

## **ADDENDUM TO SCOPE AND FEE PROPOSAL FOR PROFESSIONAL ENGINEERING SERVICES**

This Addendum (the “Addendum”) modifies and amends that certain Professional Services Agreement (the “Agreement”) between the City of Seguin, Texas (“City”) and Freese and Nichols, Inc. (“FNI”) concerning quality control and construction inspection attached hereto.

### **ARTICLE 1 FNI’S SERVICES AND RESPONSIBILITIES**

#### **1.1 STANDARDS OF PERFORMANCE**

1.1.1 The performance of all services by FNI in connection with this Agreement will be by persons appropriately licensed or registered under State, local and Federal laws governing their respective consulting disciplines.

1.1.3 No work under this Agreement will be subcontracted by FNI without prior written approval from the City. Any work or services subcontracted under this Agreement will be specified by separate written Agreement and will be subject to each provision of this Agreement. Persons hired by FNI or its subcontractors shall not be employees of or have any contractual interest with the City.

1.1.4 Any provisions in this Agreement pertaining to the City’s review, approval or acceptance of written materials prepared by FNI or its subconsultants, contractors, and subcontractors in connection with this Agreement will not diminish FNI’s responsibility for the services set forth herein.

#### **1.2 ADDITIONAL SERVICES/CHANGE IN SERVICES**

1.2.1 FNI will submit a written estimate of fees to the City and obtain the City’s authorization before initiating any additional services not addressed in the Agreement.

1.2.2 Each material change (deletion or addition) in the services to be provided by FNI must be authorized by the City on an Authorization of Change in Services form approved by the City, subject to meeting the requirements of applicable ordinances or state law.

### **ARTICLE 2 FNI’S RECORDS**

2.1 All expense records of FNI will be kept on a recognized accounting basis acceptable to the City and will be available to the City at mutually convenient times.

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

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

### **ARTICLE 3**

#### **INSURANCE AND INDEMNITY**

*3.1 To the extent permitted under Texas Law (specifically, Texas Local Government Code 27.1904), FNI will indemnify, hold harmless and defend the City and its employees, agents, officers and servants from any and all lawsuits, claims, demands and causes of action of any kind arising from the negligent or intentional acts or omissions of FNI, its officers, employees or agents. This will include, but not be limited to, the amounts of judgments, penalties, interest, court costs, reasonable legal fees, and all other expenses incurred by the City arising in favor of any party, including the amounts of any damages or awards resulting from claims demands and causes of action for personal injuries, death or damages to property alleged or actual infringement of patents, copyrights, and trademarks and without limitation by enumeration, all other claims, demands, or causes of action of every character occurring, resulting, or arising from any negligent or intentional wrongful act, error or omission of FNI and/or its agents and/or employees. This obligation by FNI will not be limited by reason of the specification of any particular insurance coverage in this Agreement.*

3.2 FNI will procure and maintain at FNI's expense insurance as outlined in the Agreement, with insurance companies authorized to do business in the State of Texas, covering all operations under this Agreement, whether performed by FNI or FNI's agents, subcontractors or employees. Before commencing the work FNI will furnish to the City a certificate or certificates in form satisfactory to the City, showing that FNI has complied with this paragraph. All certificates will provide that the policy will not be changed or canceled until at least 30 calendar days written notice will have been given to the City. Commercial general liability insurance and motor vehicle insurance will be written with the City of Seguin, Texas as an additional insured and will be endorsed to provide a waiver of the carrier's right of subrogation against the City.

### **ARTICLE 4**

#### **CLAIMS AND DISPUTES**

4.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation at the sole option of the City as a condition precedent to the commencement of litigation. Unless agreed to by the City, the rules of the American Arbitration Association will not be binding.

4.2 If the City elects to mediate, the City and FNI shall endeavor to resolve claims, disputes and other matters in question between them by non-binding mediation. Unless the parties mutually agree otherwise, the 25th District Court of Guadalupe County, Texas shall appoint the mediator, and the mediation shall be held at a mutually agreeable time and place in Seguin, Texas. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation.

4.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the work in the Agreement is located, unless another location is mutually agreed upon.

4.4 If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the dispute may be resolved through litigation in a state court in Guadalupe County, Texas of competent jurisdiction or, if in federal court, the United States District Court for the Western District of Texas, Austin Division.

