economic Recovery (TIGER) Grant Program.

PASSED AND APPROVED this 5th day of April, 2016.

THE CITY OF HUNTSVILLE

Andy Brauningner, Mayor

ATTEST:

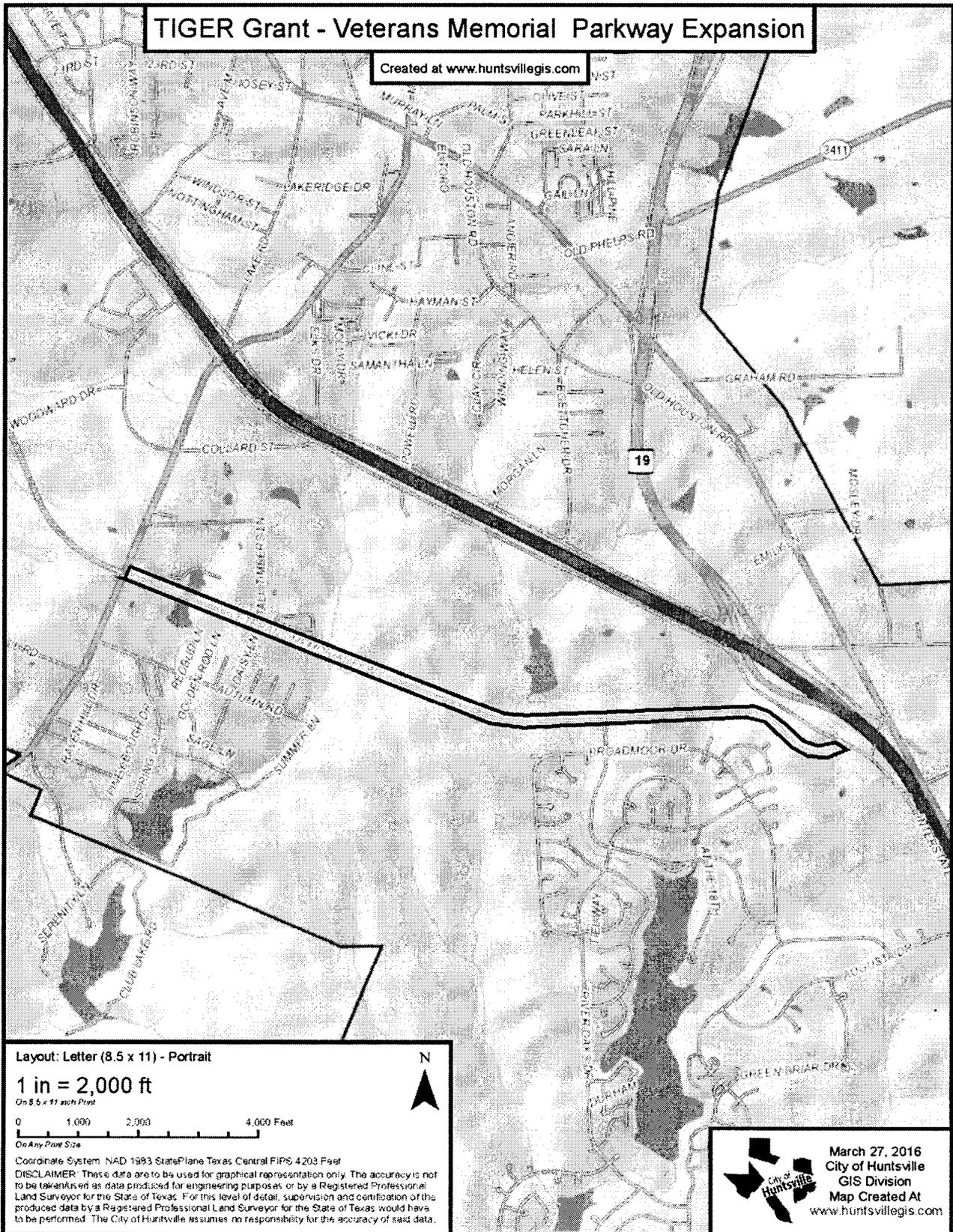
APPROVED AS TO FORM:

Lee Woodward,
City Secretary

Leonard Schneider,
City Attorney

TIGER Grant - Veterans Memorial Parkway Expansion

Created at www.huntsvillegis.com



Layout: Letter (8.5 x 11) - Portrait

1 in = 2,000 ft

On 8.5 x 11 inch Print

0 1,000 2,000 4,000 Feet

On Any Print Size

Coordinate System NAD 1983 StatePlane Texas Central FIPS 4203 Feet

DISCLAIMER: These data are to be used for graphical representation only. The accuracy is not to be taken as data produced for engineering purposes or by a Registered Professional Land Surveyor for the State of Texas. For this level of detail, supervision and certification of the produced data by a Registered Professional Land Surveyor for the State of Texas would have to be performed. The City of Huntsville assumes no responsibility for the accuracy of said data.



March 27, 2016
City of Huntsville
GIS Division
Map Created At
www.huntsvillegis.com

RESOLUTION NO. 2016-24

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, TEXAS, AUTHORIZING THE SUBMISSION OF A TRANSPORTATION INVESTMENT GENERATING ECONOMIC RECOVERY (TIGER) GRANT THROUGH THE FEDERAL DEPARTMENT OF TRANSPORTATION; AND AUTHORIZING THE CITY MANAGER TO ACT AS THE CITY'S EXECUTIVE OFFICER AND AUTHORIZED REPRESENTATIVE IN ALL MATTERS PERTAINING TO THE CITY'S PARTICIPATION IN THE TIGER GRANT PROGRAM

WHEREAS The City desires to develop a viable urban community, including decent housing and a suitable living environment and expanding the economic opportunities, principally for persons of low and moderate income; and

WHEREAS Certain conditions exist which represent a threat to public safety; and

WHEREAS It is necessary and in the best interests of Huntsville to avail itself of the Transportation Investment Generating Economic Recovery (TIGER) Grant Program;

NOW, THEREFORE, be it resolved by the City Council of the City of Huntsville, Texas, that:

SECTION 1: A Transportation Investment Generating Economic Recovery (TIGER) Grant Program application is hereby authorized to be filed on behalf of the City and be placed in competition for funding.

SECTION 2: The requested amount of TIGER funding is \$6,150,000 for the Veterans Memorial Parkway Expansion between FM 1374 and IH-45.

SECTION 4: The City Council directs and designates the City Manager as the City's Chief Executive Officer and Authorized Representative to act in all matters in connection with this application and the City's participation in the Transportation Investment Generating Economic Recovery (TIGER) Grant Program.

PASSED AND APPROVED this 5th day of April, 2016.

