

## **EXHIBIT B**

### **Terms and Conditions for Professional Services**

#### **I. Standard of Performance:**

1. The performance of all services by Consultant, its employees or subcontractors in connection with this Agreement will be by persons appropriately licensed or registered under State, local and Federal laws governing their respective consulting disciplines.
2. In performing all services under this Agreement, the Consultant will use that degree of care and skill ordinarily exercised for similar projects by professional landscape architects who possess expertise in the types of services involved under this Agreement.
3. No work under this Agreement will be subcontracted by the Consultant without prior written approval from the Owner. Further, the Consultant will perform all of its services in coordination with the Owner.
4. In performing all services under this Agreement, the Consultant will comply with applicable local, state and federal laws.
5. Consultant will advise the Owner of data and information that Consultant needs to perform its services and Consultant will meet with Owner representatives at mutually convenient times to assemble this data and information. Consultant shall be allowed to reasonably rely on the accuracy of Owner supplied information.

#### **II. Owner's Responsibilities:**

1. The Owner will provide information to the Consultant regarding the Owner's requirements for the Consultant's services under this Agreement. The Owner will furnish the Consultant with copies of official City design standards and construction standards, and other data and information in the Owner's possession needed by the Consultant, at the Consultant's request.
2. The Owner will designate an authorized representative to act on the Owner's behalf with respect to this Agreement. The Owner will examine documents and information submitted by the Consultant, and promptly render responses to the Consultant on issues requiring a decision by the Owner.

#### **III. Consultant's Opinions of Probable Cost (Cost Estimates):**

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

#### **IV. Construction Procedures (applies only if included within the scope of services):**

During the construction phase of this project, the Consultant will:

1. Administer the construction services as set forth in the Owner's construction contract documents. The Consultant will not pursue a course of conduct that might jeopardize any of the Owner's rights under those documents. The Consultant may permit minor deviations from the construction contract documents that do not affect the validity of performance bonds with prior Owner approval.
2. Be a representative but not an agent of the Owner, and advise and consult with the Owner and provide written progress reports and advice to the Owner; forward the Owner's instructions to the construction contractor unless (a) the Consultant is unavailable in person or by telephone to issue instructions necessary for the proper progress and acceptance of work; (b) jeopardy to life or property exists; or (c) lack of instructions or unavailability of the Consultant will, in the Owner's opinion, result in harm to the Owner, in which cases the Owner may forward instructions directly to the construction contractor; Consultant shall have authority to act on behalf of the Owner only to the extent provided herein and in the construction contract documents. The Owner will advise the Consultant of any instructions issued directly by the Owner to the construction contractor if the Consultant was unavailable at the time of issuance of the instructions.
3. Make on-site professional observations of the project to ensure Consultant's familiarity with the progress and quality of the work, to determine if the work is proceeding in acceptable conformance with the construction contract documents, and to review the work with the Owner's designated representatives. On the basis of these observations, the Consultant will keep the Owner informed of the progress and quality of the work through written status reports. The Consultant will also be reasonably available to perform site visitations at the specific request of the Owner by the next business day after a request is made.
4. Not have control or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, for the acts or omissions of the construction contractor, subcontractors or any other persons performing any of the work, or for the failure of any of them to carry out the work in accordance with the construction contract documents, unless the acts or omissions are due to the negligence of the Consultant. However, the Consultant will exercise its authority on behalf of the Owner so that all work performed by the construction contractor results in a project completed in reasonably acceptable accordance with the construction contract documents. If the Consultant becomes aware of the construction contractor's utilization of means, methods, techniques, sequences or procedures of construction which, in the Consultant's opinion, will not result in completion of the project in accordance with the construction contract documents or which are unsafe, the Consultant will immediately inform the Owner.
5. Determine the amounts owing to the construction contractor based on its on-site professional observations and on evaluations of the construction contractor's applications for payment, including comparisons of the construction contractor's monthly cost reports with its applications for payment, and make recommendations for payment in these amounts, as provided in the construction contract documents, or take such other appropriate action which the Consultant deems necessary. The Consultant's recommendations for payment will constitute a representation by the Consultant to the Owner based on the Consultant's observations and on the data comprising the construction contractor's application for payment, that to the best of Consultant's knowledge, information and belief (a) the work has progressed to the point indicated, (b) the quality of the work is in acceptable conformance with the construction contract documents (subject to an evaluation of the work of conformance with the construction

contract documents upon substantial completion, subject to the results of any subsequent tests required by or performed under the construction contract documents, subject to minor variations from the construction contract documents correctable prior to completion, and subject to any specific qualifications stated in the certificate for payment), and (c) the construction contractor is entitled to payment in the amount certified. However, the issuance of a certificate for payment will not be a representation that the Consultant has made any examination to ascertain how and for what purpose the construction contractor has used the monies paid by the Owner.

