

**DESIGN/BUILD AGREEMENT BETWEEN CITY OF SEGUIN AND
TRANSCEND, INC. D/B/A SPA SKATEPARKS**

THIS AGREEMENT BETWEEN THE CITY OF SEGUIN AND TRANSCEND, INC. D/B/A SPA SKATEPARKS (this "Agreement") is made and entered into effective as of the 5th day of August 2014, and between CITY OF SEGUIN, TEXAS (the "City"), and TRANSCEND, INC. D/B/A SPA SKATEPARKS (the "Contractor").

WITNESSETH:

A. The City owns certain real property, with improvements situated thereon, located at the southeast corner of San Antonio Avenue and North Vaughn Avenue in Seguin, TX 78155 and known locally as Hoermann Property (the "Property").

B. The City desires to have certain improvements constructed on the Property consisting of the new Seguin Skatepark, including the design and creation of a paved skateboard area to include a paved bowl and/or street style elements, based on the data, recommendation report G214171 from Rock Engineering and Testing Laboratory dated May 28, 2014, reports and other specifications set out in the REQUEST FOR QUALIFICATIONS (RFQ) DESIGN BUILD SERVICES FOR A PUBLIC SKATEBOARD PARK RFQ No. 34-2014-32 and the REQUEST FOR PROPOSALS (RFP) DESIGN BUILD SERVICES FOR A PUBLIC SKATEBOARD PARK RFQ No. 34-2014-32A ("City Specifications") and as set forth in Contractor's Design Build Services Proposal for a Public Skateboard and Park (the "Proposal") and the Scope of Work, attached as Exhibit "A", (the "Improvements"), such Improvements to be constructed in accordance with the Plans and Specifications hereinafter described.

C Contractor desires to serve as both the designer and the general contractor for the aforementioned construction project (the "Project") for purposes of furnishing the necessary labor and materials (collectively, the "Work," as more specifically detailed in the Contractor's Proposal and Scope of Work and Project Budget, which is attached hereto as Exhibit A and incorporated herein by reference for all purposes) to be utilized in the construction of such Improvements, and Contractor shall, subject to and in accordance with the terms and provisions of this Agreement, supervise the construction of, purchase the materials and furnish the equipment necessary to timely complete, the Project.

NOW, THEREFORE, for and in consideration of the premises, the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, the City and Contractor hereby agree as follows:

1. Conceptual Design and Development. Contractor has prepared a draft master plan for the Project which it agrees to promptly revise to the satisfaction of the City with input from the public in conjunction with conceptual design and development. It includes preparation of a base plan, preparation of illustrative drawings and computer renderings thereof, a cost estimate and a final conceptual design (collectively, the "Design Drawings"). The City shall pay Contractor 5% of the Project Budget upon Contractor's completion of such revisions, as agreed to by the parties. For clarity purposes, Contractor will initially provide the design options outlined in the Proposal, but public input may alter the Proposal submitted designs.

2. Plans and Specifications. Promptly upon acceptance and approval of the Design Drawings in writing by the City, Contractor shall prepare all construction documents for the Project, which are based on the City Specifications, including a layout plan, a drainage plan, construction details and such other plans or specifications as may be required for the Project, consistent with the Design Drawings (collectively, the "Plans and Specifications"). Upon acceptance and approval of the Plans and Specifications in writing by the City, the City shall pay Contractor 5% of the remaining balance of the Project Budget.

3. Subcontractors. All portions of the Work not performed directly by Contractor or Contractor's employees shall be performed under subcontracts that shall be subject to, and will conform to the requirements of this Agreement and the other Contract Documents, including insurance requirement set forth below in Paragraph 21. Promptly after acceptance and approval of the Plans and Specifications by The City, Contractor shall furnish to the City a written list identifying all subcontractors Contractor proposes to use for the Work to be performed hereunder, if any. The Contractor shall assume the obligation to pay for and control the work performed by subcontractors, if any.