THE CITY OF HUNTSVILLE

Andy Brauninger, Mayor

ATTEST:

APPROVED AS TO FORM:

Lee Woodward,
City Secretary

Leonard Schneider,
City Attorney



CITY COUNCIL AGENDA

4/5/2016

Agenda Item: 5e

Item/Subject: Consider a resolution accepting a bid for the sale of a City-owned 0.615 acre tract of land located north of 20th Street, south of 19th Street, west of Sam Houston Avenue, and east of Avenue L ½, located at 1930 A Sam Houston Avenue, and authorizing the City Manager, City Secretary, and City Attorney to execute all documents for the sale of said property.

Initiating Department/Presenter: Community & Economic Development

Presenter: Aron Kulhavy, AICP, Director of Community and Economic Development

Recommended Motion: Move to adopt Resolution 2016-25 to accept a bid for the sale of a City-owned 0.615 acre tract of land located north of 20th Street, south of 19th Street, west of Sam Houston Avenue, and east of Avenue L ½, located at 1930 A Sam Houston Avenue, and authorizing the City Manager, City Secretary, and City Attorney to execute all documents for the sale of said property.

Strategic Initiative: Goal #3 - Economic Development - Promote and enhance a strong and diverse economy.

Discussion: In January of 2016, the City Council authorized and directed City staff to solicit bids for the property located at 1930 A Sam Houston Avenue. An appraisal and survey were completed on the property and an appraised value of \$9,377 was placed on the 0.615 acres of the tract which excludes the 20' wide strip of access located between Humphrey's and Barefoot Athletics. (A separate appraisal was completed on this property and that portion of the original tract will be handled through a separate process). Staff set a minimum bid amount of \$10,000 on the property and included the conditions of a payment bond, of selling the property as-is with no warranty for environmental or other unknown factors, and of submittal of a Planned Development District application for this property and others, consisting of at least two (2) acres.

Invitations for bids were solicited and published in accordance with the Charter and state law governing the sale of real property. Bids were received on March 9, 2016, and opened at 2:00 p.m. At the time of opening, two bids were received under the proper procedures: one from the Ethician Foundation in the amount of \$12,000 and a second from Area Management Services, Inc. in the amount of \$12,500. The bid from the Area Management Services, Inc. also included an exhibit "A" of modifications and objections to the bid. These objections included references to deed restrictions, liability insurance for inspections on the property, and an application for Planned Development under the Development Code.

At 2:19 p.m. on March 9, 2016, a third bid was received via email. This bid from Stonemont Financial Group was in the amount of \$30,000 and posed no objections to any of the additional requirements spelled out in the bid document. Copies of this bid and the other two bids are available for review at the Service Center.

In reviewing the solicitation for bids, the bid packet specifically stated the means of submittal and the time at which packets must be received. However, in the packet, an exception is made stating "if less than three responses are received, the City of Huntsville reserves the right to extend the opening date as it seems to be in the best interest of the City." In addition, the City "reserves the right to reject any or

all response for any or all products and/or services covered in this request and to waive all informalities or defects or to accept such as it shall deem to be in the best interests of the City of Huntsville.”

One of the most important factors in reviewing the possible sale of this property was the potential land use for the property. Since the portion of the tract being sold has no road frontage, and because of its location near the University and a couple of bars, it is important that the City’s tract be combined with others in a master development plan. The creation of a Planned Development District for this area with the inclusion of the City’s lot is the only means under the Development Code in which the City can ensure a detailed development review of the area. An example of this is through increasing development standards for multi-family residential property adjacent to the bars within the block to minimize noise penetration resulting in reduced complaints from the residents adjacent to the bars.

After a thorough review of all the bids received and the process, it is staff’s opinion that the best interests of the City would be served by awarding the bid to the highest and best bidder, Stonemont Financial Group. First, the bid received from this group was significantly higher than the other two bidders and no objections were given as part of the submission. Second, there is nothing that suggests the City would receive better and more complete bids should we decide to rebid the sale of the property. Finally, it is within the City’s right to reject any or all responses in the best interests of the City of Huntsville and staff believes the proposal from Stonemont is in the best interests of the City.

Should the City Council not adopt the recommendation of staff to accept the bid from Stonemont Financial Group, it may take one of two courses of action. First, the Council could accept the offer of another bidder under the guidelines of the proposal. Second, the Council could reject all bids and provide specific direction to the staff on how to proceed with this property.

Previous Council Action: The City Council authorized staff to solicit bids for this property in January 2016.

Financial Implications:

- There is no financial impact associated with this item.**
 - Item is budgeted:** The current fiscal year budget includes adequate funds to pay for the proposed professional services associated with this item.
 - Item is not budgeted:**
 - Item is estimated to generate additional revenue:** \$30,000 would be received upon transfer of the property.
-

Approvals: City Attorney Director of Finance City Manager

Associated Information:

- Resolution 2016-25 (page 3)
- Stonemont Financial letter of intent (pages 4-5)

RESOLUTION NO. 2016-25

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, TEXAS, ACCEPTING A BID FOR THE SALE OF CITY OWNED PROPERTY LOCATED AT 1930 A SAM HOUSTON AVENUE, AND AUTHORIZE THE CITY MANAGER, CITY ATTORNEY, AND/OR THE CITY SECRETARY TO SIGN ALL NECESSARY DOCUMENTS TO COMPLETE THE SALE.

WHEREAS the City of Huntsville, Texas (the "City"), is duly incorporated under the general laws of the State of Texas and is operating as a home-rule municipality of the State of Texas, and authorized to sell real property for public purposes; and

WHEREAS the City has determined that it wishes to sell the real property ("the Property") that is located within the City corporate boundaries and more particularly described as 1930 A Sam Houston Avenue; and

WHEREAS the City has determined it has the authority to sell the Property pursuant to the City Charter and that all requisites to sell the property have been followed; and

WHEREAS the City has determined that the sale of the Property will be a benefit to the citizens of Huntsville.

NOW, THEREFORE, be it resolved by the City Council of the City of Huntsville, Texas, that:

SECTION 1: That the above findings of fact are adopted by the City Council.

SECTION 2: A bid in the amount of \$30,000 was submitted in accordance with Section 14.13 of the City of Huntsville Charter, as well as Chapter 272 of the Local Government Code by Stonemont Financial Group;

SECTION 3: That the City approves the sale of the property for the price of \$30,000 to Stonemont Financial Group;

SECTION 4: That the City Manager, City Attorney, and/or the City Secretary be and hereby are authorized to sign all necessary documents to accomplish the sale of the property subject to final approval of documents by the City Attorney.

PASSED AND APPROVED this 5th day of April 2016.