6. Have authority to reject work which does not conform to the construction contract documents. Whenever it is necessary or advisable in the Consultant's opinion for the proper implementation of the intent of the construction contract documents, and with the approval of the Owner, the Consultant will have authority to require special inspection or testing of the work in accordance with the construction contract documents, whether or not the work is then fabricated, installed or completed. The Consultant will review the work and results of all testing laboratories as required by the construction contract documents and shall be allowed to reasonably rely on the results of such inspections or testing.

7. Prepare minor changes in the plans and specifications as directed by the Owner; and prepare necessary change orders for approval by the Owner and execution in accordance with the construction contract documents. The Consultant will not issue change orders not previously approved in writing by Owner, and no course of conduct on the part of the Consultant or the Owner will amend, waive or alter this provision.

8. Conduct professional inspections to determine the dates of substantial completion and final completion for the project, issue final certificates for payment or take other appropriate action, and make a written recommendation to the Owner regarding the Owner's acceptance of the project.

9. Review the completed Project with the Owner and the Contractor prior to the end of the one year warranty period and have all deficient items corrected. The extent of the duties, responsibilities and limitations of authority of the Consultant as the Owner's representative during construction will not be modified or extended after the construction contract documents have been authorized by the Owner to be competitively bid without written consent of the Owner and the Consultant and with notice to the Contractor.

## **V. Consultant's Records**

1. All expense records of the Consultant will be kept on a recognized accounting basis acceptable to the Owner and will be available to the Owner at mutually convenient times. (applies only if the Consultant is to be reimbursed for any expenses)

2. The Owner, its auditors and federal and state agencies that have monitoring or auditing responsibilities for this Agreement will have access to any books, documents, papers and records of the Consultant which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, copying and transcriptions.

3. The Consultant will furnish to the Owner at such time and in such form as the Owner may require, financial statements including audited financial statements, records, reports, data and information, as the Owner may request pertaining to the matters covered by this Agreement.

## **VI. Ownership and Use of Documents**

1. All documents, including, but not limited to designs and plans, prepared by the Consultant in connection with this Agreement will become the property of the Owner whether any project related to this Agreement is executed or not. Any reuse without specific written verification or adaptation by Consultant will be at Owner's sole risk and without liability of legal exposure to Consultant.
2. Under no circumstances shall the transfer of ownership of the Consultant's drawings, specifications, electronic files or other instruments of service be deemed a sale by the Consultant. With the exception of the Project and Services embodied by this Agreement, Consultant makes no warranties, either express or implied, of merchantability and fitness for any particular purpose.
3. The Consultant will retain all of its records and supporting documentation relating to this Agreement, and not delivered to the Owner, for a period of three years, except that in the event the Consultant goes out of business during that period, it will turn over to the Owner all of its records relating to the Project for retention by the Owner.

## **VII. Insurance and Indemnity**

1. Prior to the approval of this contract by the Owner, Consultant shall furnish a completed Insurance Certificate to the Purchasing office. The certificate shall be completed by an agent authorized to bind the named underwriter(s) to the coverage, limits, and termination provisions shown thereon, and shall furnish and contain all required information referenced or indicated thereon. OWNER SHALL HAVE NO DUTY TO PAY OR PERFORM UNDER THIS CONTRACT UNTIL SUCH CERTIFICATE IS RECEIVED BY THE OWNER'S PURCHASING DEPARTMENT, and no officer or employee of the Owner shall have authority to waive this requirement.
2. Subject to Consultant's right to maintain reasonable deductibles in such amounts as are approved by Owner, Consultant shall obtain and maintain in full force and effect for the duration of this contract, and any extension hereof, at Consultant's sole expense, insurance coverage written by companies approved by the State of Texas and acceptable to Owner, in the following type(s) and amount(s):

<u>Type of Coverage</u>		<u>Limits of Liability</u>	
a.	<b>Workers' Compensation</b>	Statutory	
b.	<b>Employer's Liability</b>	\$100,000	\$300,000
c.	<b>Commercial General (public) Liability</b>		
i.	Bodily Injury (ea. oc.)	\$1,000,000	\$1,000,000
ii.	Property Damage (Incl.	\$100,000 (ea. oc.)	\$300,000 (aggreg.)

