

# AIA® Document B104® – 2017

## Standard Abbreviated Form of Agreement Between Owner and Architect

**AGREEMENT** made as of the 25 day of July in the year 2024 (hereafter, the "Effective Date")

*(Paragraph deleted)*

**BETWEEN** the Engineer's client identified as the Owner:  
*(Name, legal status, address and other information)*

Ector County Independent School District  
802 N. Sam Houston  
Odessa, TX 79761  
Telephone Number: 432.456.9719  
Fax Number: 432.456.9718

and the Engineer:  
*(Name, legal status, address and other information)*

Bluefin, LLC  
4322 N. Beltline Rd. Suite B110  
Irving, TX 75038  
Telephone Number: 214.758.0785

for the following Project:  
*(Name, location and detailed description)*

Roof Design and Engineering and Project Management Services  
Ector County ISD  
Various ECISD Campus Locations

The Owner and Engineer agree as follows.

WHEREAS Ector County Independent School District (hereinafter referred to as "Owner") and Bluefin, LLC (hereinafter referred to as "Engineer") desire to enter into a contract under which Engineer will perform construction services relating the above referenced Project(s) on behalf of Owner;

WHEREAS Owner and Engineer have agreed to enter into AIA Document B104™-2017 Contract ("Contract") as the basic form for that contract; and

WHEREAS certain terms and conditions of the contract must be modified to comply with applicable laws and policies affecting Owner and Engineer on this project, Owner and Engineer hereby agree to the following amendments to the Contract:

### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

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### ARTICLE 1 INITIAL INFORMATION

§ 1.1 This Agreement is based on the Initial Information set forth below:

*(Paragraph deleted)*

Roof Design/Engineering and Project Management Services for Roof Replacement / Repair Projects at Various ECISD Campuses as determined and agreed to by Owner and Engineer during the term of this Agreement awarded pursuant to Ector County Independent School District Request for Qualifications for Roofing Consulting Services ("RFQ #24-10").

§ 1.2 The Owner and Engineer may rely on the Initial Information. Both parties, however, recognize that such information may materially change and, in that event, the Owner and the Engineer shall appropriately adjust the schedule, the Engineer's services and the Engineer's compensation.

§ 1.3 The parties shall agree upon written protocols governing the transmission and use of, and reliance on, Instruments of Service or any other information or documentation in digital form.

§ 1.3.1 Any use of, or reliance on, all or a portion of a building information model without agreement to written protocols governing the use of, and reliance on, the information contained in the model shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees.

*(Paragraph deleted)*

### ARTICLE 2 ENGINEER'S RESPONSIBILITIES

§ 2.1 The Engineer shall provide professional services as set forth in this Agreement. The Engineer shall also comply with all provisions in Texas Administrative Code, Title 19 Section 61.1040, pertaining to services and actions required of the Engineer. Engineer, prior to signing this Agreement and submitting it to the Owner, shall comply with the provisions of Texas Government Code Section 2252.908, requiring a Disclosure of Interested Parties filed with the Texas Ethics Commission. Engineer certifies that Engineer is a registered professional architect or engineer licensed

to practice in the State of Texas. Engineer agrees to notify Owner should Engineer's registration status change. Engineer certifies that Engineer and Engineer's employees and agents are eligible to work under federal, state and local immigration laws and regulations. The Engineer shall perform its services consistent with the professional skill and care ordinarily provided by competent engineers practicing in the same or similar locality under the same or similar circumstances and professional license and as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer, as set out in Texas Local Government Code Section 271.904(d) and Texas Civil Practices and Remedies Code Section 130.0021, hereinafter referred to as the "Standard of Care." The Engineer shall further, and to the extent required by 19 Texas Administrative Code Section 61.1040, provide all certifications required by Section 61.1040(f), and otherwise perform its services and obligations required of it by applicable laws, codes, and ordinances in accordance with the Standard of Care. Owner's approval, acceptance, use of, or payment for all or any of Engineer's services shall in no way alter Engineer's obligations or Owner's rights hereunder.

**§ 2.2** Prior to performing Engineer's services under this Agreement, Engineer shall procure, maintain and provide insurance certificates, policies and endorsements, in at least the following amounts, to protect Engineer and Owner from claims arising out of the performance of the Engineer's services under this Agreement and caused by any error, omission, negligent act or omission, or design defect by Engineer, such insurance to be in a form approved by the Owner, with an effective date prior to the beginning date of design. Such insurance shall be written on an occurrence basis, if available, and on a claims-made basis, if occurrence basis insurance is not available. Engineer shall maintain its insurance in full force and effect and uninterrupted during the term of this Agreement and after the completion of services under this Agreement until the completion of any applicable statute of limitations, such period to be not less than one year from Final Completion of all construction of this Project as to workers compensation, two years from the Final Completion of all construction of this Project as to commercial general liability, and comprehensive automobile liability, and not less than eight years from the Substantial Completion of all construction of this Project (or ten years, as allowed by Texas Civil Practice and Remedies Code § 16.008), as to errors and omissions insurance. Engineer shall furnish to Owner insurance certificates, policies and endorsements upon request at any time. Engineer shall name Owner as an additional insured under his policies for commercial general liability and comprehensive automotive liability. All insurance required herein shall be obtained from a company licensed to do business in the State of Texas by the Texas Department of Insurance, and shall be underwritten by a company rated not less than A-X in A.M. Best's Key Rating Guide, Property-Casualty, according to the latest posted ratings available on A.M. Best's website, [www.ambest.com](http://www.ambest.com), and that permits waivers of subrogation. Deductibles or self-insured retention limits for all policies (except Engineer's Errors or Omissions insurance) shall not exceed \$25,000 for a project budgeted at \$4 million or less, or \$50,000 for a project budgeted at more than \$4 million. The policies shall include a waiver of subrogation in favor of the Owner. Any deviation from these requirements can only be approved by Owner's Board of Trustees. To the extent that Engineer is unable to procure the insurance designated herein because the insurance is not reasonably available or is cost-prohibitive, then Engineer shall provide written notice to Owner's Board of Trustees. Any nonconformity may be grounds for termination or modification of the Contract. Such policies shall be primary and non-contributory. The limits of liability for such insurance shall be in at least the following amounts:

- .1 Commercial General Liability with policy limits of not less than the following amounts:  
\$1,000,000 per incident/\$2,000,000 aggregate
- .2 Business Automobile Liability (including owned, non-owned, hired, or any other vehicles):  
Combined single limit policy in the amount of at least \$1,000,000 (one million) for Bodily Injury and Property – Each Accident.
- .3 Workers' Compensation
  1. State: Statutory benefits. Must also comply with the provisions of 28 Texas Administrative Code § 110.110(i)
  2. Employer Liability: \$1,000,000
- .4 Professional Liability

\$2,000,000 per claim /\$3,000,000 per annual aggregate

.5 Umbrella Excess Liability coverage shall be:

\$10,000,000 per occurrence and in the aggregate

6. Texas Workers Compensation Insurance. Because Engineer will be performing services on-site, a copy of a certificate of insurance, a certificate of authority to self-insure issued by the Texas Department of Insurance (TDI), or a coverage agreement (DWC-81, DWC-82, DWC-83, or DWC-84), showing statutory workers' compensation insurance coverage for the Engineer or his employees providing services on a Project is required for the duration of the Project. All applicable definitions are found in 28 Texas Administrative Code § 110.110(i).

### ARTICLE 3 SCOPE OF ENGINEER'S BASIC SERVICES

§ 3.1 The Engineer's Basic Services consist of those described in this Article 3 and include usual and customary roof engineering services and roofing consultant services. Services not set forth in this Article 3 are Supplemental or Additional Services.

§ 3.1.1 The Engineer shall coordinate its services with those services provided by the Owner and the Owner's consultants. The Engineer shall be entitled to rely on (1) the accuracy and completeness of the services and information furnished by the Owner and the Owner's consultants in accordance with 19 TAC Section 61.1040 and (2) the Owner's approvals. The Engineer shall provide written notice with reasonable promptness to the Owner if the Engineer becomes aware of any error, omission, or inconsistency in such services or information. Engineer shall also promptly respond in writing to notices from Owner regarding Owner's discovery of errors, omissions, or inconsistencies, and, if requested, shall promptly meet with Owner regarding same. Owner's notice or lack of notice shall not relieve Engineer of any responsibility or liability for performance of Engineer's contracted services.