THE CITY OF HUNTSVILLE

Andy Brauning, Mayor

ATTEST:

APPROVED AS TO FORM:

Lee Woodward, City Secretary

Leonard Schneider, City Attorney



March 9, 2016

Mr. Aron Kulhavy, AICP
Community and Economic Development Director
City of Huntsville
450 SH 75 North
Huntsville, Texas 77320

Re: Letter of Intent to Purchase Property in Huntsville, TX

Dear Mr. Kulhavy:

The purpose of this Summary Term Sheet ("Term Sheet") is to outline the terms and conditions under which an entity formed by SFG Acquisitions, LLC ("Stonemont" or "Lessor"), would enter into an agreement to purchase the approximately 0.615 acre tract of land located North of 20th Street, South of 19th Street, West of Sam Houston Avenue, and East of Avenue L 1/2 in Huntsville, Texas (the "Property"). Purchaser and Seller shall enter into a mutually agreed-upon Purchase and Sale Agreement containing, but not limited to the conditions below.

With over \$17.1 billion in closed transactions over the past 21 years, Stonemont Financial Group's principals have a proven track record of providing its partners certainty of execution throughout the closing process. Stonemont currently has approximately \$500 million in projects in different stages of construction, including similar student housing projects located in Kentucky, Tennessee, Maryland, Georgia, Missouri and Michigan.

Property:	0.615 acre tract of land located North of 20 th Street, South of 19 th Street, West of Sam Houston Avenue, and East of Avenue L 1/2 in Huntsville, Texas
Purchaser:	An entity wholly-owned by Stonemont Financial Group, LLC.
Seller:	City of Huntsville
Purchase Price:	Purchase price shall be equal to <u>\$30,000</u> (Thirty Thousand Dollars).
Closing Period:	Purchaser requests a (120) day due diligence period with three (3) thirty (30) day extension option, followed by a thirty (30) day Closing Period.
Earnest Money:	Upon execution of a Purchase and Sale agreement, \$1,500 (One Thousand Five Hundred Dollars) shall be deposited with Huntsville Abstract & Title Company (the "Title Company").

Purchase and Sale Agreement:

Purchaser shall provide Seller a Purchase and Sale Agreement (the "Definitive Agreement") within five (5) days following Purchaser's receipt of a fully executed copy of this letter. Seller and Purchaser shall work together to finalize the Definitive Agreement if possible, within ten (10) days following the date Purchaser delivers the Definitive Agreement to Seller.

Planned Development:

The Purchaser plans to go through the Planned Development process to build a multi-family development on the subject site. The development will encompass approximately 2.5 acres and will include several parcels of land. The closing of the subject Property is contingent upon getting the Planned Development approval. The current plan for the Property is attached.

Confidentiality:

To the extent permitted by the laws of the State of Georgia, this proposal and all discussions related thereto shall be had in confidence and will not be discussed with third parties except on an "as-needed" basis.

This Summary Term Sheet supersedes and replaces all previous offers, letters-of-intent and other communications pertaining to the Property, whether written or oral, yet remains non-binding. Tenant and Landlord will be bound only once both parties execute a mutually acceptable Agreement. This is not a contract or a promise to perform, and the parties acknowledge that they have not set forth the essential terms of an agreed-upon transaction. No party has the right to detrimentally rely on the statements set forth herein or on the verbal or written negotiation conducted herewith. Tenant and Landlord agree not to publicize or make it known in the market the existence of this Letter or any subsequent Agreement.

We look forward to discussing this proposal with you. Should you have any questions, please feel free to contact me at (404) 491-9707.

Sincerely,

STONEMONT FINANCIAL GROUP, LLC

William I. Markwell III (Zack)
Principal

SELLER:

By: _____

Name: _____

Title: _____



ORDINANCE NO. 2002-18

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, TEXAS, CREATING THE HUNTSVILLE CEMETERY ADVISORY BOARD TO ASSIST IN RAISING CONTRIBUTIONS FOR THE CEMETERY ENDOWMENT FUND AND CAPITAL IMPROVEMENTS; SETTING THE NUMBER OF MEMBERS OF THE BOARD; ESTABLISHING MEETINGS AND PROVIDING FOR A QUORUM; DEFINING THE DUTIES OF THE BOARD; MAKING OTHER FINDINGS AND PROVISIONS RELATED THERETO; AND PROVIDING FOR AN EFFECTIVE DATE HEREOF.

WHEREAS, the City of Huntsville has assumed ownership and maintenance of Oakwood Cemetery from the Oakwood Cemetery Association pursuant to a court order and agreement between the City and the Oakwood Cemetery Association; and

WHEREAS, pursuant to such agreement, the City agrees to create a cemetery advisory board; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, TEXAS, THAT:

Section 1: There is hereby created the Huntsville Cemetery Advisory Board, which shall be governed by the following rules and regulations:

- a) *Creation; number of members.* The Board provided for herein shall be comprised of eleven (11) members to be recommended by the Mayor and approved by City Council. The Mayor shall recommend the person to serve as Chair of the Board and such recommendation shall be approved by the City Council. The Director of Parks & Recreation shall serve as an ex-officio member of the Board.
- b) *Terms staggered.* Five of the members of the Board originally appointed shall be for a term of one (1) year, and the Chair and six of the members of the Board originally appointed shall be for a term of two (2) years. Thereafter, the term of each Board member shall be two (2) years.
- c) *Meetings.* Six members of the Board shall constitute a quorum for the conduct of business. The members of the Board shall regularly attend meetings and public hearings of the Board and shall serve without compensation except for reimbursement of authorized expenses attendant to the performance of their duties.

The Board shall elect the vice-chair annually from among its members. The Board shall meet regularly and shall designate the time and place of its meetings. Meetings shall be held in accordance with the Open Meetings Act.

The Board shall adopt its own rules of procedure and keep a record of its proceedings. Newly appointed members shall be installed at the first regular meeting after their appointment.

d) *Duties of Board.* The Board shall:

1. have the primary responsibility for raising contributions for the Oakwood Cemetery endowment fund and for capital improvements to Oakwood Cemetery;

2. Carry out such other tasks as the City Council may designate; and
 3. Seek government and private sector grants for improvement of Oakwood Cemetery.
- d) *Sub-committees.* To accomplish these responsibilities, the Board may establish sub-committees. Each sub-committee shall be chaired by a Board member with an unspecified number of community volunteers chosen by the Board as working sub-committee members.

Section 2: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

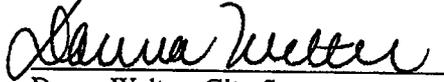
Section 3: This ordinance shall be in full force and effect from and after its passage and approval.

PASSED AND APPROVED THIS 3RD DAY OF SEPTEMBER 2002.