4. Construction Work; City to Provide Utilities for the Work. (a) Contractor shall, in a good and workmanlike manner and in accordance with this Agreement, prosecute and perform the Work necessary to construct the Improvements described in and reflected on the Plans and Specifications. Contractor understands and acknowledges that the City is entering into this Agreement in reliance upon Contractor's special skill and abilities in performing the Work hereunder. Contractor has visited the Project site and immediately adjacent areas and has become familiar with the local conditions under which the Work is to be performed. Contractor shall supervise and direct the Work to be performed in connection with the construction of the Improvements upon the Property and the completion of the Project using Contractor's best efforts, skill, judgment, abilities and attention, and Contractor shall be solely responsible for all fabrication, shipment, delivery and installation means, methods, techniques, sequences and procedures, and for coordinating and implementing all portions of the Work to be performed under this Agreement in a manner such that the final product conforms to the agreed plans and specifications.

(b) City will provide temporary water and electricity service for the Work. Contractor, and its subcontractors, will utilize the temporary water and electricity service solely for the benefit of the Work. Contractor will cooperate with the City and any of the City's separate or other contractors or laborers whose work might interfere with the Work to be performed by Contractor hereunder, and Contractor shall, as requested by the City, participate in the preparation of coordinated plans and schedules to alleviate any such interference or congestion. Contractor shall provide and pay for all labor, materials, equipment, tools, machinery, transportation, storage and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Project. Contractor shall at all times enforce strict discipline and good order among Contractor's employees and shall not employ on the Project any unfit person or anyone not skilled in the task assigned them. Contractor will clean up and haul away all debris resulting from the performance of the Work hereunder and will at all times keep and leave the Project in as clean and orderly condition as the circumstances will permit. All materials, equipment, furnishings and fixtures incorporated in the Work will be new unless otherwise specified, and all Work to be performed hereunder will be of a good quality, free from faults and defects, and in conformance with the provisions of this Agreement, the Plans and Specifications and any other written instrument or document approved by the City and Contractor in writing and relating to the performance and prosecution of the Work in connection with the Project (this Agreement, the exhibits attached hereto, the Plans and Specifications, the

Proposal, the Project Budget and such other written instruments or documents, if any, approved by the City and Contractor in writing and relating to the performance and prosecution of the Work in connection with the Project are sometimes hereinafter referred to collectively as the "Contract Documents").

5. Adequate Safety Precautions. Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of its obligations pursuant to this Agreement. Contractor shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to, (a) employees at the Project and other persons who may be affected thereby, (b) the Work and all materials and equipment to be incorporated therein, whether in storage on or off the Project site, and (c) all other property at the Project site or adjacent thereto, such as trees, shrubs, walkways, pavement, driveways, streets and utilities not designated for removal, relocation or replacement during the course of construction. Contractor shall erect and maintain, as may be dictated by the conditions surrounding the performance of the Work, reasonable safeguards for the safety and protection of all persons and property, including, without limitation, posting danger signs and warnings against potential hazards, promulgating safety regulations, and installing and maintaining safety and silt fencing around the perimeter of the Project site, if necessary. If and to the extent any hazardous materials or equipment or other unusual methods become necessary for the execution of the Work, Contractor shall exercise utmost care and carry on such activities under the supervision of properly qualified personnel. The City shall be responsible for regulating access to the Project site, and for excluding the City's guests, employees and the public from the Project site during the period when the Work is being performed, provided that Contractor shall cooperate with such efforts.

6. Commencement and Completion of Work; Mobilization Fee. Contractor shall commence the construction portion of Work promptly upon receiving a Notice to Proceed from the City, which notice shall be given only upon the City's approval of the Plans and Specifications, it being understood that the City shall not unreasonably withhold the Notice to Proceed. After completion of design and included with the Contractor's first payment application for construction, the City shall pay to the Contractor a Mobilization Fee in an amount equal to ten percent (10%) of the remaining balance of the Project Budget for the Work. At Contractor's sole risk, Contractor may commence preparing for the Work at the Property prior to receiving the Notice to Proceed, subject to the terms of this Agreement, provided that no such Work preparation shall occur at the Property prior to August 5, 2014 unless pursuant to written instructions from the City to Contractor. It shall be the Contractor's duty to obtain all required permits and licenses prior to commencement of construction, including any state or federal permits. The City, however will waive all fees related to City permits. Contractor will, from and after the date on which construction commences, diligently and continuously perform and prosecute the Work to its completion in accordance with the Contract Documents, and shall use its best efforts to achieve final completion of the entire Project within one hundred and fifty (150) days after Contractor's receipt of the City's Notice to Proceed for Construction phase (such date of required completion being referred to herein as the "Scheduled Completion Date"). Notwithstanding any provision contained herein which could be construed to the contrary, final Completion (herein so called) of the Project shall not be deemed to have occurred until and unless (a) construction thereof is sufficiently complete so that the Project may be used by the City for its intended purpose, subject only to minor "punch list"-type items, (b) all required permits, licenses, certificates of compliance, certificates of occupancy and other approvals from the applicable governmental authorities exercising jurisdiction over the Project shall have been issued, (c) all utilities necessary to service the Improvements have been