## **ARTICLE 5 MISCELLANEOUS PROVISIONS**

5.1 This Agreement is governed by and will be construed under the laws of the State of Texas. All obligations of both parties are performable and exclusive venue for any dispute arising under this Agreement shall be as stated in paragraph 4.4.

5.2 FNI will not use funds received by it directly or indirectly under the terms of this Agreement for any partisan political activity or to further the election or defeat of any candidate for public office.

5.3 FNI hereby affirms that FNI and FNI's firm have not made or agreed to make any valuable gift whether in the form of service, loan, thing, or promise to any person or any of his/her immediate family, having the duty to recommend, the right to vote upon, or any other direct influence on the selection of Engineers to provide professional services to the City within the two years preceding the execution of this Agreement. A campaign contribution, as defined by the Texas Election Code or the Seguin City Code will not be considered as a valuable gift for the purposes of this Agreement.

5.4 In performing the services required under this Agreement, FNI will not discriminate against any person on the basis of race, color, religion, sex, national origin, age, disability or ancestry. FNI 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, national origin, age, disability or ancestry. A breach of this covenant may be regarded as a default by FNI of the Agreement.

5.5 Should any provision in this Agreement be found or deemed to be invalid, this Agreement will be construed as not containing the provision, and all other provisions which are otherwise lawful will remain in full force and effect, and to this end the provisions of this Agreement are declared to be severable.

5.6 In performing all services under this Agreement, FNI, its subcontractors, successors and assigns will comply with all local, state and federal laws.

5.7 The City's execution and performance under this Agreement will not act as a waiver by the City of any immunity from suit or limitations on liability to which it is entitled under applicable law. The parties acknowledge that the City, in executing and performing this Agreement, is a governmental entity acting in a governmental capacity.

5.8 The City of Seguin is governed by the Texas Public Information Act (the "Act"), Chapter 552 of the Texas Government Code. This Agreement and all written information generated under this agreement may be subject to release under the Act. FNI will not make any reports, information, data, etc. generated under this Agreement available to any individual or organization without the written approval of the City.

5.9 The captions or headings included in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions, articles, or sections of this Agreement.

5.10 In the event that the performance by either the City or FNI of any of its obligations under this Agreement is interrupted or delayed by events outside of their control such as acts of God, war, riot or

civil commotion, then the party is excused from such performance for the period of time reasonably necessary to remedy the effects of such events.

5.11 In the event of a default or breach of this Agreement by FNI, the City reserves the right to choose among the remedies for the default or breach available to the City. These remedies may be used in conjunction with one another or separately, and together with any other statutory or common law remedies available to the City. Any failure by the City to enforce this Agreement with respect to one or more defaults by FNI will not waive the City's ability to enforce the Agreement after that time.

5.12 Pursuant to Chapter 2270, Texas Government Code, Contractor certifies Contractor (1) does not currently boycott Israel; and (b) will not boycott Israel during the Term of this Agreement. Contractor acknowledges this Agreement may be terminated and payment withheld if this certification is inaccurate.

5.13 Pursuant to Subchapter F, Chapter 2252, Texas Government Code, Contractor certifies Contractor (1) is not engaged in business with Iran, Sudan, or a foreign terrorist organization. Contractor acknowledges this Agreement may be terminated and payment withheld if this certification is inaccurate.

## **ARTICLE 6 EXTENT OF AGREEMENT**

6.1 In the event of any conflict between the Agreement and the provisions of this Addendum, this Addendum will govern and control and the conflicting provisions in the Agreement shall be superseded by the terms in this Addendum and shall be of no force or effect. Specifically, any provisions within the Agreement limiting liability, or the amount of damages or duties to defend and indemnify the City, as they pertain to FNI, regardless of whether arising from a claim by a third party, are hereby deemed to be void and of no force or effect.

6.1 No provision in the Agreement shall serve to modify any applicable statutes of limitation or other law or judicial interpretation affecting the applicability of statutes of limitation to either party in connection with the filing of a lawsuit by either party. For the avoidance of doubt, all common law rules governing notice of or the accrual of a cause of action based on when a party knew or should have known certain information shall control over any conflicting provisions in the Agreement.

Each of the persons executing this Agreement represents that he or she has full power and authority to execute this Agreement on behalf of the party that person represents. This Agreement will be effective as of the day and year established in the first paragraph of this Agreement.

CITY:

FNI:

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Steve Parker, City Manager

By: 

Name: Charles Kucherka, P.E.

Title: Principal