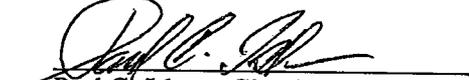
THE CITY OF HUNTSVILLE


William B. Green, Mayor

ATTEST:


Danna Welter, City Secretary

APPROVED:


Paul C. Isham, City Attorney

ORDINANCE NO. 2016-14

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF HUNTSVILLE, TEXAS, AMENDING ORDINANCE 2002-18 CREATING THE HUNTSVILLE CEMETERY ADVISORY BOARD BY AMENDING SECTION 1(d) ENTITLED *DUTIES OF BOARD* BY ADDING UPDATING DUTIES LISTED, MAKING VARIOUS FINDINGS RELATED TO THE SUBJECT; AND PROVIDING FOR SEVERABILITY.

WHEREAS, the City Council previously created the Cemetery Advisory Board pursuant to an agreement between the City and Oakwood Cemetery Association; and

WHEREAS, the City Council has studied the provisions of Ordinance 2002-18 and finds and determines that it is appropriate and proper to Amend Ordinance 2002-18 by authorizing the Huntsville Cemetery Advisory Board to select its own Chairman from the appointed 11 members; now, therefore

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HUNTSVILLE:

Section 1. The facts and matters set forth in the preamble of this Ordinance are hereby found to be true and correct.

Section 2. Ordinance 2002-18 of the City of Huntsville, Texas is hereby amended by replacing subsection "d" entitled "*Duties of Board*" of Section 1 with a new subsection "d" which shall provide as follows:

d) *Duties of the Board.* The Board shall:

1. Encourage and support raising contributions for the Oakwood Cemetery endowment fund;
2. Review and recommend capital improvements to Oakwood Cemetery;
3. Encourage and support seeking government and private grants for improvement of Oakwood Cemetery;
4. Review and recommend the placement of historical markers in Oakwood Cemetery;
5. Review and make recommendations to amend or change CHAPTER 16-CEMETERIES of the Municipal Code;
6. Review financial reports and project updates provided by City staff;
7. Recommend and apply for Hotel Occupancy Tax (HOT) Funds as determined appropriate.

Section 3. In the event any clause, phrase, provision, sentence, or part of this Ordinance or the application of the same to any person or circumstance shall for any reason be adjudged invalid or held unconstitutional by a court of competent jurisdiction, it shall not affect, impair, or invalidate this Ordinance as a whole or any part or provision hereof other than the part declared to be invalid or unconstitutional; and the City Council of the City of Huntsville, Texas, declares that it would have passed each and every part of the same notwithstanding the omission of any such part thus declared to be invalid or unconstitutional, whether there be one or more parts.

Section 4. The City Secretary is directed to attach this Ordinance to Ordinance 2002-18.

Section 5. The City Council finds that notice was posted and the ordinance was passed in accordance with the Open Meetings Act.

PASSED AND APPROVED THIS _____ day of _____ 2016.

CITY OF HUNTSVILLE, TEXAS

Andy Brauninger, Mayor

APPROVED AS TO FORM:

ATTEST:

Lee Woodward, City Secretary

Leonard Schneider, City Attorney





CITY COUNCIL AGENDA

4/5/2016

Agenda Item: 6e

Item/Subject: Request by Councilmember Allen to discuss changes to the City policy for payments to construction companies, to ensure that the contractors provide written proof of payment to their subcontractors/vendors who worked or provided materials/equipment on the project (the written proof being provided before the contractors are paid by the City, to protect owners granting easements to the City from being threatened with a lien against their property by subcontractors/vendors who are not paid by the contractor).

Initiating Department/Presenter: City Manager

Presenter: Matt Benoit, City Manager; Leonard Schneider, City Attorney; Ram Ramachandra, City Engineer

Recommended Motion: (Councilmember Allen's recommendation) Move to make changes to the city policy for payments to construction companies, to ensure that the contractors provide written proof of payment to their subcontractors/vendors who worked or provided materials/equipment on the project, before, the contractors are paid by the City, to protect property owners granting easements to the City from being threatened with a lien against their property by subcontractors/vendors that were not paid by the contractor.

Strategic Initiative: Goal #7 - Finance - Provide a sustainable, efficient and fiscally sound government through conservative fiscal practices and resource management.

Executive Summary: It appears this item has been placed in response to an unfortunate incident in which a local citizen was threatened with a lien on his property related to a City project. The issue was handled quickly and appropriately by City staff and the City Attorney. While City staff certainly understands and appreciates Councilman Allen's desire to protect the citizens against this sort of unnecessary harassment and would wish to prevent this incident, the proposed motion is not an appropriate solution and will not prevent the problem. Rather, the proposed action duplicates State law requirements, puts City staff in a very difficult position, could invite litigation and will almost certainly result in the City paying more for construction projects.

Discussion: In the State of Texas, public property is exempt from liens (Section 43.002 of the Texas Property Code, also Article II, Section 9 of the Texas Constitution which exempts public property from forced sale). In many instances, people either unfamiliar with the law or attempting to pressure public agencies will threaten to place a lien on public property. In most cases, this occurs when a City hires a General Contractor to perform work and a subcontractor claims to not have been paid for work performed (and threatens to file a lien). Whether the threat of a lien is the result of someone who is unfamiliar with Texas law or is attempting to harass and intimidate does not matter. Liens cannot be filed on public property in Texas.

It is critical to understand that the City does not have a contractual relationship with subcontractors. The City's only contractual relationship is with the General Contractor. Since liens cannot be placed on public property, Chapter 2253 of the Government Code requires the City to require a Payment Bond. The purpose of Chapter 2253 is to protect subcontractors, suppliers, and

laborers. Cities are required by state law to collect and accept payment bonds for projects over \$25,000. Payment bonds are an insurance policy purchased by the General Contractor (at the City's expense) to ensure payment to those working for the General Contractor. When there is a dispute between a subcontractor and a General Contractor, the payment bond provider (an insurance company) is to settle the financial dispute, not the City. There are no payment bonds available for the protection of prime or general contractors (i.e. those with a direct contractual relationship with the public entity). If a public entity fails to pay the general contractor, the general contractor is left to contractual remedies and a statutory claims procedure, which means the General Contractor can sue the City.

There are several reasons why payment bonds are beneficial to the City. Primarily, there is no way for the City to know what arrangement(s) a General Contractor has with a subcontractor. Settling these disputes can require significant amounts of time and effort. Generally speaking, however, subcontractors are not paid unless or until the City pays the General Contractor. Withholding payment to a General Contractor (at any stage in the project) is a good way to ensure a dispute between a General Contractor and a subcontractor.