connected and are available for immediate use and (d) The City shall have conducted an inspection of the Project, shall have reasonably approved of same, and shall have reasonably determined that all Work has been completed substantially in compliance with the Contract Documents, subject only to completion of punch-list items. Within ten (10) days of notice from Contractor that Completion has occurred, the City and Contractor shall inspect the Work for purposes of creating a list of punch-list items. Upon Completion of the Project, if requested by the City, Contractor shall join with the City in the execution of an Affidavit of Completion (herein so called) or similar instrument evidencing Completion of the Project; provided, however, that any failure or refusal on the part of Contractor to execute such Affidavit of Completion upon Completion of the Project shall not prejudice the right of the City to unilaterally execute such Affidavit of Completion and cause the same to immediately be filed of record in the county in which the Property is located.

7. Contractor Delay. Contractor shall be excused for the period of any delay in performance of any obligations hereunder when it is prevented from doing so by the wrongful or negligent acts or omissions of the City or by causes beyond either party's control, which shall include all labor disputes, civil disturbance, war, warlike operations, invasions, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, fires or other casualties, adverse weather conditions, inability to obtain any material or service, or acts of God. Contractor shall not, however, be entitled to any monetary damages for such delay.

8. Contractor's Fee. For and in consideration of the faithful performance of this Contract in accordance with all terms herein contained, the City agrees to pay the total cost of the Work as set forth in the Project Budget in the not-to-exceed amount of **Three Hundred and Eighty Five Thousand Dollars (\$385,000)**, inclusive of the specific payments made to Contractor as provided above. However, the Project Budget may exceed Three Hundred and Eighty Five Thousand Dollars (\$385,000) if the information provided in the City Specifications materially alters after the Contractor's initial Proposal. Such fee will be paid by the City to Contractor as the Work progresses as described in Paragraph 10 below. Contractor shall be entitled to no other compensation for the Work to be performed hereunder, and Contractor expressly covenants and agrees that all expenses incurred by Contractor in the conduct of its activities and the performance of its obligations and services hereunder shall be borne exclusively by Contractor (even if at variance with the Budget), and Contractor shall be solely responsible for the payment of same. Contractor understands and agrees that Contractor shall not be entitled to any benefits not expressly specified in this Agreement.

9. Changes in the Work. No change, modification, addition, deletion or other revision to the Work and/or the Contract Documents in furtherance of the Project shall be valid, binding or effective unless a written change order approved by the City and signed by the City, after approval by the City Council, and Contractor shall authorize the same. In the event of any such written change order approved by the City and signed by the City and Contractor, the value of the labor or materials, set forth in the approved change order shall be added to or deducted from the Budget. Contractor shall have no claim for additional work performed by Contractor unless such work has been done pursuant to a written change order approved by and signed by The City and Contractor. If, as the result of any valid change order effected pursuant to the provisions of this Paragraph 7, the applicable changes in the Work may reasonably be expected to delay Contractor in achieving Completion of the Project, the City and Contractor may agree and stipulate in the written change order itself that the Scheduled Completion Date will be extended by the appropriate number of days corresponding to the anticipated delay. However, absent any such stipulation in the change order serving to extend the Scheduled Completion Date, the Scheduled Completion Date shall not

be deemed to be extended and Contractor will be expected to achieve Completion of the Project (including those portions of the Work covered by the change order) on or prior to the Scheduled Completion Date.