§ 3.1.2 As soon as practicable after the date of this Agreement, the Engineer shall submit for the Owner's approval a schedule for the performance of the Engineer's services including the dates of Engineer's design services and the completion of documentation required of the Engineer. Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Engineer. With the Owner's prior written approval for reasonable cause, the Engineer shall adjust the schedule, if necessary, as the Project proceeds until the commencement of construction.

§ 3.1.3 The Engineer shall cooperate with the Owner, if necessary, in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project.

### § 3.2 Design Phase Services

§ 3.2.1 The Engineer shall review the program and other information furnished by the Owner, and shall review laws, codes, and regulations applicable to the Engineer's services.

§ 3.2.2 The Engineer shall discuss with the Owner the Owner's program, schedule, budget for the Cost of the Work, Project site, and alternative approaches to design and construction of the Project. The Engineer shall reach a written understanding with the Owner regarding the Project requirements.

§ 3.2.3 The Engineer shall consider and discuss with Owner sustainable design alternatives, such as material choices, together with other considerations based on program, aesthetics, and any sustainable objectives, in developing a design for the Project that is consistent with the Owner's schedule and budget for the Cost of the Work. The Owner may, but shall not be required to, consider and approve any sustainable design alternatives recommended by Engineer so long as such alternatives do not increase the cost of the Work. The Owner's decisions on matters relating to aesthetic effect shall be final. To the extent that Owner's Contractor or Construction Manager at Risk recommends aesthetic revisions to Owner, Engineer shall be consulted.

§ 3.2.4 Based on the Project requirements, the Engineer shall prepare Design Documents for the Owner's approval consisting of drawings and other documents appropriate for the Project. When the Project requirements have been sufficiently identified, including Owner's budgetary constraints, programmatic needs, and expectations as to quality,

functionality of systems, maintenance costs, and usable life of materials, the Engineer shall prepare and submit to the Owner an estimate of the Cost of the Work prepared in accordance with Section 6.3.

**§ 3.2.5** The Engineer shall submit the Design Documents to the Owner, and request the Owner's approval. Engineer shall not proceed to the Construction Documents Phase without the approval of Owner's Board of Trustees, or the Board's designee; provided, however, this approval shall not relieve Engineer of Engineer's responsibility and liability to provide documents which are sufficient for Owner to complete the construction of the Project, and are free from material defects or omissions. Engineer shall bear full responsibility for, and all resulting excess costs incurred by Engineer in, proceeding without required approval.

### **§ 3.3 Construction Documents Phase Services**

**§ 3.3.1** Based on the Owner's approval of the Design Documents, the Engineer shall prepare for the Owner's approval Construction Documents. "Construction Documents" means: all Drawings, specifications, submittals, transmittals, deliverables, instructions to Contractor, and other documents, including those in electronic form, prepared by the Engineer and the Engineer's consultants which shall set forth in detail the requirements for construction of the Project. The Construction Documents shall reflect all agreements between Owner and Engineer concerning Owner's budgetary constraints, programmatic needs and expectations as to quality, functionality of systems, maintenance costs, and usable life of equipment and facilities or materials. The Engineer shall provide Construction Documents which are sufficient for the Owner to complete construction of the Project, are free from material defects or omissions, and comply with all applicable laws, ordinances, codes, rules, and regulations, as of the date of issuance of Construction Documents. The Owner and Engineer acknowledge that in order to construct the Work the Contractor will provide additional information, including Shop Drawings, Product Data, Samples and other similar submittals, which the Engineer shall review in accordance with Section 3.4.4. Owner and Owner's authorized representatives shall be given the opportunity to review all Construction Documents prior to release of the Construction Documents for bidding, proposal or negotiation purposes. Engineer's bid specifications and any subsequent contract shall not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to any organization. Texas Government Code Section 2269.054. Engineer shall also add the following language in any document issued to solicit bids or competitive sealed proposals on the Project: *"By submitting a bid or proposal, each bidder or proposer agrees to waive any claims it has or may have against the Owner, the Engineer, and their respective employees, agents, or representatives, arising out of or in connection with the administration, evaluation, recommendation, or selection of any bid or proposal; waiver of any requirements under the bid or proposal documents or contract documents; acceptance or rejection of any bid or proposal; and award of the contract."*

**§ 3.3.2** The Engineer shall incorporate the design requirements of governmental authorities having jurisdiction over the Project into the Construction Documents. Engineer shall certify that Engineer has reviewed the standards contained in 19 Texas Administrative Code Section 61.1040 and Section 61.1031, if applicable to the Project, and performed its services in accordance with the Standard of Care in executing the Construction Documents. Engineer shall complete the Texas Education Agency's (TEA's) Certification of Project Compliance, if applicable. In executing the certifications required under the provisions of this Section, Engineer shall exercise its reasonable professional judgment and care consistent with the Standard of Care. It shall be the responsibility of Engineer to address revisions or amendments to applicable codes or standards that become effective prior to the date of Substantial Completion. Revisions or amendments to applicable codes or standards which become effective after the date of Substantial Completion shall be addressed by the Engineer, and shall be compensated as a Change in Service.

**§ 3.3.3** The Engineer shall submit the Construction Documents to the Owner, update the estimate for the Cost of the Work and advise the Owner of any adjustments to the estimate of the Cost of the Work, take any action required under Section 6.5, and request the Owner's approval. Engineer shall not proceed to the Bidding or Negotiation Phase without the approval of Owner's Board of Trustees, or Board designee; provided, however, this approval shall not relieve Engineer of Engineer's responsibility and liability to provide documents which are sufficient for Owner to complete the construction of the Project, and are free from material defects or omissions, in accordance with the Standard of Care. Engineer shall bear full responsibility for, and all resulting excess costs incurred by Engineer in, proceeding without required approval.

§ 3.3.4 The Engineer, following the Owner's approval of the Construction Documents and of the latest estimate of the Cost of the Work, shall assist the Owner in obtaining bids or proposals and awarding and preparing contracts for construction.

### § 3.4 Construction Phase Services

#### § 3.4.1 General

§ 3.4.1.1 The Engineer shall provide administration of the Contract between the Owner and the Contractor as set forth below and in AIA Document A104™–2017, Standard Abbreviated Form of Agreement Between Owner and Contractor, as amended for the Project. If the Owner and Contractor modify AIA Document A104–2017 (or use an altogether different contract), those modifications shall not affect the Engineer's services under this Agreement unless the Owner and the Engineer amend this Agreement. While on Owner's property and throughout Engineer's services under this Agreement, the Engineer shall comply with all policies, regulations, and rules of the Owner, including, but not limited to, those related to employee conduct (such as prohibitions against alcohol, weapons, drugs, fraternization, harassment, and tobacco on school property), and prohibitions against fraud and financial impropriety.

§ 3.4.1.2 The Engineer shall be a representative of, and shall advise and consult with the Owner during the Construction Phase Services. The Engineer shall have authority to act on behalf of the Owner only to the extent provided in this Agreement. The Engineer shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Engineer be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Engineer shall be responsible for the Engineer's negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work. Any services by Engineer made necessary due to Engineer's failure to discover a construction defect or nonconforming work in accordance with the Standard of Care shall be at no additional cost to Owner. Any services by Engineer made necessary by Engineer's design errors or omissions in accordance with the Standard of Care shall be at no additional cost to Owner.

§ 3.4.1.3 Subject to Section 4.2, the Engineer's responsibility to provide Construction Phase Services commences with the award of the Contract for Construction and terminates on the date the Engineer issues the final Certificate for Payment.

#### § 3.4.2 Evaluations of the Work

*(Paragraph deleted)*

§ 3.4.2.1 The Engineer, or his authorized representative, as a representative of the Owner, shall visit the site at least once per week (or more per week when deemed necessary by the Owner or when necessary to protect Owner's interest), and at other intervals appropriate to the stage of the Contractor's operations (1) to inspect the progress, quantity and quality of the Work completed; (2) to reject any observed nonconforming Work; (3) to become familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed; (4) to guard the Owner against defects and deficiencies in the Work; (5) to determine if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents and on time; and (6) to document progress of the Work, in written and photographic form.. On the basis of the site visits, on-site observations, or inspections by the Engineer, Engineer shall keep Owner and Owner's Contractor informed of the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, and from the most recent construction schedule submitted by the Contractor, and (2) defects and deficiencies observed in the Work. Engineer shall guard Owner against defects and deficiencies in the Work, and shall promptly notify Owner and Contractor orally regarding the defect or nonconforming Work, which notice shall be followed by notice in writing of defects and nonconforming work noted and corrective actions taken or recommended. Any services by Engineer made necessary due to Engineer's failure to discover a construction defect or nonconforming work shall be at no additional cost to Owner. Any services by Engineer made necessary by Engineer's design errors or omissions shall be at no additional cost to Owner.