The issue believed to have prompted this agenda item is the attached letter. In this particular instance, a company in California sent a letter (on behalf of a supplier) to a private citizen who had granted the City an easement threatening to file a lien on his private property. Since the City has an easement, a lien cannot be filed on any part of the property. No part of the letter indicates an understanding of Texas law. The City Attorney promptly responded (also attached). The amount of the construction contract with T Gray Utilities for Drainage Improvements on 9th Street near Avenue H (Verdes Haynes Drainage Project) was \$61,747.50. The City made final payment to T Gray Utilities on January 22, 2016. The demand letter is dated March 14, 2016. As is the case with most of these circumstances, there is no way to verify whether Trench Plate Rental Company is owed anything, and if so, how much. Hence the City's Attorney's correspondence referring Trench Plate Rental Company to the payment bond.

City staff recommends the Council take no action on this matter for the following reasons:

1. In 2015 alone, the City awarded bids for construction contracts totaling \$4,731,072.92 from eight (8) different construction contracts. Of that total, only one (1) contract experienced any sort of known payment dispute between a subcontractor and General Contractor, which is the contract with T Gray Utilities. In all, this issue is rare.
2. The City is required by law and already pays a premium for the payment bond. This extra layer of payment verification does not serve a public interest.
3. In order for subcontractors to be paid prior to General Contractors, the City will almost certainly pay more for construction projects because the General Contractor will need to advance the subcontractors' amounts.
4. In most cases, it will be very difficult for City staff to mediate or arbitrate payment disputes. Even if a circumstance can be conclusively determined, it doesn't prevent litigation or threats of liens, and makes the payment bond worthless.

Previous Council Action: None

Financial Implications: It is difficult to determine the cost associated with this policy change. As is stated, in all likelihood, the City will pay more for construction projects. How much more is not known and cannot be predicted.

Approvals: City Attorney Director of Finance City Manager

Associated Information:

- Councilmember Ronald Allen's Request for Agenda Item (page 3)
- Letter of Notice from an attorney in California to the City, Contractor, and Property Owner (pages 4)
- City Attorney's reply letter to the attorney in California (pages 5-6)
- Article advising against lien-release requirements in public projects (page 7)
- Construction contract clauses on payment to the contractor – Staff shared this item with Councilmember Ronald Allen on his request (pages 8-18)

Rec'd. 3/28/16 YJW

Agenda Item

Discuss changes to the city policy for payments to construction companies, to ensure that the contractors provide written proof of payment to their subcontractors/vendors who worked or provided materials/equipment on the project, before, the contractors are paid by the city, to protect property owners granting easements to the city from being threatened with a lien against their property by subcontractors/vendors that were not paid by the contractor.

Motion

I make a motion that we make changes to the city policy for payments to construction companies, to ensure that the contractors provide written proof of payment to their subcontractors/vendors who worked or provided materials/equipment on the project, before, the contractors are paid by the city, to protect property owners granting easements to the city from being threatened with a lien against their property by subcontractors/vendors that were not paid by the contractor.

NOTICE TO OWNER OR ORIGINAL CONTRACTOR

(Texas Property Code §§ 53.252, 53.254)

3/14/2016

VERDIS A. HAYNES
811 9TH ST
HUNTSVILLE, TX 77320

cc: T GRAY UTILITY & REHAB CO LLC
PO BOX 2176
CYPRESS, TX 77410

RE: 9TH ST HUNTSVILLE 9TH ST HUNTSVILLE
811 9TH ST,
HUNTSVILLE, TX 77320

Our company, Trench Plate Rental Company has furnished labor and/or materials to T GRAY UTILITY & REHAB CO LLC for the construction at the above referenced project.

There remains due and owing \$1,493.58 for such labor and /or materials furnished to your subcontractor in DEC 2015, and generally described as follows: Construction Rental Equipment and Labor. If this account remains unpaid, you will be personally liable or your property subjected to a lien against it unless you withhold payment from your original contractor for the payment of the claim or unless the claim is otherwise paid or settled. This letter is sent to conform to the requirements of the Texas Property Code and so that you may have an opportunity to see that this unpaid account is paid in full.

It is our understanding that you are the Owner of the real property on which the improvements are being constructed. If you are not the Owner of the property, please advise us at once. In compliance with Section 53.107(a)(2), we also request that you give the undersigned written notice of either termination of or abandonment of performance of the original contract.

We regret that this action must be taken. If there is any reason why you believe that you or your property should not be liable for this claim, please let us know at once.

Sincerely,



Laura Pavay / CRF Solutions
Authorized Agent For:
Trench Plate Rental Company
13217 Laureldale Ave.
Downey, CA 90242
Ph: 888-833-3777
Fax: 888-559-5704
Mr. Armando Coronado

Via Certified Mail Certif: 9314 8898 8030 0001 4390 17
CRF #: 953236
Bond/Loan #

LILES PARKER
Attorneys & Counselors at Law

CONTACT
Leonard V. Schneider IV
TELEPHONE
(713) 432-7474
FACSIMILE
(713) 456-2079
CELL
(832) 527-4572
E-MAIL
lschneider@lilesparker.com

March 25, 2016

Laura Pavey
CRF Solutions
13217 Laureldale Ave Via CMRRR
Downey, CA 90242 Via Fax 888-559-5704

RE: Debtor: T-Gray Utility
Claimant: Trench Plate Rental Company
Name of Project: Verdes Haynes Drainage
Bond No.: 62543717

Dear Ms. Pavey:

The City of Huntsville, Texas ("City") is in receipt of your letter dated March 14, 2016 addressed to Verdis A Haynes at 811 9th Street, Huntsville, Texas 77320. Your letter is enclosed

Also enclosed is a copy of the payment bond issued on behalf of T Gray Utility and Rehab Co. The toll-free telephone number maintained by the Texas Department of Insurance is Texas Consumer Helpline 800.252.3439.

Also enclosed please find a copy of a recorded easement given by Mr. Haynes to the City on March 19, 2015. Please note that the construction work by T-Gray Utility was on a portion of real property of which the City has a property interest. As such, no liens may be recorded on or against the easement or the lot of real property that includes the easement. Such a lien is prohibited by Sections 43.002 and 53.022(b) of the Texas Property Code.

Any action by you or Trench Plate to place a lien on the subject property will result in an action by the City to have the lien removed and declared unenforceable and the City will also seek attorney fees.

Please note that the City is not liable as it has complied with chapter 2253 of the Government Code and any lawsuit filed against the City will result in a counter-claim for Declaratory Judgment and for attorney fees.

Liles Parker PLLC
800 Rockmead Drive • Suite 165 • Kingwood, TX 77339
Washington, D.C. • San Antonio, TX • Baton Rouge, LA
LilesParker.com

Please call if you have any questions.

Sincerely,
Liles Parker PLLC

Leonard V. Schneider

Leonard V. Schneider, City Attorneys for the City of Huntsville
Attachments

Cc: City
Verdis Haynes

Liles Parker, PLLC • 800 Rockmead Drive • Suite 165 • Kingwood, TX 77339

Lien Releases On Public Projects - A Bad Idea

Good Idea

www.texas.construction.com

By William Coats

The author asserts that public owners should stop including lien-release requirements in their contracts.