10. Progress Payments. All payments to Contractor hereunder shall be made on a work-in-place basis following inspection and approval by the City, such approval not to be unreasonably withheld. Every two (2) or four (4) weeks during the progress of construction, Contractor will submit to the City an application for payment (referred to herein as an "Application for Payment") covering the portion of the Work performed (and materials used including quantity verifications) for which payment has not been previously made. Each such Application for Payment shall be in form and substance reasonably satisfactory to the City and shall include, without limitation, (a) the amount due for the Work performed for which Contractor is requesting payment, (b) a reasonably detailed breakdown and itemization of such Work and the amount due, (c) the percentage of completion of the Work performed, (d) the sum of all prior payments made from the City to Contractor hereunder and (e) such other information and attachments as shall be reasonably required by the City for purposes of evaluating the Work performed for which Contractor is requesting payment. At the time Contractor submits an Application for Payment to the City, if requested by the City, Contractor will also provide to the City true, correct and legible copies of all invoices and bills for labor and materials incorporated in the Work and which are to be paid from the proceeds of the payment to be made by the City at such time. The City's finance department runs checks twice a month, on the 10th and 25th. Payment requests must be submitted, with sufficient time for approval, before the respective cutoff dates being the 5th and 15th of each month. Within ten (10) business days following the timely submission of an Application for Payment by Contractor to the City, the City shall provide notice to Contractor stating either (1) that the Application for Payment as submitted by Contractor has been approved by the City, or (2) that payment will be withheld until Contractor shall perform such corrective measures as shall reasonably be specified by the City to ensure that the Work performed for which payment is to be made conforms in all substantive respects to the Contract Documents. Within thirty (30) days following the City's receipt of the Application for Payment or, as applicable, within thirty (30) days after Contractor's completion of such corrective measures as shall have been reasonably identified by the City as aforesaid, and subject to the other provisions of this Agreement, the City shall make payment to Contractor.

11. Effect of Application for Payment. Each Application for Payment made from Contractor to the City hereunder shall be deemed a representation and warranty by Contractor to the City that, as of the date of such Application for Payment, (a) there exists no Event of Default (as hereinafter defined) and no event or condition that, with notice or lapse of time, or both, would constitute an Event of Default, (b) there has been no material variance from the Contract Documents with respect to the Work performed through the date of such Application for Payment; (c) all Work performed in furtherance of the construction of the Improvements at the then current state of construction has been done in a good and workmanlike manner, and all materials, equipment, furnishings and fixtures usually furnished and installed at such time have been so furnished and installed in a good and workmanlike manner; and (d) all items stated in the application for payment have actually been purchased or installed as stated.

12. Retainage. During the period in which the Work is being performed and for thirty (30) days thereafter, the City shall retain five percent (5%) of the amounts paid by the City under Paragraph 8 above (the "Retainage"). Subject to the provisions of this Agreement, such Retainage as aforesaid will be advanced to Contractor as the final payment hereunder upon the later of (i) the

expiration of thirty-one (31) days following Completion of the Project or (ii) Contractor's completion of the punch-list items referred to in Paragraph 6 above or (iii) receipt by the City of an Affidavit of Payment on the form provided by the City.

13. Withholding of Payments. Notwithstanding any provision contained herein which could be construed to the contrary, the City shall not be obligated to make any payment to Contractor hereunder (whether a progress payment or the final payment) if any one or more of the following conditions exist:

- a. An Event of Default, or any event or condition which, with notice or lapse of time, or both, would constitute an Event of Default, has occurred.

14. Inspection by the City. The City shall have the right, but not the obligation, at any time and from time to time during construction of the Improvements to inspect the progress of the Work and to ensure that the same is being prosecuted and performed fully in accordance with the Contract Documents; provided, however, no inspection made by the City shall relieve Contractor of any of its obligations hereunder, including, without limitation, Contractor's obligations to correct defects in the Work and to provide the warranties set forth in this Agreement. In addition, the City, at its own expense, shall have the right, but not the obligation, to appoint a person or firm with architectural and/or engineering expertise (for convenience, referred to herein as the "the City's Architect") to observe, inspect, monitor and test the Work performed hereunder and the progress of construction at the Project. Contractor covenants and agrees that the City's Architect shall be permitted to visit and be on the Project from time to time for such purposes and Contractor shall use its best efforts to cooperate fully with the City's Architect in the performance of its duties and to supply the City's Architect with such materials and information as the City's Architect may reasonably request for such purposes.