§ 3.4.2.2 If requested by Owner in writing, the Engineer may provide project management as Additional Services as provided in this Agreement.

§ 3.4.2.3 The Engineer shall not supervise, direct or have control over the Contractor's work nor have any responsibility for the construction means, methods, techniques, sequences, or procedures selected by the Contractor

nor for the Contractor's safety precautions or programs in connection with the Work. These rights and responsibilities are solely those of the Contractor in accordance with the Contract Documents.

**§ 3.4.2.4** The Engineer shall not be responsible for any acts or omissions of the Contractor, any subcontractor, any entity performing any portions of the Work or any agents or employees of any of them. The Engineer does not guarantee the performance of the Contractor and shall not be responsible for the Contractor's failure to perform the Work in accordance with the Contract Documents or any applicable laws, codes, rules, or regulations.

**§ 3.4.2.5** The Engineer has the authority to reject Work that does not conform to the Contract Documents. Whenever the Engineer considers it necessary or advisable, the Engineer shall recommend to Owner additional inspection or testing of the Work in accordance with the provisions of the Contract Documents.

**§ 3.4.2.6** The Engineer shall interpret and make recommendations to Owner regarding matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Engineer's response to such requests shall be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

**§ 3.4.2.7** Interpretations and recommendations of the Engineer shall be consistent with the intent of, and reasonably inferable from, the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and recommendations, the Engineer shall endeavor to secure faithful performance by both Owner and Contractor, and shall not be liable for results of interpretations or recommendations rendered in good faith.

**§ 3.4.2.8** The Engineer shall promptly render initial written recommendations on Claims, disputes, or other matters in question between the Owner and Contractor as provided in the Contract Documents.

#### **§ 3.4.3 Certificates for Payment to Contractor**

**§ 3.4.3.1** The Engineer shall observe the progress of the Work, critically evaluate, review and certify the amounts due the Contractor and shall sign and issue Certificates for Payment in such amounts if such amounts are valid, correct, and deemed due and owing, in Engineer's professional opinion, within seven (7) days of receipt of Contractor's Application for Payment. The Engineer's certification for payment shall constitute a representation to the Owner, based on the Engineer's observations and/or evaluation of the Work as provided in Section 3.4.2 and on the data comprising the Contractor's Application for Payment, that the Work has progressed to the point indicated, and in Engineer's professional opinion, the quality of the Work is in accordance with the Construction Documents and Contract Documents, and that the Contractor is entitled to payment in the amount certified. If Engineer disputes the Contractor's Application for Payment in whole or in part, Engineer shall provide in writing to Owner and Contractor a detailed statement of the Engineer's reason for withholding certification in accordance with Texas Government Code §2251.042(a) and applicable sections of the AIA Document A104™-2017 for this Project. The Engineer shall maintain a record of the Applications and Certificates for Payment.

**§ 3.4.3.2** The issuance of a Certificate for Payment shall not be a representation that the Engineer has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

#### **§ 3.4.4 Submittals**

**§ 3.4.4.1** The Engineer shall review and approve, or take other appropriate action, upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with the Contract Documents and all laws, statutes, codes and requirements applicable to Engineer's design services. Review of such submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Engineer's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Engineer, of any construction means, methods, techniques, sequences or procedures. The Engineer's action in reviewing submittals shall be taken in accordance with the approved submittal schedule or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time, in the



Engineer's professional judgment, to permit adequate review. If it is determined that any submittal does not comply with the requirements of the Contract Documents, then Engineer shall require Contractor to come into compliance. The Engineer shall promptly report in writing to the Contractor and Owner any errors, inconsistencies and omissions discovered by the Engineer in the Shop Drawings, Product Data and Samples. The Engineer is not authorized to approve changes involving major systems such as HVAC, roof, foundation, outward appearance, color schemes, floor plans, building materials, or mechanical equipment without Owner's prior written consent.

**§ 3.4.4.2** If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials or equipment, the Engineer shall specify the appropriate performance and design criteria that such services must satisfy. The Engineer shall review and take appropriate action on Shop Drawings and other submittals related to the Work designed or certified by the Contractor's design professional, provided the submittals bear such professional's seal and signature when submitted to the Engineer. The review shall be for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Engineer shall be entitled to rely upon, and shall not be responsible for, the adequacy, accuracy, and completeness of the services, certifications, and approvals performed or provided by such design professionals.

**§ 3.4.4.3** The Engineer shall review and respond to written requests for information about the Contract Documents. The Engineer's response to such requests shall be made in writing within any time limits agreed upon, or otherwise with reasonable promptness. The Engineer shall maintain all records of submittals and copies of submittals supplied by the Contractor in accordance with the requirements of the Contract Documents.

#### **§ 3.4.5 Changes in the Work**

With notice and consent of Owner, the Engineer may authorize minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. Subject to Section 4.2.3, the Engineer shall prepare Change Orders and Construction Change Directives for the Owner's approval and execution in accordance with the Contract Documents. The Engineer shall maintain records relative to changes in the Work.

#### **§ 3.4.6 Project Completion**

The Engineer shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion; issue Certificates of Substantial Completion and of Final Completion, using Owner's or State forms, and ensure Contractor gives its notarized signature on its Certification of Substantial or Final Completion; receive from the Contractor and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract; and issue a final Certificate for Payment based upon a final inspection indicating that the Work complies with the requirements of the Contract Documents. For any Work that exceeds \$50,000, Engineer shall schedule and ensure completion of inspections with the Texas Department of Licensing and Regulation as required by Texas Government Code Section 469.105.

### **ARTICLE 4 SUPPLEMENTAL AND ADDITIONAL SERVICES**

**§ 4.1** Supplemental Services may be required for the Project and shall be included under Basic Services. The Engineer shall provide the Supplemental Services indicated below, as needed, at no additional compensation to the Owner: coordination of separate contractors or independent consultants, detailed cost estimates, on-site project *(Paragraphs deleted)* representation, value analysis, preparation of as-designed record drawings, sustainable project services (if applicable for the Project).

**§ 4.2** The Engineer may provide Additional Services after execution of this Agreement without invalidating the Agreement. Upon recognizing the need to perform Additional Services, the Engineer shall notify the Owner. The Engineer shall not provide the Additional Services, including those listed below at section 4.2.1, until the Engineer receives the Owner's written authorization. Except for services required due to the fault of the Engineer, any Additional Services provided in accordance with this Section 4.2 shall entitle the Engineer to compensation pursuant to Section 11.3.

**§ 4.2.1** The Engineer shall provide the following as Additional Services: services necessitated by a significant change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project



including, but not limited to, size, quality, complexity; a significant change in the Owner's schedule or budget for Cost of the Work, or procurement or delivery method.

§ 4.2.2 The Engineer has included in Basic Services weekly visits to the site by the Engineer during construction. The Engineer shall conduct site visits in excess of that amount as an Additional Service.

*(Paragraphs deleted)*

## **ARTICLE 5 OWNER'S RESPONSIBILITIES**

§ 5.1 Unless otherwise provided for under this Agreement, the Owner shall provide information in a timely manner regarding requirements for and limitations on the Project, including a written program as required by 19 Texas Administrative Code Section 61.1040 and any other applicable law. The Engineer shall review the program and specifications furnished by Owner to ascertain the specific requirements of the Project and shall arrive at a mutual written understanding of such requirements with Owner. Engineer shall include all components of Owner's program in the Project, unless specific written agreement to delete a component is received from Owner.

§ 5.2 The Owner shall establish and update the Owner's budget for the Project, when required, including (1) the budget for the Cost of the Work as defined in Section 6.1; (2) the Owner's other costs; and, (3) reasonable contingencies related to all of these costs. The Owner shall update the Owner's budget for the Project as necessary throughout the duration of the Project until final completion. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Engineer. The Owner and the Engineer shall thereafter agree to a corresponding change in the Project's scope and quality.