Whether due to a lack of understanding of the law or a motivation to see all project bills paid, public owners on Texas projects often insist upon and use contracts that require "lien" releases from subcontractors and suppliers as a condition of payment (final payment particularly) to the general contractor. Insistence on lien releases as a condition of payment in the public work context presents a number of problems for the owner and the general contractor while providing little or no legal (and little practical) benefit to the public owner. In fact, the practice is likely to unnecessarily involve the public owner in the underlying payment dispute and may precipitate a breach of the contract by the owner vis-à-vis the general contractor. Simply put, the practice is ill-advised.

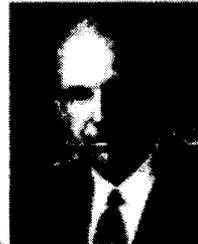
Unpaid subcontractors and suppliers on public works contracts do not have lien rights (excepting cases involving projects of less than \$25,000.00). These vendors are protected by a payment bond provided by the general contractor. The law has been long established that the public owner is not liable for the payment of such vendors. The vendor's sole remedy, other than suit against their cus-

tomers, is a claim under the payment bond. This is true even if the bonding company becomes insolvent. Accordingly, lien releases do not provide any meaningful legal benefit to the public owner, i.e. it is a release of a non-existent right against a party protected from any direct claim.

In addition to the protection of the payment bond, the public works contract documents often require the general contractor to indemnify and defend the public owner from vendor claims. This indemnification and defense obligation is also backed up by the general contractor's performance bond. Hence, any argument to the effect that the public owner is receipt of a notice of unpaid bills should withhold money to protect it from the expense of defending itself, in the remote event it is sued, is not well supported. Moreover, the more involved the public owner becomes in the underlying dispute, the more likely it is that the unpaid vendor will try and fashion out a suit against the public owner based on this involvement.

From the public owner's perspective, withholding payment from the general contractor in reliance on the lien release requirement is arguably a breach of its contract with the general contractor (failing to pay in the absence of a material breach). From a practical standpoint, it will also be a self-fulfilling prophecy: people don't get paid, more notices are mailed, reluctance to perform sets in and the project becomes unnecessarily problematic.

So, why does the lien release requirement appear in public works contracts and what should the public owner do about it? Often, the presence of the requirement is simply the result of the project consultant's use of standardized industry forms, which do not distinguish between private and public works. Liens



Bill Coats is a director, a member of the executive committee and head of the Construction Law Section of Houston-based CoatsParrise.

are possible on private work, and requiring lien releases is the right thing to do in other cases. It may be motivated by the public owner's sincere desire to see all bills paid on their projects, which ignores the reality of the typical payment dispute, namely, the owner is often insisting that a subcontractor that did not perform be paid, when the general contractor has spent the defaulting subcontractor's contract money (and often more) completing that subcontractor's work. The fairer and better approach is for the public owner with a contract requiring lien releases to waive the requirement and obtain the bonding company's consent to payment, with disclosure to and acknowledgement by the surety that the public owner has received notices of unpaid bills. The best approach of all is for public owners to stop including lien release requirements in their contracts, and stay out of the contractor-subcontractor relationship. <<

This document has important legal consequences; consultation with an attorney is encouraged with respect to its use or modification. This document should be adapted to the particular circumstances of the contemplated Project and the controlling Laws and Regulations.

STANDARD GENERAL CONDITIONS OF THE CONSTRUCTION CONTRACT

Prepared by

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

and

Issued and Published Jointly by



ASCE American Society
of Civil Engineers

**National Society of
Professional Engineers**
Professional Engineers in Private Practice

AMERICAN COUNCIL OF ENGINEERING COMPANIES

ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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Endorsed by



CONSTRUCTION SPECIFICATIONS INSTITUTE

EJCDC C-700 Standard General Conditions of the Construction Contract
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13.09 *Owner May Correct Defective Work*

- A. If Contractor fails within a reasonable time after written notice from Engineer to correct defective Work, or to remove and replace rejected Work as required by Engineer in accordance with Paragraph 13.06.A, or if Contractor fails to perform the Work in accordance with the Contract Documents, or if Contractor fails to comply with any other provision of the Contract Documents, Owner may, after seven days written notice to Contractor, correct, or remedy any such deficiency.
- B. In exercising the rights and remedies under this Paragraph 13.09, Owner shall proceed expeditiously. In connection with such corrective or remedial action, Owner may exclude Contractor from all or part of the Site, take possession of all or part of the Work and suspend Contractor's services related thereto, take possession of Contractor's tools, appliances, construction equipment and machinery at the Site, and incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere. Contractor shall allow Owner, Owner's representatives, agents and employees, Owner's other contractors, and Engineer and Engineer's consultants access to the Site to enable Owner to exercise the rights and remedies under this Paragraph.
- C. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred or sustained by Owner in exercising the rights and remedies under this Paragraph 13.09 will be charged against Contractor, and a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work; and Owner shall be entitled to an appropriate decrease in the Contract Price. If the parties are unable to agree as to the amount of the adjustment, Owner may make a Claim therefor as provided in Paragraph 10.05. Such claims, costs, losses and damages will include but not be limited to all costs of repair, or replacement of work of others destroyed or damaged by correction, removal, or replacement of Contractor's defective Work.
- D. Contractor shall not be allowed an extension of the Contract Times because of any delay in the performance of the Work attributable to the exercise by Owner of Owner's rights and remedies under this Paragraph 13.09.

ARTICLE 14 – PAYMENTS TO CONTRACTOR AND COMPLETION

14.01 *Schedule of Values*

- A. The Schedule of Values established as provided in Paragraph 2.07.A will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to Engineer. Progress payments on account of Unit Price Work will be based on the number of units completed.

14.02 *Progress Payments*

A. *Applications for Payments:*

- 1. At least 20 days before the date established in the Agreement for each progress payment (but not more often than once a month), Contractor shall submit to Engineer for review an

Application for Payment filled out and signed by Contractor covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing, the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that Owner has received the materials and equipment free and clear of all Liens and evidence that the materials and equipment are covered by appropriate property insurance or other arrangements to protect Owner's interest therein, all of which must be satisfactory to Owner.

2. Beginning with the second Application for Payment, each Application shall include an affidavit of Contractor stating that all previous progress payments received on account of the Work have been applied on account to discharge Contractor's legitimate obligations associated with prior Applications for Payment.
3. The amount of retainage with respect to progress payments will be as stipulated in the Agreement.