15. Correction of Work. All Work not conforming to the requirements of the Contract Documents, or which is rejected by any governmental authority, will be considered defective. Contractor shall promptly correct defects in the Work, whether observed before or after final completion of the Project and whether or not fabricated, installed or completed. Contractor shall bear all costs and expenses of correcting defective Work. The City may correct any defective Work (a) which Contractor does not undertake to correct within ten (10) days following written notice from the City to Contractor of the need for such correction or which Contractor thereafter fails to continue to correct with due diligence, or (b) without notice, in the case of an emergency. In the event the City undertakes to correct defects in the Work as aforesaid, Contractor shall reimburse the City for all costs and expenses reasonably incurred in connection therewith promptly on demand, supported by reasonable documentation of such costs and expenses. The provisions of this paragraph will apply to Work done or furnished by Contractor or its employees. If the City, in its sole and absolute discretion and without any obligation to do so, elects to accept Work which is defective, then the City may do so instead of requiring its correction, in which case the fee payable to Contractor under Paragraph 8 above will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made to Contractor hereunder.

16. No Liens. Contractor shall defend, indemnify and hold harmless the City and the Project (including the Property and all improvements thereon) from and against any and all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien, encumbrance or claim thereof. Notwithstanding any provision contained herein which could be construed to the contrary, the City shall in no event be required to make final payment to Contractor hereunder at

any time when any lien, encumbrance or claim thereof shall be outstanding. Should claims against the Contractor be filed with the City, the City may withhold additional retainage from any payment due Contractor hereunder to insure that amounts as are necessary to pay any and all claims for which the City has received notice (for convenience, a "Claim Notice") from any person or party providing labor and/or materials, including, without limitation, specially fabricated materials, used in the construction of the Improvements on the Project.

17. Contractor's Representative. Jamie Curtis ("Curtis") is hereby designated as the person in charge of the Work to be performed by Contractor under this Agreement. Curtis will participate in and will at all times be completely familiar with the performance by Contractor of the Work hereunder and will serve as the Contractor's point of contact between the City and Contractor.

18. Communications With the City. As to any matter on which the City's input shall be required hereunder, Contractor shall provide the City with all necessary materials and information from which the City may formulate its input and thereafter provide the City with a reasonable opportunity to respond. Upon request by the City, Contractor shall prepare and distribute minutes of all meetings and conferences held with the City to the participants of such meetings and conferences indicating Contractor's interpretation of the decisions reached and actions to be taken resulting therefrom.

19. Ownership of Documents and Drawings. All drawings, models, renderings, plans and specifications, including, without limitation, the Plans and Specifications, together with any other documents or information prepared by Contractor for the City in connection with the Project, shall be the property of the City. They shall not be used by Contractor on any project other than the Project unless expressly so authorized in writing by the City. In the event of a termination of this Agreement for any reason, Contractor will promptly deliver to the City the originals of all drawings, models, renderings, plans and specifications, including the Plans and Specifications, prepared to the date of termination. The City shall have the right to use such materials for completion of the Project.

20. Bonds. Contractor shall provide performance and payment bonds written on the City's forms and executed, with a surety company authorized to do business in the State of Texas.

21. Insurance. Contractor shall, at its sole cost and expense, shall provide insurance of the types and at least in the minimum amounts set forth on Exhibit "B" attached hereto and incorporated herein as if set out in full.

22. Warranties Concerning Improvements. Contractor warrants and represents to the City that the Work performed in connection with the construction of the Improvements shall be done in a timely, good and workmanlike manner and substantially in accordance with the Contract Documents. Contractor covenants and warrants that title to all work, materials and equipment incorporated in the Work will pass to the City free and clear of all liens, claims, security interests or encumbrances. In addition, Contractor will obtain and provide, for the benefit of the City and its assigns, all customary warranties and guarantees in regard to any materials, equipment, furnishings and fixtures incorporated in the Work, said guarantees expressly expiring after three (3) years.