Contractual Coverage of  
the Consultant's Indemnity  
under Section D hereof)

d. **Comprehensive Automobile Liability**

i.	Bodily Injury	\$300,000 (ea. pers.)	\$1,000,000(ea. oc.)
ii.	Property Damage	\$300,000 (ea. oc.)	

All costs for the above specified insurance shall be borne by the Consultant.

The Consultant shall require all of its subcontractors engaged to do work in connection with this contract to carry appropriate insurance in amounts not less than specified above.

3. Owner shall be entitled, upon request, and without expense, to receive copies of the policies and all endorsements thereto and may make any reasonable request for deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any of such policies). Upon such request by Owner, Consultant shall exercise reasonable efforts to accomplish such changes in policy coverage, and shall pay the cost thereof.
4. Consultant agrees with respect to the above required insurance, all insurance contracts and certificate(s) of insurance will contain and state, in writing, on the certificate or its attachment, the following required provisions.
  - a. Name, the CITY OF SEGUIN and its officers, employees, and elected representatives as additional insured(s), (as the interest of each insured may appear) to all applicable coverage.
  - b. Provide for 30 days' notice to Owner for cancellation, non-renewal, or material change.
  - c. Provide for notice to Owner at the address shown below by registered mail.
  - d. Consultant agrees to waive subrogation against the City of Seguin, its officers, employees, and elected representatives for injuries, including death, property damage, or any other loss to the extent same may be covered by the proceeds of insurance.
  - e. Provide that all provisions of this agreement concerning liability, duty, and standard of care together shall be underwritten by contractual liability coverage sufficient to include such obligations within applicable policies.
  - f. For coverage that is only available with claims made policies, the required period of coverage will be determined by the following formula: Continuous coverage for the life of the contract, plus one year (to provide coverage for the warranty period) and an extended discovery period or policy to be maintained for a minimum of five years which shall begin at the end of the warranty period.

5. PROFESSIONAL LIABILITY. Consultant shall provide professional liability insurance coverage with limits of not less than \$1,000,000.00 per claim and \$1,000,000.00 in the aggregate. Such Insurance shall remain in effect during the entire term of this Agreement and for a period of two (2) years after final completion of the Services. Professional liability insurance is not subject to the additional terms set forth above in Subsection 4.
6. INDEMNIFICATION. **THE CONSULTANT AGREES TO INDEMNIFY AND SAVE HARMLESS THE CITY OF SEGUIN FROM ANY AND ALL CLAIMS, CAUSES OF ACTION, AND DAMAGES OF EVERY KIND, FOR INJURY TO OR DEATH OF ANY PERSON AND DAMAGES TO PROPERTY ARISING OUT OF THE DESIGN AND CONSTRUCTION ADMINISTRATION SERVICES EMBRACED BY THIS CONTRACT, AND INCLUDING ACTS OR OMISSIONS OF THE CONSULTANT IN CONNECTION WITH THIS PROJECT.**

The Owner agrees to include Consultant as an indemnified party in the construction contracts for the work. Such indemnification shall protect Consultant to the same degree as the Owner. Further, the Owner agrees that Consultant shall be listed as an additional insured under the construction contractor's liability insurance policies.

7. Approval, disapproval, or failure to act by Owner regarding any insurance supplied by Consultant shall not relieve Consultant of responsibility or liability for damages and accidents as set forth in the contract documents. Neither shall the bankruptcy, insolvency, or denial of liability by the insurance company exonerate Consultant from liability.

#### **VIII. Controlling Law**

This Agreement is to be governed by the laws of the State of Texas and venue shall lie in the district courts of Guadalupe County, Texas.

#### **IX. Successors and Assigns**

Owner and Consultant, respectively, bind themselves, their partners, successors, assigns, and legal representatives to the covenants of this Agreement. Neither Owner nor Consultant will assign, sublet, or transfer any interest in this Agreement or claims arising therefrom without the written consent of the other.

#### **X. Term and Termination of Agreement**

1. The term of this Agreement begins upon its execution by the Owner, and will end upon the Consultant's completion, and the Owner's acceptance, of all services described in this Agreement and attachments incorporated therein.

2. The Owner or Consultant may terminate the Agreement, in whole or in part, by giving fifteen (15) days written notice, if the other party substantially fails to fulfill its obligations under the Agreement through no fault of the terminating party.