§ 5.3 Upon written request of the Engineer, the Owner shall furnish surveys known to the Owner describing physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. Other than the metes and bounds noted in the legal description of the site, the Engineer shall not be entitled to rely on the accuracy of information furnished by the Owner, but shall exercise proper precautions relating to the safe performance of the Work. The Owner may furnish services of geotechnical engineers or other consultants, when the Engineer requests such services and demonstrates that they are reasonably required by the scope of the Project.

§ 5.4 The Owner shall coordinate the services of its own consultants with those services provided by the Engineer. Upon the Engineer's request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner's consultants. The Owner shall require that its consultants and contractors maintain insurance, including professional liability insurance, as appropriate to the services or work provided.

§ 5.5 The Owner shall furnish tests, inspections and reports that are required by law or the Contract Documents to be furnished by the Owner. To the extent that tests, inspections and reports are not required by law or the Contract Documents to be furnished by Owner, but are deemed necessary by the Engineer or Owner, then they shall be furnished by Engineer, unless Engineer receives Owner's written permission to charge Owner for the services or Owner agrees to separately contract for the services.

§ 5.6 Unless otherwise provided in this Agreement, the Owner may, in its sole discretion, furnish 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.

§ 5.7 The Owner shall provide prompt written notice to the Engineer if the Owner becomes aware of any fault or defect in the Project, including errors, omissions or inconsistencies in the Engineer's Instruments of Service and Engineer shall have the reasonable amount of time required by Texas Government Code Chapter 2272 to cure its errors, omissions, or inconsistencies as a precondition to any dispute resolution proceeding involving Owner and Engineer. Engineer acknowledges that Engineer is the leader of the design team and is responsible for the design of the Project. Therefore, Owner shall be entitled to rely on the Construction Documents, services, and information furnished by the Engineer. This Section shall not relieve Engineer of any responsibility or liability for the performance of Engineer's contracted services on the Project, in accordance with the Standard of Care.

§ 5.8 The Owner shall endeavor to communicate with the Contractor through the Engineer about matters arising out of or relating to the Contract Documents.

§ 5.9 The Owner shall provide the Engineer access to the Project site prior to commencement of the Work and shall obligate the Contractor to provide the Engineer access to the Work wherever it is in preparation or progress.

*(Paragraph deleted)*

## **ARTICLE 6 COST OF THE WORK**

§ 6.1 For purposes of the Engineer's compensation, the Cost of the Work shall be the total cost to the Owner to construct all elements of the Project designed or specified by the Engineer, and constructed by the Owner, and shall include contractors' general conditions costs, overhead and profit. To the extent that the Project is not completed or constructed, the Cost of the Work shall include the estimated cost to the Owner of all elements of the Project designed by the Engineer and accepted by the Owner but not constructed by the Owner. The Cost of the Work also includes the reasonable value of labor, materials, and equipment, donated to, or otherwise furnished by, the Owner. The Cost of the Work does not include the compensation of the Engineer or Engineer's consultants; the costs of the land, rights-of-way, financing, or contingencies for changes in the Work; alternate designs of the Engineer that are not constructed or accepted by the Owner; or other costs that are the responsibility of the Owner. The Cost of the Work does not include elements of the Project designed by Engineer but not accepted by the Owner. For purposes of the Engineer's compensation, the Cost of the Work shall not include the fee for management and supervision of construction or installation provided by a separate Owner representative. For purposes of the Engineer's compensation, the Cost of the Work shall include the Owner's cost of labor and materials furnished by the Owner in constructing portions of the Project, if the Work is designed and construction is overseen by Engineer. For purposes of the Engineer's compensation, the Cost of the Work shall only include the Owner's cost of fixtures, furnishing and equipment designed by the Engineer, at the request of the Owner.

§ 6.2 The Owner's budget for the Cost of the Work is provided in Initial Information, and shall be adjusted throughout the Project as allowed under Sections 5.2, 6.4 and 6.5. Evaluations of the Owner's budget for the Cost of the Work, and the preliminary estimate of the Cost of the Work and updated estimates of the Cost of the Work prepared by the Engineer, represent the Engineer's judgment as a design professional. It is recognized, however, that neither the Engineer nor the Owner has control over the cost of labor, materials or equipment; the Contractor's methods of determining bid prices; or competitive bidding, market or negotiating conditions. Accordingly, if the Engineer's design is determined to exceed Owner's budget, then Engineer agrees to redesign the Project, at Engineer's expense and as a part of Engineer's Basic Services, to meet Owner's budget.

§ 6.3 The Engineer shall prepare a preliminary estimate of the Cost of the Work, which shall incorporate Owner's budgetary constraints, programmatic needs, and expectations as to quality, functionality of systems, maintenance costs, and usable life of equipment and facilities. As the design process progresses through the end of the preparation of the Construction Documents, the Engineer shall update and refine the preliminary estimate of the Cost of the Work. The Engineer shall advise the Owner of any adjustments to previous estimates of the Cost of the Work indicated by changes in Project requirements or general market conditions. The Engineer shall cooperate with Owner in developing and designing the Project to, in accordance with the Standard of Care, satisfy Owner's budgetary constraints, programmatic needs and expectations as to quality, functionality of systems, maintenance costs, and usable life of equipment and facilities. In preparing estimates of the Cost of Work, the Engineer shall be permitted to include contingencies for design, bidding and price escalation; to determine what materials, equipment, component systems and types of construction are to be included in the Contract Documents; to recommend reasonable adjustments in the program and scope of the Project with the prior consent of the Owner; and to include design alternates as may be necessary to adjust the estimated Cost of the Work to meet the Owner's budget.

§ 6.4 If, through no fault of the Engineer, construction procurement activities have not commenced within 90 days after the Engineer submits the Construction Documents to the Owner the Owner's budget for the Cost of the Work may be adjusted to reflect changes in the general level of prices in the applicable construction market.

§ 6.5 If at any time the Engineer's estimate of the Cost of the Work exceeds the Owner's budget for the Cost of the Work, then the Engineer shall redesign elements to achieve cost savings within the Scope of the Work, but in doing so, shall not delete any essential elements of the Project, without the Owner's knowledge and written consent. Engineer shall present the redesign to Owner for Owner's approval and, in doing so, shall notify Owner in writing of the actions taken to bring the Project into Owner's budget. If Engineer is unable to redesign the Project to meet Owner's budgetary, programmatic and quality needs, then the Engineer shall make appropriate written recommendations to the

Owner to adjust the Project's size, quality or budget. Owner shall consider Engineer's recommendation, but shall decide, in its discretion, what adjustments to make.

**§ 6.6** If the Owner's current budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services is exceeded by the lowest bona fide bid or negotiated proposal prior to commencement of the Work, the Owner shall

- .1 give written approval of an increase in the budget for the Cost of the Work;
- .2 authorize rebidding or renegotiating of the Project within a reasonable time, and/or authorize a different construction procurement method, consistent with State law;
- .3 terminate in accordance with Section 9.5;
- .4 in consultation with the Engineer, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or
- .5 implement any other mutually acceptable alternative; or
- .6 direct the Engineer to redesign the Project to meet the Owner's budgetary, programmatic and quality needs.

**§ 6.7** If the Owner chooses to proceed under Section 6.6.4 or 6.6.5, the Engineer, without additional compensation, shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1. The Engineer's modification of the Construction Documents before commencement of the Work shall be the limit of the Engineer's responsibility under this Article 6.

**§ 6.8** If, after commencement of the Work, the Cost of the Work is exceeded due to the negligent errors or omissions of the Engineer, in accordance with the Standard of Care, then the Engineer shall bear financial responsibility to Owner for the increases in the Cost of the Work, except for all materials, labor, and overhead related to the betterment obtained by the Owner. By way of example, the Engineer shall bear responsibility for the difference between what would have been the original cost of that portion of the Work, but for Engineer's negligent error or omission, in accordance with the Standard of Care, and the actual cost of that portion of the Work performed to remedy the negligent error or omission. Further, Engineer shall not be entitled to Engineer's fee for the excess Cost of the Work. Unless Engineer disputes the amounts due pursuant to the alternative dispute resolution process provided in Article 8 of this Agreement, as amended, Owner shall be entitled to withhold from sums due to Engineer the amounts detailed above.