23. Compliance With Laws; Payment of Taxes; Non-Discrimination. Contractor warrants and represents to the City that the Project and all Work to be performed in connection

therewith and in furtherance thereof shall conform to all applicable federal, state and/or local or municipal laws, rules, regulations, codes and ordinances and with those of any other governmental or quasi-governmental body having jurisdiction over the Project, or any portion thereof including obtaining required permits. Contractor has reviewed the Plans and Specifications and is satisfied that they do not call for construction that would violate such laws, rules, etc. Contractor will pay all employment, social security and other taxes imposed upon it as an employer in connection with its performance of this Agreement and will furnish evidence, when requested by the City, showing that payment of all such taxes has been made. Contractor shall pay timely when due all local, state and federal taxes in connection with the Work to be performed hereunder and Contractor's business operations generally. Contractor agrees not to engage in employment practices which have the purpose or effect of discriminating against employees or prospective employees because of race, color, sex, religion, age, disability, national origin, or ancestry. The City may regard a breach of this provision as a default by Contractor of this Contract.

24. Indemnity. To the fullest extent permitted by law, Contractor shall defend, indemnify and hold harmless The City, and its agents, employees and representatives, from and against any and all claims, causes of action, damages, losses and expenses of any nature whatsoever, including, injury to or death of any person or persons, without limitation, court costs, attorneys' fees and related legal expenses, arising out of or resulting from any material defects in the Work or any negligence in the performance of the Work hereunder or occurring in connection therewith. Without limiting the generality of the preceding sentence, Contractor understands and acknowledges that the indemnity provided pursuant to this paragraph shall extend to and cover, and Contractor shall accordingly defend, indemnify and hold harmless the City, its agents, employees and representatives, from and against, any and all claims, causes of action, damages, losses and expenses of any nature whatsoever brought or asserted by any person or party whomsoever (including, without limitation, any third party purchaser of the Project) arising out of or resulting from defects in the Work. Such obligations of indemnity on the part of Contractor hereunder shall survive the expiration or any termination of this Agreement.

25. Default by the City and Contractor's Remedies. If the City fails to make payment to Contractor hereunder for a period of ten (10) days after the date on which such payment became due pursuant to the provisions hereof, Contractor may, upon seven (7) additional days' written notice to the City, in addition to any other remedies which may be available to Contractor, (a) bring a suit at law against the City for recovery of sums due Contractor and/or (b) discontinue the performance of the Work hereunder until such time as the appropriate payment is received by Contractor. All payments not made timely hereunder shall bear interest, without the necessity of demand or presentment, which are hereby waived, from the date due at the rate of eight percent (8%) per annum. No waiver by Contractor of any of its rights or remedies hereunder shall be considered a waiver of any other or subsequent right or remedy of Contractor, and no delay or omission in the exercise or enforcement by Contractor of any rights or remedies shall ever be construed as a waiver of any right or remedy of Contractor.

26. Default by Contractor. Any one or more of the following shall constitute an event of default ("Event of Default") by Contractor hereunder:

- a. The breach by Contractor of any warranty or representation contained herein;
- b. The failure of Contractor to perform or observe any term, provision, covenant, agreement or condition contained herein or in any of the other Contract Documents and

the continuance of such failure for five (5) days following written notice thereof from the City to Contractor, except that if the nature of the particular failure on the part of Contractor is such that, by its nature, cannot be cured, the City shall not be required to give Contractor notice of such failure, and such failure shall constitute an Event of Default immediately upon its occurrence;