3. In the event of termination as provided in this Section, the Consultant will be compensated for all services performed to the termination date which are deemed by the Owner to be in accordance with this Agreement. This amount will be paid by the Owner upon the Consultant's delivering to the Owner all information and materials developed or accumulated by the Consultant in performing the services described in this Agreement, whether completed or in progress. The expense of the reproduction of these items will be borne by the Owner.

#### **XI. Severability**

If any provision of this agreement is held invalid or unenforceable, the remaining provisions shall be valid and binding upon the parties. One or more waivers by either party of any provision, term or condition shall not be construed by the other party as a waiver of any subsequent breach of the same provision, term or condition.

#### **XII. Changes**

The parties agree that no change or modification to this Agreement, or any attachments hereto, shall have any force or effect unless the change is reduced to writing, dated, and made part of this Agreement. The execution of the change shall be authorized and signed in the same manner as this Agreement. Adjustments in the period of services and in compensation shall be in accordance with applicable paragraphs and sections of this Agreement. Should the project involve conceptual or process development services or activities that exceed the initial planning as defined in the original Scope of Service and the facts developed may dictate a change in the services to be performed, which may alter the scope Consultant will inform the Owner of such situations so that changes in scope and adjustments to the time of performance and compensation can be made as required. If such change, additional services, or suspension of services results in an increase or decrease in the cost of or time required for performance of the services, an equitable adjustment shall be made, and the Agreement modified accordingly.

#### **XIII. Equal Employment and Nondiscrimination**

In connection with the services under this Agreement, Consultant agrees to comply with the applicable provisions of federal and state Equal Employment Opportunity for individuals based on color, religion, sex, or national origin, or disabled veteran, recently separated veteran, other protected veteran and armed forces service medal veteran status, disabilities under provisions of executive order 11246, and other employment, statutes and regulations, as stated in Title 41 Part 60 of the Code of Federal Regulations § 60-1.4 (a-f), § 60-300.5 (a-e), § 60-741 (a-e).

#### **XIV. Hazardous Materials**

The Owner represents to the Consultant that, to the best of its knowledge, no hazardous materials are present at the project site. However, in the event hazardous materials are known to be present, the Owner represents that to the best of its knowledge it has disclosed to the Consultant the existence of all such hazardous materials, including but not limited to asbestos, PCB's, petroleum, hazardous waste, or radioactive material located at or near the project site,

including type, quantity and location of such hazardous materials. It is acknowledged by both parties that the Consultant's scope of services do not include services related in any way to hazardous materials. In the event Consultant or any other party encounters undisclosed hazardous materials, Consultant shall have the obligation to notify the Owner and, to the extent required by law or regulation, the appropriate governmental officials, and Consultant may, at its option and without liability for delay, consequential or any other damages to the Owner, suspend performance of services on that portion of the project affected by hazardous materials until OWNER: (a) retains appropriate specialist consultant(s) or contractor(s) to identify and, as appropriate, abate, remediate, or remove the hazardous materials; and (b) warrants that the project site is in full compliance with all applicable laws and regulations. The Owner acknowledges that Consultant is performing professional services for the Owner and that Consultant is not and shall not be required to become an "arranger," "operator," "generator," or "transporter" of hazardous materials, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or near the project site in connection with Consultant's services under this Agreement. If Consultant's services hereunder cannot be performed because of the existence of hazardous materials, Consultant shall be entitled to terminate this Agreement for cause as set forth in Section X of this Agreement.

#### **XV. Finality of Agreement**

1. This Agreement, including the exhibits and schedules made part hereof, one of which shall include the scope of services, constitutes the entire Agreement between Consultant and the Owner, supersedes and controls over all prior written or oral understandings. This Agreement may be amended, supplemented or modified only by a written instrument duly executed by the parties.
2. In the event of any conflict between these Terms and Conditions and the provisions of any exhibit or attachment to this Agreement, these Terms and Conditions will govern and control.

#### **XVI. Litigation Support**

In the event the Consultant is required to respond to a subpoena, government inquiry or other legal process related to the services in connection with a legal or dispute resolution proceeding to which Consultant is not a party, the Owner shall reimburse the Consultant for reasonable costs in responding and compensate the Consultant at its then standard rates for reasonable time incurred in gathering information and documents and attending depositions, hearings, and trial.

#### **XVII. Utility Location**

If underground sampling or testing is to be performed, a local utility locating service shall be contacted to make arrangements for all utilities to determine the location of underground utilities. In addition, the Owner shall notify Consultant of the presence and location of any underground utilities located on the Owner's property which are not the responsibility of private utilities. The Consultant shall take reasonable precautions to avoid damaging underground utilities that are properly marked.