## **ARTICLE 7 COPYRIGHTS AND LICENSES**

**§ 7.1** The Engineer and the Owner warrant that in transmitting Construction Documents, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

*(Paragraphs deleted)*

**§ 7.2.** Engineer shall provide to Owner, as a "Work Made for Hire", all Drawings, specifications, submittals, transmittals, deliverables, instructions to Contractor of Engineer and Engineer's consultants (including the necessary number of paper copies and electronic format copies), and other documents hereinafter "Construction Documents", that are within Engineer's scope of services and are sufficient for Owner to complete construction of the Project and are free from material defects or omissions. The Construction Documents for this Project are the property of the Owner whether or not the Project is completed and whether or not Engineer's Agreement is terminated. The Owner shall be furnished and permitted to retain reproducible copies and electronic versions of the Construction Documents. Only the signature details, standard details and form specifications of the Construction Documents relating to this Project may be used by the Engineer on other projects, but they shall not be used as a whole without written authorization by the Owner. Owner-furnished forms, conditions, and other written documents shall not be used on other projects by the Engineer without written authorization by the Owner. Owner hereby owns all common law, statutory, or other reserved rights, including copyrights, pertaining to the Construction Documents; provided, however, Owner hereby assigns to Engineer the right to enforce Owner's copyright in the Construction Documents and agrees to reasonably cooperate with Engineer in any proceedings related to such enforcement.

**§ 7.3.** The Construction Documents may be used as a prototype for other facilities by the Owner. The Owner may elect to use the Engineer to perform the site adaptation and other professional services involved in reuse of the prototype. If

so, then the Engineer agrees to perform the work for an additional compensation that will fairly compensate the Engineer and its consultants only for the additional work involved. It is reasonable to expect that the fair additional compensation will be significantly less than the fee provided for under this Agreement. If the Owner elects to employ a different engineer to perform the site adaptation and other professional services involved in reuse of the prototype, then that engineer may use Engineer's consultants on the same basis that the Engineer would have been entitled to use them for the work on the reuse of the prototype, and such consultant will be entitled, to the extent allowed by law, to duplicate the design and review and refer to the Construction Documents, approved shop drawings and calculations, and "as-builts" in performing its work. The Engineer will not be responsible for errors and omissions of a subsequent engineer. The Engineer shall endeavor to commit its consultants to the terms of this Section and shall notify Owner in writing if Engineer is unable to do so. In the event of termination of this Agreement for any reason, the Owner shall receive all original documents prepared to the date of termination and shall have the right to use those documents and any reproductions in any way necessary to complete the Project.

§ 7.4 The Owner shall be free to use said Construction Documents for Owner's purposes, but shall not assign, delegate, sublicense, pledge or otherwise transfer said Construction Documents, including any underlying copyright or license granted herein, to another party for use by any party other than on behalf of Owner. The Owner may use the Construction Documents for future additions or alterations to this Project or for other projects constructed by Owner. The Owner's privilege to use said Construction Documents extends to their use with and by other engineers on Owner's projects only.

§ 7.5 Except as otherwise stated in Section 7.3, the provisions of this Article 7 shall survive the termination of this Agreement.

## **ARTICLE 8 CLAIMS AND DISPUTES**

### **§ 8.1 General**

§ 8.1.1 The Owner and Engineer shall commence all claims and causes of action against the other and arising out of or related to this Agreement, whether in contract, tort, or otherwise, in accordance with the requirements of the binding dispute resolution method selected in this Agreement and within the period specified by this Agreement and by Texas law, but in any case not more than 8 (eight) years after the date of Substantial Completion of the Work, unless extended in accordance with Texas Civil Practice and Remedies Code Section 16.008. The Owner and Engineer waive causes of action not commenced in accordance with this Section 8.1.1.

§ 8.1.1.1 All claims, disputes, or matters in controversy between Owner and Engineer shall be discussed by the parties in good faith, in an attempt to resolve the claim, dispute, or controversy. In the event such claim, dispute, or controversy cannot be resolved by good faith discussion between the parties, any such claim, dispute or matter in controversy shall be subject to the Owner's grievance policy GF (LEGAL) and (LOCAL), or any other applicable policy and regulations as designated by Owner, and the timelines established in the policy. Level I of the grievance process will be conducted by the Superintendent's designee or the Superintendent, as appropriate. Level II shall be heard by the Superintendent, unless he heard Level I. If the Superintendent heard Level I, then the grievance will proceed to the Owner's Board of Trustees at Level III. If Engineer is dissatisfied with the outcome of Owner's grievance process, then any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party.

§ 8.1.1.2 Engineer stipulates that Owner is a political subdivision of the State of Texas, and, as such, may enjoy immunities from suit and/or liability under the Constitution and laws of the State of Texas. By entering into this Agreement, Owner does not waive any of its immunities from suit and/or liability, except as otherwise specifically provided herein and as specifically authorized by law.

§ 8.1.2 Only to the extent damages are fully covered by property insurance, the Owner and Engineer waive all rights against each other and against the contractors, consultants, agents, and employees of the other, for damages, except such rights as they may have to the proceeds of such insurance as set forth in AIA Document A104-2017, Standard Abbreviated Form of Agreement Between Owner and Contractor as amended for this Project. The Owner or the Engineer, as appropriate, shall require of the contractors, consultants, agents, and employees of any of them, similar waivers in favor of the other parties enumerated herein.

§ 8.1.3 The Engineer waives consequential damages for claims, disputes, or other matters in question, arising out of or

relating to this Agreement. This waiver is applicable, without limitation, to all consequential damages due to Owner's termination of this Agreement. In any litigation arising under this Agreement, the types and amounts of damages recoverable shall be subject to Subchapter I of Texas Local Government Code Chapter 271.

**§ 8.1.4** When Owner has an applicable claim for construction defects, Owner shall comply with the provisions of Texas Government Code Chapter 2272 related to the provision of notice of defects and the Contractor's or Engineer's opportunity to cure.

## **§ 8.2 Mediation**

**§ 8.2.1** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to the institution of legal or equitable proceeding, unless the filing deadlines under applicable statutes of limitation and/or repose would otherwise expire. If suit is filed before mediation in order to avoid expiration of limitations and/or repose, then the parties agree to submit the matter to mediation as soon as reasonably possible. Claims for injunctive relief shall not be subject to this Section.

**§ 8.2.2** The Owner and Engineer shall endeavor to resolve claims, disputes and other matters in question between them by mediation. A request for mediation shall be made in writing, delivered to the other party to this Agreement, and filed with the mutually acceptable person or entity administering the mediation. In the event the parties are unable to agree on a mediator, then the mediation shall be conducted by either the Center for Public Policy Dispute Resolution at the University of Texas School of Law or by a mediator selected by a local district court judge upon the joint request of the parties. The request shall be made within 30 days after the completion of Owner's grievance process. In no event shall the request for mediation be made after the date when institution of legal or equitable proceedings based on such claim, dispute, or other matter in controversy would be barred by applicable statutes of limitation. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the county where Owner's main administrative office is located, unless another location is mutually agreed upon. Mediation shall be subject to and in accordance with Chapter 154 of the Texas Civil Practice & Remedies Code. Agreements reached in mediation shall be reduced to writing, considered for approval by the Owner's Board of Trustees, signed by the parties' authorized representatives, if approved by the Board of Trustees, and, if signed, shall thereafter be enforceable as provided by the laws of the State of Texas.

**§ 8.2.3** If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the *(Paragraphs deleted)* parties shall submit the dispute or claim(s) to a court of competent jurisdiction.

☒ **[ X ]** Litigation in a court of competent jurisdiction

*(Paragraphs deleted)*

The parties agree that any claim, dispute, or other matter in controversy between them shall not be subject to mandatory arbitration. The parties may, however, mutually agree in writing to submit such claims, disputes, or matters in controversy to nonbinding arbitration. However, neither party may compel the other to arbitrate any claim, dispute, or matter in controversy between them.

**§ 8.2.4** Engineer stipulates that Owner is a political subdivision of the State of Texas, and, as such, may enjoy immunities from suit and/or liability under the Constitution and laws of the State of Texas. By entering into this Agreement, Owner does not waive any of its immunities from suit and/or liability, except as otherwise specifically provided herein and as specifically authorized by law.