- c. The insolvency of Contractor;
- d. The appointment of a receiver of Contractor, or of all or any substantial part of its property, and the failure of such receiver to be discharged within thirty (30) days thereafter;
- e. The admission by Contractor in writing of its inability to pay its debts generally as they become due;
- f. The execution by Contractor of an assignment for the benefit of its creditors;
- g. The filing by or against Contractor of a petition to be adjudged a bankrupt, or a petition or answer seeking reorganization or admitting the material allegations of a petition filed against it in any bankruptcy or reorganization proceeding, or the act of Contractor in instituting or voluntarily being or becoming a party to any other judicial proceeding intended to effect a discharge of the debts of Contractor, in whole or in part, or a postponement of the maturity or the collection thereof, or a suspension of any other rights or powers granted to The City herein or in any other documents executed in connection herewith;
- h. The failure of Contractor to pay any money judgment against it before the expiration of thirty (30) days after such judgment becomes final and no longer appealable; or
- i. The failure of any attachment, sequestration or similar proceeding against any of Contractor's property to remain undischarged or unbonded by Contractor, or undismissed, for a period of thirty (30) days after the commencement thereof.

27. The City's Remedies. Without limitation of the right of the City to all remedies available to the City as otherwise provided herein, at law or in equity, upon the occurrence of an Event of Default, the City, at its option, without any further notice or demand whatsoever, which are hereby waived, may perform such acts or expend such sums as shall be reasonably necessary to remedy any such Event of Default and may deduct the cost thereof from payments then or thereafter due Contractor hereunder. Upon the occurrence of an Event of Default, at the City's option, and without prejudice to any other remedy the City may have, the City may terminate this Agreement and may finish the Work by whatever method the City may deem expedient, and to the extent the costs thereof shall reasonably exceed those which would have otherwise become due to Contractor hereunder had Contractor timely and properly performed its obligations under this Agreement, Contractor shall pay and reimburse the City on demand for such costs, together with interest thereon calculated at the lesser of (i) the maximum rate of interest allowed by applicable federal or state law or (ii) eight percent (8%) per annum. All rights and remedies of the City hereunder are cumulative of each other and of every other right or remedy which the City may otherwise have at law or in equity, and the exercise of one or more rights or remedies by the City

shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies. No waiver by the City of any of its rights or remedies hereunder shall be considered a waiver of any other or subsequent right or remedy of the City, and no delay or omission in the exercise or enforcement by the City of any rights or remedies shall ever be construed as a waiver of any right or remedy of the City.

28. Collection Rights. With respect to any sums or charges which may become due from one party to the other pursuant to the provisions of this Agreement, the party to whom such sums are due shall have all rights and remedies available at law or in equity to collect such sums or charges, including, without limitation, the right to set off any such sums or charges against payments becoming due to the other party hereunder.

29. Termination by the City. Notwithstanding any provision contained in this Agreement which could be construed to the contrary, and irrespective of whether there shall have occurred an Event of Default, the City may terminate this Agreement at any time effective upon ten (10) days' written notice to Contractor of such termination, whereupon neither party shall have any further liability or obligation to the other hereunder, except as otherwise expressly provided herein. In the event of any such termination by the City pursuant to this provision, Contractor shall be entitled to be paid an amount which is equitable in the circumstances for Work performed hereunder as of the date of termination (including Contractor's fee hereunder earned as of such date), together with Contractor's actual and provable costs with respect to materials, equipment, tools and storage, including reasonable profit and overhead, mobilization and demobilization. In the event the City and Contractor are unable to agree upon the amount to be paid as a result of any such termination within ten (10) days after termination, the City shall obtain, at its own expense, a Professional Engineer's sealed opinion of the amount due in consideration of all circumstances surrounding the termination and shall make payment accordingly. In such event, in addition to any other remedies available to Contractor, Contractor shall have all the remedies available for other payment claims under Paragraph 24 above.

30. Independent Contractor. It is understood and agreed that the relationship of Contractor to the City shall be that of an independent contractor. Nothing contained herein shall be deemed or construed to (a) make Contractor the agent, servant or employee of the City, or (b) create any partnership, joint venture or other association between the City and Contractor. Contractor shall not have the right to bind the City to any obligations whatsoever, and this Agreement shall not be construed to make the City liable to any person or party for debts or claims of any character accruing to them against Contractor.