B. Review of Applications:

1. Engineer will, within 10 days after receipt of each Application for Payment, either indicate in writing a recommendation of payment and present the Application to Owner or return the Application to Contractor indicating in writing Engineer's reasons for refusing to recommend payment. In the latter case, Contractor may make the necessary corrections and resubmit the Application.
2. Engineer's recommendation of any payment requested in an Application for Payment will constitute a representation by Engineer to Owner, based on Engineer's observations of the executed Work as an experienced and qualified design professional, and on Engineer's review of the Application for Payment and the accompanying data and schedules, that to the best of Engineer's knowledge, information and belief:
 - a. the Work has progressed to the point indicated;
 - b. the quality of the Work is generally in accordance with the Contract Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, the results of any subsequent tests called for in the Contract Documents, a final determination of quantities and classifications for Unit Price Work under Paragraph 9.07, and any other qualifications stated in the recommendation); and
 - c. the conditions precedent to Contractor's being entitled to such payment appear to have been fulfilled in so far as it is Engineer's responsibility to observe the Work.
3. By recommending any such payment Engineer will not thereby be deemed to have represented that:
 - a. inspections made to check the quality or the quantity of the Work as it has been performed have been exhaustive, extended to every aspect of the Work in progress, or

involved detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in the Contract Documents; or

- b. there may not be other matters or issues between the parties that might entitle Contractor to be paid additionally by Owner or entitle Owner to withhold payment to Contractor.
4. Neither Engineer's review of Contractor's Work for the purposes of recommending payments nor Engineer's recommendation of any payment, including final payment, will impose responsibility on Engineer:
- a. to supervise, direct, or control the Work, or
 - b. for the means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or
 - c. for Contractor's failure to comply with Laws and Regulations applicable to Contractor's performance of the Work, or
 - d. to make any examination to ascertain how or for what purposes Contractor has used the moneys paid on account of the Contract Price, or
 - e. to determine that title to any of the Work, materials, or equipment has passed to Owner free and clear of any Liens.
5. Engineer may refuse to recommend the whole or any part of any payment if, in Engineer's opinion, it would be incorrect to make the representations to Owner stated in Paragraph 14.02.B.2. Engineer may also refuse to recommend any such payment or, because of subsequently discovered evidence or the results of subsequent inspections or tests, revise or revoke any such payment recommendation previously made, to such extent as may be necessary in Engineer's opinion to protect Owner from loss because:
- a. the Work is defective, or completed Work has been damaged, requiring correction or replacement;
 - b. the Contract Price has been reduced by Change Orders;
 - c. Owner has been required to correct defective Work or complete Work in accordance with Paragraph 13.09; or
 - d. Engineer has actual knowledge of the occurrence of any of the events enumerated in Paragraph 15.02.A.

C. Payment Becomes Due:

1. Ten days after presentation of the Application for Payment to Owner with Engineer's recommendation, the amount recommended will (subject to the provisions of Paragraph 14.02.D) become due, and when due will be paid by Owner to Contractor.

D. *Reduction in Payment:*

1. Owner may refuse to make payment of the full amount recommended by Engineer because:
 - a. claims have been made against Owner on account of Contractor's performance or furnishing of the Work;
 - b. Liens have been filed in connection with the Work, except where Contractor has delivered a specific bond satisfactory to Owner to secure the satisfaction and discharge of such Liens;
 - c. there are other items entitling Owner to a set-off against the amount recommended; or
 - d. Owner has actual knowledge of the occurrence of any of the events enumerated in Paragraphs 14.02.B.5.a through 14.02.B.5.c or Paragraph 15.02.A.
2. If Owner refuses to make payment of the full amount recommended by Engineer, Owner will give Contractor immediate written notice (with a copy to Engineer) stating the reasons for such action and promptly pay Contractor any amount remaining after deduction of the amount so withheld. Owner shall promptly pay Contractor the amount so withheld, or any adjustment thereto agreed to by Owner and Contractor, when Contractor remedies the reasons for such action.
3. Upon a subsequent determination that Owner's refusal of payment was not justified, the amount wrongfully withheld shall be treated as an amount due as determined by Paragraph 14.02.C.1 and subject to interest as provided in the Agreement.

14.03 *Contractor's Warranty of Title*

- A. Contractor warrants and guarantees that title to all Work, materials, and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to Owner no later than the time of payment free and clear of all Liens.

14.04 *Substantial Completion*

- A. When Contractor considers the entire Work ready for its intended use Contractor shall notify Owner and Engineer in writing that the entire Work is substantially complete (except for items specifically listed by Contractor as incomplete) and request that Engineer issue a certificate of Substantial Completion.
- B. Promptly after Contractor's notification, Owner, Contractor, and Engineer shall make an inspection of the Work to determine the status of completion. If Engineer does not consider the Work substantially complete, Engineer will notify Contractor in writing giving the reasons therefor.
- C. If Engineer considers the Work substantially complete, Engineer will deliver to Owner a tentative certificate of Substantial Completion which shall fix the date of Substantial Completion. There shall be attached to the certificate a tentative list of items to be completed or corrected before

final payment. Owner shall have seven days after receipt of the tentative certificate during which to make written objection to Engineer as to any provisions of the certificate or attached list. If, after considering such objections, Engineer concludes that the Work is not substantially complete, Engineer will, within 14 days after submission of the tentative certificate to Owner, notify Contractor in writing, stating the reasons therefor. If, after consideration of Owner's objections, Engineer considers the Work substantially complete, Engineer will, within said 14 days, execute and deliver to Owner and Contractor a definitive certificate of Substantial Completion (with a revised tentative list of items to be completed or corrected) reflecting such changes from the tentative certificate as Engineer believes justified after consideration of any objections from Owner.

- D. At the time of delivery of the tentative certificate of Substantial Completion, Engineer will deliver to Owner and Contractor a written recommendation as to division of responsibilities pending final payment between Owner and Contractor with respect to security, operation, safety, and protection of the Work, maintenance, heat, utilities, insurance, and warranties and guarantees. Unless Owner and Contractor agree otherwise in writing and so inform Engineer in writing prior to Engineer's issuing the definitive certificate of Substantial Completion, Engineer's aforesaid recommendation will be binding on Owner and Contractor until final payment.
- E. Owner shall have the right to exclude Contractor from the Site after the date of Substantial Completion subject to allowing Contractor reasonable access to remove its property and complete or correct items on the tentative list.