**§ 8.3** The provisions of this Article 8 shall survive the termination of this Agreement.

*(Paragraphs deleted)*

**§ 8.4 INDEMNITY.** Approval of any Construction Documents by Owner shall not constitute and shall not be deemed to be a release of the responsibility and liability of Engineer, its agents, employees, and subcontractors, for Construction Documents which are sufficient for Owner to complete the construction of the Project and are free from material defects or omissions, nor shall such approval be deemed to be an assumption of such responsibility and liability by Owner for any defect in the Construction Documents prepared by Engineer, its agents, employees,

subcontractors, or consultants, it being the intent of the parties that the approval by Owner signifies Owner's approval of only the general design concept of the improvements to be constructed. In this connection, ENGINEER SHALL, DURING THE CONSTRUCTION OF SAID PROJECT AND FOR A PERIOD OF TEN YEARS AFTER SUBSTANTIAL COMPLETION INDEMNIFY AND HOLD HARMLESS OWNER AND ALL OF ITS OFFICERS, TRUSTEES, AGENTS, REPRESENTATIVES, SERVANTS, AND EMPLOYEES FROM ANY LOSS, DAMAGE, LIABILITY, OR EXPENSE, INCLUDING ATTORNEY'S FEES, INCURRED BY OWNER ON ACCOUNT OF DAMAGE OR DESTRUCTION TO PROPERTY AND INJURIES, INCLUDING DEATH, TO ANY OR ALL PERSONS, INCLUDING INVITEES AND EMPLOYEES OF THE OWNER, CONSTRUCTION MANAGER, ENGINEER, OR SUBCONTRACTORS AND OF ALL OTHER PERSONS PERFORMING ANY PART OF THE WORK, THAT IS CAUSED BY OR RESULTS FROM AN ACT OF NEGLIGENCE, INTENTIONAL TORT, INTELLECTUAL PROPERTY INFRINGEMENT, OR FAILURE TO PAY A SUBCONTRACTOR OR SUPPLIER, COMMITTED BY THE ENGINEER, OR THE ENGINEER'S AGENT, CONSULTANT UNDER CONTRACT, OR ANOTHER ENTITY OVER WHICH THE ENGINEER EXERCISES CONTROL; provided and except, however, that this indemnification provision shall not be construed as requiring Engineer to indemnify or hold Owner harmless for any loss, damage, liability, or expense on account of damaged property or injuries, including death to any person, which may arise out of or may be caused by any act of negligence or breach of obligation under this Agreement by Owner or Owner's employees or agents, except Engineer. THE PROVISIONS OF THIS SECTION IN ITS ENTIRETY SHALL SURVIVE THE COMPLETION, TERMINATION OR EXPIRATION OF THIS CONTRACT.

**§ 8.5** Neither the Owner nor the Engineer shall be obligated to indemnify the other party in any manner whatsoever for the other party's own negligence.

**§ 8.6** It is agreed with respect to any legal limitations now or hereafter in effect and affecting the validity or enforceability of the indemnification obligations under Paragraph 8.4, such legal limitations are made a part of the indemnification obligation and shall operate to amend the indemnification obligation to the minimum extent necessary to bring the provision into conformity with the requirements of such limitations, and as so modified, the indemnification obligations shall continue in full force and effect.

**§ 8.7** It is understood and agreed that Article 8 above is subject to, and expressly limited by, the terms and conditions of Texas Civ. Prac. & Rem. Code Ann. Sec. 130.001 to 130.005, as amended.

## **ARTICLE 9    TERMINATION OR SUSPENSION**

**§ 9.1** Suspension of Services. If the Owner fails to make timely payments for undisputed sums in accordance with this Agreement and Texas law, or otherwise is in breach of this Agreement, the Engineer may suspend performance of services upon seven (10) calendar days' written notice to the Owner, in accordance with Texas Government Code section 2251.051 et seq. Upon payment in full by the Owner for undisputed sums due prior to suspension, the Engineer shall resume services under this Agreement, and the time schedule and compensation shall be equitably adjusted to compensate for the period of suspension plus any other reasonable time and expense necessary for the Engineer to resume performance.

**§ 9.2** Termination of Services. If the Owner fails to make timely payments to the Engineer for undisputed sums in accordance with the payment terms herein, such failure shall be considered substantial nonperformance of this Agreement and shall be cause for termination of this Agreement by the Engineer, unless Engineer elects to suspend services in lieu of termination as provided in Section 9.1.

**§ 9.3** Set-Offs, Backcharges, and Discounts. Payment of invoices shall not be subject to any discounts or set-offs by the Owner, unless agreed to in writing by the Engineer. Payment to the Engineer for services rendered and expenses incurred shall be due and payable regardless of any subsequent suspension or termination of this Agreement by either party. Payment of any invoice by the Owner to the Engineer shall be taken to mean that the Owner is satisfied with the Engineer's services to the date of invoice and is not aware of any deficiencies in those services.

**§ 9.4** Either party may terminate this Agreement upon not less than seven twenty-one (21) days' written notice and opportunity to cure should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

**§ 9.5 Disputed Invoices.** If the Owner objects to any portion of an invoice, the Owner shall so notify the Engineer in writing within three (3) business days of receipt of the invoice. The Owner shall identify in writing the specific cause of the disagreement and the amount in dispute and shall pay that portion of the invoice not in dispute in accordance with the other payment terms of this Agreement. Any dispute over invoiced amounts due which cannot be resolved within ten (10) calendar days after presentation of invoice by direct negotiation between the parties shall be resolved within thirty (30) calendar days in accordance with the Dispute Resolution provision of this Agreement. Interest as stated above shall be paid by the Owner on all disputed invoice amounts that are subsequently resolved in the Engineer's favor and shall be calculated on the unpaid balance from the due date of the invoice and calculated in accordance with Texas Government Code § 2251.025 or its successor.

**§ 9.6** The Owner may terminate this Agreement upon not less than seven days' written notice to the Engineer for the Owner's convenience and without cause. The Owner may also terminate this Agreement on seven days' written notice if the budget for the Cost of the Work, prior to commencement of the Work, is exceeded by the lowest bona fide bid or negotiated proposal. If the Owner terminates this Agreement for its convenience, the Owner shall compensate the Engineer for services performed prior to termination, together with Reimbursable Expenses then due.

**§ 9.7**

*(Paragraphs deleted)*

The parties hereby agree that: 1) if an order for relief is entered on behalf of the Engineer, pursuant to Chapter 11 of the U.S. Bankruptcy Code; 2) if any other similar order is entered under any debtor relief laws; 3) if Engineer makes an assignment for the benefit of one or more of its creditors; 4) if a receiver is appointed for the benefit of its creditors; 5) if a receiver is appointed on account of its insolvency, any such event could impair or frustrate Engineer's performance. Accordingly, it is agreed that upon occurrence of any such event, Owner shall be entitled to request of Engineer adequate assurance of future performance in accordance with the terms and conditions of this Agreement. Failure to comply with such request within ten (10) days of delivery of the request shall entitle Owner to terminate the Engineer's services in accordance with this Section.

**§ 9.8** Except as otherwise expressly provided herein, this Agreement shall terminate one year from the date of Final Completion of the Project, but in no event later than five (5) years from the "Effective Date" of this Agreement.

**§ 9.9** This Agreement may be terminated by Owner at any time if Engineer engages in conduct that would constitute a violation of state or federal criminal law, including but not limited to, the laws prohibiting certain gifts to public servants, or engages in conduct that would constitute a violation of the Owner's ethics or conflict of interest policies.

**ARTICLE 10 MISCELLANEOUS PROVISIONS**

**§ 10.1** This Agreement shall be governed by the law of the State of Texas. Mandatory and exclusive forum and venue for any dispute resolution arising out of or related to this Agreement shall be in the state district courts of Ector County.

**§ 10.2** Terms in this Agreement shall have the same meaning as those in AIA Document A104-2017, Standard Abbreviated Form of Agreement Between Owner and Contractor. As a material consideration of the making of this Agreement, the Modifications to this Agreement shall not be construed against the drafter of said Modifications.

**§ 10.3** The Owner and Engineer, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement. Neither the Owner nor the Engineer shall assign this Agreement without the written consent of the other.

**§ 10.4** If the Owner requests the Engineer to execute certificates, the language of such certificates shall be submitted to the Engineer for review at least 14 days prior to the requested dates of execution. The Engineer shall execute certificates or consents consistent with the Engineer's Standard of Care pursuant to this Agreement.