31. Notices. Notices to be given by either party hereto shall be in writing and shall be deemed to have been served, given and received (a) if hand delivered, when delivered in person to the address set forth hereinafter for the party to whom notice is given, (b) if mailed, when placed in the United States mail, postage prepaid, by certified mail, return receipt requested, properly addressed to the party to whom notice is given at the address hereinafter specified, or (c) if faxed, when verifiable confirmation of delivery is received by the sender of such fax to the party whose fax address is hereinafter specified. Until changed by written notice, the parties' addresses for notices are as set forth on the signature page attached hereto.

32. Assignment. Without the prior written consent of the City, Contractor shall not assign any of its rights or delegate any of its duties hereunder. Any such attempted assignment or delegation, without the prior written consent of the City as aforesaid, shall be null and void. the

City may assign its rights and obligations under this Agreement from time to time to any third party provided such third party assignee expressly assumes the City's obligations hereunder, provided that the City shall not be released by any such assignment from the performance of any obligations hereunder.

33. Binding Effect. This Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective heirs, legal representatives, successors and permitted assigns.

34. Time of Essence. Time is of the essence of this Agreement and any breach of same shall go to the essence thereof, and Contractor, in agreeing to use its best efforts to complete the Work within the time period prescribed herein, has taken into consideration and made allowances for common and foreseeable hindrances incident to the Work to be performed hereunder.

35. Attorneys' Fees. Should any party bring suit against the other party concerning matters arising out of this Agreement, the prevailing party shall be entitled to recover from the other party court costs, reasonable attorneys' fees and related legal expenses incurred in connection with such suit.

36. Applicable Law. This Agreement is to be governed and construed under the laws of the State of Texas, Galveston County and the laws of the United States applicable to transactions in Texas. All of the obligations contained in this Agreement are and shall be performable in the county where the Property is located.

37. Entire Agreement. This Agreement, along with the Exhibits, City Specifications, and the Contractor's submittal to the Request for Proposal constitutes the entire agreement and understanding, and supersedes all prior agreements and understandings, if any, whether written or oral, between the City and Contractor concerning the subject matter hereof, and there are no other covenants, agreements, promises, terms, provisions, conditions, undertakings or understandings, either oral or written, between them concerning the subject matter of this Agreement other than those expressly set forth herein. No subsequent alteration, amendment, change, deletion or addition to this Agreement shall be binding upon the City or Contractor unless in writing and signed by both parties to this Agreement.

38. Headings. The headings, captions, numbering system, etc., are inserted only as a matter of convenience and under no circumstances will they be considered in interpreting the provisions of this Agreement.

39. Singular and Plural; Gender. Where required for proper interpretation, words in the singular shall mean the plural, and vice versa; the masculine gender shall include the neuter and the feminine, and vice versa.

40. Unenforceable or Inapplicable Provisions. If any provision hereof is for any reason unenforceable or inapplicable, the other provisions hereof will remain in full force and effect in the same manner as if such unenforceable or inapplicable provision had never been contained herein.

41. Counterparts. This Agreement may be executed in any number of counterparts, each of which will for all purposes be deemed to be an original, and all of which are identical.

42. Construction. The parties hereto each acknowledge and agree that this Agreement shall be construed without presumption of any rule requiring construction to be made against the party causing same to be drafted.

43. Authority. Each person executing this Agreement, by their execution hereof, represents and warrants that they are fully authorized to do so, and that no further action or consent on the part of the party for whom they are acting is required to the effectiveness and enforceability of this Agreement against such party following such execution.

44. Waiver of Consequential Damages. Anything herein to the contrary notwithstanding, each of the parties hereto hereby waives all claims against the other for consequential damages.

IN WITNESS WHEREOF, the parties have executed this Agreement between Seguin and Transcend, Inc. d/b/a SPA Skateparks as of the day and year first above written.

THE CITY:

CITY OF SEGUIN

By: _____

Name: Douglas G. Faseler

Title: City Manager

Address: 205 N River Street
Seguin, Texas 78155

Phone:

Fax:

THE CONTRACTOR

TRANSCEND, INC. D/B/A SPA SKATEPARKS

By: _____

Name: Yann Curtis

Title: Vice President

Address: 1301 Orlando Road
Austin, Texas 78733

Phone: 512-203-5445

Fax: 512-236-5272