14.05 *Partial Utilization*

- A. Prior to Substantial Completion of all the Work, Owner may use or occupy any substantially completed part of the Work which has specifically been identified in the Contract Documents, or which Owner, Engineer, and Contractor agree constitutes a separately functioning and usable part of the Work that can be used by Owner for its intended purpose without significant interference with Contractor's performance of the remainder of the Work, subject to the following conditions:
 - 1. Owner at any time may request Contractor in writing to permit Owner to use or occupy any such part of the Work which Owner believes to be ready for its intended use and substantially complete. If and when Contractor agrees that such part of the Work is substantially complete, Contractor, Owner, and Engineer will follow the procedures of Paragraph 14.04.A through D for that part of the Work.
 - 2. Contractor at any time may notify Owner and Engineer in writing that Contractor considers any such part of the Work ready for its intended use and substantially complete and request Engineer to issue a certificate of Substantial Completion for that part of the Work.
 - 3. Within a reasonable time after either such request, Owner, Contractor, and Engineer shall make an inspection of that part of the Work to determine its status of completion. If Engineer does not consider that part of the Work to be substantially complete, Engineer will notify Owner and Contractor in writing giving the reasons therefor. If Engineer considers that part of the Work to be substantially complete, the provisions of Paragraph 14.04 will apply with respect to certification of Substantial Completion of that part of the Work and the division of responsibility in respect thereof and access thereto.

4. No use or occupancy or separate operation of part of the Work may occur prior to compliance with the requirements of Paragraph 5.10 regarding property insurance.

14.06 *Final Inspection*

- A. Upon written notice from Contractor that the entire Work or an agreed portion thereof is complete, Engineer will promptly make a final inspection with Owner and Contractor and will notify Contractor in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. Contractor shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies.

14.07 *Final Payment*

A. *Application for Payment:*

1. After Contractor has, in the opinion of Engineer, satisfactorily completed all corrections identified during the final inspection and has delivered, in accordance with the Contract Documents, all maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance, certificates of inspection, marked-up record documents (as provided in Paragraph 6.12), and other documents, Contractor may make application for final payment following the procedure for progress payments.
2. The final Application for Payment shall be accompanied (except as previously delivered) by:
 - a. all documentation called for in the Contract Documents, including but not limited to the evidence of insurance required by Paragraph 5.04.B.6;
 - b. consent of the surety, if any, to final payment;
 - c. a list of all Claims against Owner that Contractor believes are unsettled; and
 - d. complete and legally effective releases or waivers (satisfactory to Owner) of all Lien rights arising out of or Liens filed in connection with the Work.
3. In lieu of the releases or waivers of Liens specified in Paragraph 14.07.A.2 and as approved by Owner, Contractor may furnish receipts or releases in full and an affidavit of Contractor that: (i) the releases and receipts include all labor, services, material, and equipment for which a Lien could be filed; and (ii) all payrolls, material and equipment bills, and other indebtedness connected with the Work for which Owner might in any way be responsible, or which might in any way result in liens or other burdens on Owner's property, have been paid or otherwise satisfied. If any Subcontractor or Supplier fails to furnish such a release or receipt in full, Contractor may furnish a bond or other collateral satisfactory to Owner to indemnify Owner against any Lien.

B. *Engineer's Review of Application and Acceptance:*

1. If, on the basis of Engineer's observation of the Work during construction and final inspection, and Engineer's review of the final Application for Payment and accompanying

documentation as required by the Contract Documents, Engineer is satisfied that the Work has been completed and Contractor's other obligations under the Contract Documents have been fulfilled, Engineer will, within ten days after receipt of the final Application for Payment, indicate in writing Engineer's recommendation of payment and present the Application for Payment to Owner for payment. At the same time Engineer will also give written notice to Owner and Contractor that the Work is acceptable subject to the provisions of Paragraph 14.09. Otherwise, Engineer will return the Application for Payment to Contractor, indicating in writing the reasons for refusing to recommend final payment, in which case Contractor shall make the necessary corrections and resubmit the Application for Payment.

C. Payment Becomes Due:

1. Thirty days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer's recommendation, including but not limited to liquidated damages, will become due and will be paid by Owner to Contractor.

14.08 Final Completion Delayed

- A. If, through no fault of Contractor, final completion of the Work is significantly delayed, and if Engineer so confirms, Owner shall, upon receipt of Contractor's final Application for Payment (for Work fully completed and accepted) and recommendation of Engineer, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance to be held by Owner for Work not fully completed or corrected is less than the retainage stipulated in the Agreement, and if bonds have been furnished as required in Paragraph 5.01, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by Contractor to Engineer with the Application for such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

14.09 Waiver of Claims

- A. The making and acceptance of final payment will constitute:
 1. a waiver of all Claims by Owner against Contractor, except Claims arising from unsettled Liens, from defective Work appearing after final inspection pursuant to Paragraph 14.06, from failure to comply with the Contract Documents or the terms of any special guarantees specified therein, or from Contractor's continuing obligations under the Contract Documents; and
 2. a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled.

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FOR
SPECIAL CONDITIONS OF AGREEMENT**

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26. INDEMNIFICATION

The CONTRACTOR agrees to and shall indemnify and hold harmless the OWNER, its officers, agents and employees from and against any and all claims, losses damages, causes of action, suits and liability of every kind, including all expenses of litigation, court costs, attorney's fees, for injury to or death of any person, or for damage to any property, or for breach of contract, arising out of or in connection with the work done by the CONTRACTOR under this agreement.

The CONTRACTOR shall indemnify and hold OWNER harmless from any claims of material suppliers, mechanics, laborers, or other subcontractors.

The CONTRACTOR shall indemnify and hold OWNER harmless from any and all injuries to or claims of adjacent property owners caused by the CONTRACTOR, its agents, employees, and representatives.

27. SOLID WASTE DISPOSAL:

Contractor shall be responsible for determining with Fire Chief all allowable burning and under what circumstances and conditions said burning will be allowed (if any).

28. PAYMENT RETAINAGE:

For partial payments, a retainage amount of five (5) percent will be held until final payment is made to the contractor.

29. ADA COMPLIANCE AND CONTRACTOR RESPONSIBILITIES:

Contractor is responsible for all ADA/TDLR Compliance and regulations in construction of project per the approved plan review set and final inspection performed at Owners Expense. Five 5% retainage will be held until inspection approval has been obtained.

30. PROJECT INFORMATION SIGN

1. At the explicit direction and stated requirement of the City Engineer this/these item(s) shall include the construction, painting, erection, maintenance and removal of project signs for the number of signs indicated in the construction documents at the locations specified therein. Upon completion of the project, the signs shall become the property of the Contractor.
2. The sign shall be constructed from 3/4 inch exterior grade plywood with one smooth side or City Engineer approved equivalent. Paint for the sign shall be a commercial grade exterior paint that will not show signs of fading during the complete construction period. If the sign fades before completion of the project, the Contractor shall repaint the sign to its original quality. Painting of the sign shall be of professional quality equivalent to commercial sign painting. Mounting posts shall be either redwood or pressure treated pine.
3. Mounting posts shall be buried to the depth indicated on the drawing and hand compacted to 6 inch lifts. The sign shall be attached to the mounting posts with 3 bolts per post. Bolts shall be standard grade, minimum 3/8 inch diameter with flat washers on both sides, lock

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