**§ 10.5** Nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the Owner or Engineer.



**§ 10.6** Unless otherwise required in this Agreement, the Engineer shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site, unless Engineer knew, directed, or specified that, or allowed such hazardous materials be used in the Project. Engineer shall promptly disclose in writing to Owner any hazardous materials specified for the Project or discovered on site, regardless of the date of discovery or the date on which Engineer learns of the hazardous nature of the materials.

**§ 10.7** With prior written consent of the Owner, the Engineer may include photographic or artistic representations of the design of the Project among the Engineer's promotional and professional materials. The Engineer shall be given reasonable access to the completed Project to make such representations, but may not photograph students without prior written parental consent. However, the Engineer's materials shall not include information the Owner has identified in writing as confidential or proprietary.

**§ 10.8** The invalidity of any provision of the Agreement shall not invalidate the Agreement or its remaining provisions. If it is determined that any provision of the Agreement violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Agreement shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Agreement.

**§ 10.9** The Engineer shall not be required to sign any documents, no matter by whom requested, that would result in the Engineer's being required to certify, guarantee or warrant the existence of conditions whose existence the Engineer could not reasonably ascertain based on the circumstances present at the time of performance. The Owner also agrees not to make resolution of any dispute with the Engineer or payment of any amount due to the Engineer in any way contingent upon the Engineer's signing any certification. The Engineer shall not be required to execute any documents subsequent to the signing of this Agreement that in any way might, in the sole judgment of the Engineer, increase the Engineer's risk or the availability or cost of its professional or general liability insurance.

**§ 10.10** As used herein, the word "certify" shall mean an expression of the Engineer's professional opinion to the best of its information, knowledge and belief, and does not constitute a warranty or guarantee by the Engineer.

**§ 10.10 NO LIENS.** The parties agree that no architect, engineer, mechanic, contractor, materialman, artisan, laborer or subcontractor, whether skilled or unskilled, shall ever, in any manner have, claim or acquire any lien upon the Project of whatever nature or kind so erected or to be erected by virtue of this Agreement, nor upon any of the land upon which said improvements are so erected, built, or situated, such property being public property belonging to a political subdivision of the State of Texas, or upon any funds of Owner.

**§ 10.11 APPLICABLE LAW.** This Agreement is subject to all applicable federal and State of Texas laws, rules, and regulations. Invalidity of any portion of this Agreement under the laws of the State of Texas or of the United States shall not affect the validity of the remainder of this Agreement.

**§ 10.12 CONFLICT OF DOCUMENTS.** To the extent of conflicts between the Contract Documents, amendments shall prevail over original forms.

**§ 10.13 RELATIONSHIP OF PARTIES.** It is understood and agreed that the relationship of Engineer to Owner shall be that of an independent contractor. Nothing contained in this Agreement or inferable from this Agreement shall be deemed or construed to: 1) make Engineer the servant or employee of the Owner; or 2) create any partnership, joint venture, or other association between Owner and Engineer. Any direction or instruction by Owner or any of its authorized representatives in respect to the Engineer's services shall relate to the results the Owner desires to obtain from the Engineer, and shall in no way affect the Engineer's independent contractor status.

**§ 10.14** No delay or omission by either of the parties hereto in exercising any right or power accruing upon the noncompliance or failure of performance by the other party hereto of any of the provisions of this Agreement shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties hereto of any of the covenants, conditions or agreements hereof to be performed by the other party hereto shall not be construed to be a waiver of any subsequent breach thereof or of any other covenant, condition or agreement herein contained.

**§ 10.15** Pursuant to Texas Education Code Section 44.034, Engineer must give advance written notice to the Owner if the Engineer or an owner or operator of the Engineer has been convicted of a felony. The Owner may terminate this Agreement if the Owner determines that the Engineer failed to give such notice or misrepresented the conduct resulting in the conviction. This paragraph requiring advance notice does not apply to a publicly held corporation.

**§ 10.16 CHILD SUPPORT.** By signing this Agreement, the undersigned certifies as follows: Under Section 231.006, Texas Family Code, the vendor or applicant certifies that the individual or business entity named in this contract, bid, or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.

**§ 10.17** By executing this Agreement, Engineer verifies that Engineer does not boycott Israel or any Israeli-controlled territory, and will not boycott Israel or any Israeli-controlled territory during the term of this Agreement. Pursuant to Texas Government Code, Chapter 2271, as amended, if Engineer is a for-profit organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations (specifically excluding sole proprietorships) that exists to make a profit which has ten (10) or more full-time employees and the value of the contract with Owner is \$100,000 or more, the Engineer represents and warrants to the Owner that the Engineer does not boycott Israel and will not boycott Israel during the term of this Agreement.

**§ 10.18** Engineer verifies and affirms that it is not a foreign terrorist organization as identified on the list prepared and maintained by the Texas Comptroller of Public Accounts. If Engineer misrepresents its inclusion on the list, then such omission or misrepresentation shall void this Agreement.

**§ 10.19** The Engineer verifies by its signature below that it is not an abortion provider or an affiliate of abortion providers.

**§ 10.21 CRIMINAL HISTORY RECORD CHECKS:**

**§ 10.21.1** So that Owner can obtain the national criminal history record information required by Texas Education Code Section 22.0834 on all "covered employees" (as defined in Section 10.21) of Engineer, its subcontractors, or any subcontracting entities who will perform the Work, Engineer shall submit to Owner the name and all necessary identifying information necessary to enable Owner to obtain the national criminal history information on those covered employees before they begin the Work. Engineer's submission will include the employee's written authorization for Owner to obtain such criminal history information. Owner may, in its sole discretion, prohibit the use of any employee to perform the Work after its review of the criminal history information, but cannot disclose the criminal history information to Engineer. Engineer shall reimburse Owner for Owner's costs incurred in obtaining the criminal history information.

**§ 10.21.2** Engineer will not assign any "covered employee" with a "disqualifying criminal history", as those terms are defined below, to work on the Project. If Engineer receives information that a covered employee has a reported disqualifying criminal history, then Engineer will immediately remove the covered employee from the Project and notify the Owner in writing within three business days. If the Owner objects to the assignment of any covered employee on the basis of the covered employee's criminal history record information, then Engineer agrees to immediately discontinue using that covered employee to provide services on Owner's Project. If Engineer has taken precautions or imposed conditions to ensure that the employees of Engineer and any subconsultant will not become covered employees, Engineer will ensure that these precautions or conditions continue throughout the time the contracted services are provided.

**§ 10.21.3** For the purposes of this Section, "covered employees" means employees, agents, or applicants of Engineer who have or will have continuing duties related to the services to be performed on Owner's Project and have or will have direct contact with Owner's students. The Owner will decide what constitutes direct contact with Owner's students. The definition of "covered employees" does not include individuals working on the Work if the Work: (1.) does not involve the construction, alteration, or repair of an instructional facility as defined herein; (2.) involves construction of a new instructional facility and the person's duties related to other contracted services will be completed not later than the seventh day before the first date the facility will be used for instructional purposes; or (3.) involves an existing instructional facility and: (a.) the work area contains sanitary facilities and is separated from all

areas used by students by a secure barrier fence that is not less than six feet in height; and (b.) the contracting entity adopts a policy prohibiting employees, contractors, and subconsultants from interacting with students or entering areas used by students, informs employees, contractors, and subconsultants of the policy, and enforces the policy at the work area. "Disqualifying criminal history" means: any conviction or other criminal history information designated by the Owner; any felony or misdemeanor conviction that would disqualify a person from obtaining educator certification under Texas Education Code Section 21.060, and 19 Texas Administrative Code Section 249.16; or one of the following offenses, if at the time of the offense, the victim was under 18 years of age or enrolled in a public school; a felony offense under Texas Penal Code Title 5 Offense Against Persons; an offense for which a defendant is required to register as a sex offender under Texas Code of Criminal Procedure Chapter 62; or an equivalent offense under federal law or the laws of another state; or a felony violation of Texas Penal Code Section 43.24 related to the sale, distribution or display of harmful material to a minor. The term "instructional facility" means real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required under the state curriculum for kindergarten through grade 12.

**§ 10.21.4** Engineer shall assume all expenses associated with the background checks.

## **ARTICLE 11 COMPENSATION**

**§ 11.1** For the Engineer's Basic Services described under Article 3 (including Supplemental Services), the Owner shall compensate the Engineer for all undisputed payments set forth below. To the extent Owner disputes any payment allegedly due, Owner shall notify Engineer that a dispute exists, shall list the specific reason for nonpayment, and shall give Engineer an opportunity to cure the noncompliance or offer compensation for noncompliance that cannot be cured, in accordance with Texas Government Code Chapter 2251. Owner shall further have the right to withhold payments as specified in Sections 6.8 and 11.9.2.2 of this Agreement.

*(Paragraphs deleted)* 6.5% of the Owner's budget for the Cost of Work.

When compensation is based on a percentage of the Cost of the Work and any portions of the Project are deleted or otherwise not constructed, compensation for those portions of the Project accepted by the Owner shall be payable in accordance with Section 6.1 herein;

*(Paragraph deleted)*

Compensation shall be paid based on the percentage of the services actually completed by Engineer. Progress payments for services in each phase for services completed shall total the percentages applicable to each phase of Engineer's services in 11.5.

**§ 11.2** For the following Supplemental Services, the Owner shall compensate the Engineer as follows:  
*(Insert amount of, or basis for, compensation. If necessary, list specific services to which particular methods of compensation apply.)*

Project Management – 8.5% of Final Construction Cost Fee to be billed monthly based on construction duration as specified in Construction Documents.

**§ 11.3** For Additional Services that may arise during the course of the Project, including those under Section 4.2, the Owner shall compensate the Engineer as follows:  
*(Insert amount of, or basis for, compensation.)*

6.5% of the Owner's budget for the Cost of Work.

**§ 11.4** Compensation for Additional Services of the Engineer's consultants when not included in Section 11.2 or 11.3, shall be the amount invoiced to the Engineer, with no additional mark-up by the Engineer.

**§ 11.5** Where compensation for Basic Services is based on a stipulated sum or percentage of the Cost of the Work, the compensation for each phase of services shall be as follows:

Design Development Phase	Twenty	percent (	20	%)
Construction Documents Phase	Fifty-five	percent (	55	%)
Bidding Phase	Five	percent (	5	%)
Construction Phase	Twenty	percent (	20	%)
<hr/>				
Total Basic Compensation	one hundred	percent (	100	%)

§ 11.6 When compensation identified in Section 11.1 is on a percentage basis, progress payments for each phase of Basic Services shall be calculated by multiplying the percentages identified in this Article by the Owner's most recent budget for the Cost of the Work. Compensation paid in previous progress payments shall not be adjusted based on subsequent updates to the Owner's budget for the Cost of the Work.

*(Paragraph deleted)*

§ 11.7 The hourly billing rates for services of the Engineer and the Engineer's consultants, if any, are set forth below. *(If applicable, attach an exhibit of hourly billing rates or insert them below.)*

Employee or Category	Rate
Engineer / Sr. Roof Consultant	\$250 / hr
Roof Consultant	\$190 / hr
Project Manager	\$150 / hr
Roof Technician	\$130 / hr
Roof Monitor / Observer	\$130 / hr
Estimator	\$120 / hr
Drafting / CADD	\$95 / hr
Clerical / Admin	\$85 / hr

## **§ 11.8 Compensation for Reimbursable Expenses**

**§ 11.8.1** Reimbursable Expenses are in addition to compensation for Basic, Supplemental, and Additional Services and include expenses incurred by the Engineer and the Engineer's consultants directly related to the Project, as follows:

.1

*(Paragraphs deleted)*

Permitting and other fees required by authorities having jurisdiction over the Project;

.2 Printing, and reproductions, plots, and standard form documents of Construction Documents, other than those required to be provided by Engineer under this Agreement;

.3 Postage, handling, and delivery of Construction Documents, other than those required to be provided by Engineer under this Agreement;

.4 Expense of overtime work requiring higher than regular rates if authorized in advance in writing by the Owner;

.5 Renderings, physical models, mock-ups, professional photography, and presentation materials requested by the Owner

*(Paragraphs deleted)*

after Engineer's provision of one artist's rendering for the Project;

**§ 11.8.2** For Reimbursable Expenses the compensation shall be only the actual expenses incurred by the Engineer and the Engineer's consultants.

Equipment Rental

At Cost

Subcontractors / Subconsultants

At Cost

## **§ 11.9 Payments to the Engineer**

### **§ 11.9.1 Initial Payment**

An initial payment of zero (\$0) shall be made upon execution of this Agreement and is the minimum payment under this Agreement. It shall be credited to the Owner's account in the final invoice.

### **§ 11.9.2 Progress Payments**

**§ 11.9.2.1** Unless otherwise agreed, payments for services shall be made monthly in proportion to services performed. Payments for undisputed amounts are due and payable within thirty (30) days after receipt of the Engineer's invoice by Owner's designated representative. Undisputed amounts unpaid more than thirty (30) days after the Owner's receipt of the invoice date shall bear interest at the rate entered

*(Paragraphs deleted)*

below specified by Texas Government Code § 2251.025 or its successor.

**§ 11.9.2.2** The Owner may withhold payments after appropriate notice as to the reasons for the withholding to the Engineer for the purposes of reimbursing Owner for any damages caused by the Engineer, for changes in the Cost of the Work which result in Engineer's compensation being reduced, for Engineer's failure to comply with the provisions of any part of this Agreement, if a claim has been filed against Engineer, or to secure performance of Engineer's services and obligations under any part of this Agreement.

**§ 11.9.2.3** Records of Reimbursable Expenses, expenses pertaining to Additional Services, and services performed on the basis of hourly rates shall be provided to the Owner upon presentation of Engineer's progress payment applications.

**§ 11.10** Engineer shall reasonably cooperate with Owner, at no additional cost to Owner, in connection with a legal proceeding against Owner that relates to the Project.

## **ARTICLE 12 SPECIAL TERMS AND CONDITIONS**

Special terms and conditions that modify this Agreement are as follows:

*(Include other terms and conditions applicable to this Agreement.)*

**§ 12.5 RECORDS RETENTION.** Engineer shall keep all accounting and construction records on the Project for a

period of at least ten years after Final Completion of the Project, and thereafter shall offer the records to the Owner in writing, in order for Owner to comply with its records retention requirements, per the Texas Government Code section 441.158 et seq. and the Texas Library and Archives Commission's Local Schedule GR (Government Records). In the alternative, Engineer may provide such records to Owner for retention at any time if Owner agrees in writing to accept such records in lieu of Engineer's retention under this Section.

**§ 12.6 COMPLAINTS.** The Texas Board of Architectural Examiner has jurisdiction over complaints regarding the professional practices of persons registered as architects in Texas under the Architects Registration Law. Texas Occupations Code Chapter 1051. The Texas Board of Architectural Examiners can be reached at Mailing address: PO Box 12337, Austin, TX 78711; Physical: 505 E. Huntland Dr., Ste. 350, Austin, TX 78752; Telephone: 512.305.9000; Fax 512.305.8900; or on the web at <https://www.tbac.texas.gov>. All work under this Agreement which involves professional engineering must be in compliance with the Texas Engineering Practices Act (Texas Occupations Code, Chapter 1001).

### ARTICLE 13 SCOPE OF THE AGREEMENT

**§ 13.1** This Agreement represents the entire and integrated agreement between the Owner and the Engineer and supersedes all prior negotiations, representations or agreements, either written or oral unless specifically provided for otherwise in this Agreement, as amended. This Agreement may be amended only by written instrument signed by both the Owner's designated representative and Engineer.

**§ 13.2** This Agreement is comprised of the following documents identified below:

- .1 AIA Document B104™-2017, Standard Abbreviated Form of Agreement Between Owner and Architect, as amended for this Project;
- .3 Exhibits:  
*(Clearly identify any other exhibits incorporated into this Agreement, including any exhibits identified in Section 4.1.)*
- .4 Other documents:  
*(List other documents, if any, including additional scopes of service forming part of the Agreement.)*  
AIA Document A104™-2017, Standard Abbreviated Form of Agreement Between Owner and Contractor, as amended for this Project and incorporated herein by reference.

Ector County Independent School District Request for Qualifications for Roofing Consulting Services ("RFQ #24-10")

This Agreement entered into as of the day and year first written above.

\_\_\_\_\_  
**OWNER (Signature)**

Dr. Scott Muri ECISD Superintendent of  
Schools

\_\_\_\_\_  
*(Printed name and title)*

  
**ENGINEER (Signature)**

Miah Dancy Chief Operating Officer

\_\_\_\_\_  
*(Printed name, title, and license number, if required)*