

## MATERIALS TESTING SERVICES AGREEMENT

This Agreement, is made by and between the Houston Independent School District, a body corporate, created under and by virtue of the laws of the State of Texas, (hereinafter "HISD"), and

an individual, partnership, or corporation, authorized to perform the materials testing services described herein (hereinafter "Consultant") for the following project.

NOW, THEREFORE, HISD and Consultant, for the consideration herein after set forth, agree as follows:

### Definitions

***"AASHTO"** means the American Association of State Highway & Transportation Officials.*

***"ACI"** means the American Concrete Institute.*

***"AISC"** means the American Institute of Steel Construction.*

***"ASTM"** means the American Society for Testing and Materials.*

***"AWS"** means the American Welding Society.*

***"Construction Manager"** ("CM") means the organization selected to represent HISD in managing the Project.*

### ARTICLE 1 CONSULTANT SERVICES

- 1.1 Consultant shall perform inspection and testing services for Structural, Paving, Masonry and Miscellaneous Work on the Project in accordance with HISD's Project Plans and Specifications, and as set out in Consultant's Proposal, which is attached hereto as Exhibit "A" and incorporated herein for all purposes.

- 1.2 Consultant shall perform the services described in this Article in strict accordance with all applicable federal, state, county, city and/or other governmental entity statutes, regulations, standards, codes and ordinances, including but not limited to all Federal Specifications and Standards and the City of Houston Building Code, and all applicable requirements of the current edition reference standards of the AASHTO, ACI, AISC, ASTM, and AWS. No pleas of misunderstanding will be considered on account of ignorance thereof. Consultant shall likewise impose the same obligations contained in this Article upon all of its sub-consultants, if any.
- 1.3 Consultant shall furnish all labor, materials, supplies, tools, machinery, equipment, transportation and supervision necessary to perform the services described in this Article. All work shall be performed under the direction of or by a Registered Professional Engineer.
- 1.4 Consultant shall exercise a degree of care and diligence in the performance of all services under this Agreement in accordance with the industry standards prevailing among materials testing laboratories in Houston, Texas.
- 1.5 All test methods shall take into account the Contractor's proposed procedures, and all sampling and testing shall be performed in a timely manner not to impede the Project schedule, with minimal interference to the Contractor's work.
- 1.6 Consultant shall submit written reports to the Construction Manager including a general description of the inspections and tests performed with identification of the specific Project area/materials involved, all data required to be recorded under AASHTO, ACI, AISC, ASTM and AWS Standards and other standard test methods employed, identification of the standard sampling and test methods utilized, all findings and test results, and an appendix of terminology and symbols used.
- 1.7 All data, sketches, charts, computer files, reports and other documents generated by Consultant pursuant to this Agreement shall be the confidential property of HISD, and Consultant shall distribute such reports only to those persons or entities designated in writing by HISD or its authorized representative. Consultant shall retain all pertinent records of the services performed under this Agreement for a period of five (5) years following completion of the Project, and shall make such records available to HISD or its authorized representative during this period.
- 1.8 Consultant shall immediately notify the Construction Manager, in writing, of any materials, procedures or test results not in compliance with the Project plans and specifications.
- 1.9 Consultant is not authorized to alter, relax, enlarge, or waive requirements of the Project plans and specifications, or to approve or accept any portion of the work, or to reject or stop the work.

- 1.10 Consultant shall maintain an inspection and testing services log for submittal with invoicing. Log will contain information regarding inspection or testing services and fees (proposal amounts and actual amounts per month) and cumulative totals.
- 1.11 Consultant shall consecutively number all reports and include these report numbers on Consultant's invoices.
- 1.12 Consultant shall visit the site as deemed appropriate by HISD in the performance of services.
- 1.13 Consultant shall coordinate with HISD's architect and CM in the performance of Consultant's services and submittal of reports related to Consultant's services.

## **ARTICLE 2 OWNER'S RESPONSIBILITY**

- 2.1 HISD shall designate a representative authorized to act on HISD's behalf with respect to the Project.
- 2.2 HISD shall consult with the Consultant as needed regarding requirements for the Project, including HISD's contemplated objectives, schedule, constraints and criteria.
- 2.3 HISD shall furnish Consultant with the plans and specifications, addenda and change orders, and approved submittals for the Project, and such other documents in its possession requested by Consultant as it deems reasonably necessary for the performance of Consultant's services.
- 2.4 HISD shall issue a written authorization giving Consultant access to the Project site.
- 2.5 HISD shall direct the Project Contractor to:
  - a. Provide Consultant with preliminary representative samples of materials Contractor proposes to use on the Project which require testing, together with any relevant data on the materials;
  - b. Furnish such incidental labor, tools and equipment as needed by Consultant to obtain samples and to facilitate inspections and tests at the Project; and
  - c. Provide and maintain adequate space at the Project for use of Consultant for safe storage and proper curing of test specimens.

### ARTICLE 3 PAYMENT FOR SERVICES

- 3.1 Notwithstanding anything in Consultant's Proposal or Exhibit "A" to the contrary, HISD shall pay to the Consultant an amount not to exceed

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for all services described in Article 1 and Exhibit "A". Consultant shall be compensated for any authorized changes made in writing by HISD in the work in accordance with the attached rate schedule. The contract sum includes reimbursement for all labor, administrative, overhead, and all other expenses associated with the Project, including ( but not limited to) all expenses incurred by Consultant in the performance of services. Satisfactory progress of services shall be maintained as a condition of payment.

- 3.2 Consultant shall submit monthly applications for payment to the Construction Manager not later than three (3) days before the end of the calendar month for which payment is sought. Consultant's application for payment shall itemize the work performed and include documentation satisfactory to HISD supporting each invoice. HISD reserves the right to delete certain portions of the Scope of Services provided for in the Project Plans and Specifications or in Exhibit A, and in such event the compensation due the Consultant shall be reduced accordingly. HISD shall make payment to Consultant of the amount approved by the Construction Manager not later than the twenty-fifth (25th) day of the following month.
- 3.3 Satisfactory progress of services shall be maintained as a condition of payment and Consultant shall invoice separately for each project. Additional Services, if any, by Consultant must be authorized in advance in writing by HISD. All fees for Additional Services shall be calculated based on the reasonable amount of time necessarily spent in accomplishing the Additional Services, subject to approval by HISD. HISD retains the right to determine which Additional Services are required and the right to contract with third parties for any such services.
- 3.4 HISD reserves the right to delete certain portions of the Scope of Services and in such event the compensation due the Consultant shall be reduced accordingly.

## ARTICLE 4 INSURANCE

4.1 Consultant shall carry insurance with responsible underwriters acceptable to HISD and with minimum limits of liability, as stated below, against claims for damages caused by bodily injury, including death, to employees and third parties, claims for property damage, and claims arising out of the performance of these services caused by any of his own errors, omissions or negligent acts or the errors, omissions or negligent acts of any person and/or consultants employed by Consultant or by others for which Consultant is legally liable. HISD shall be named as an additional insured on all such policies of insurance. The Consultant shall furnish certificates of insurance to HISD indicating compliance with this paragraph.

### Minimum Limits of Coverage Liability

| <u>Types of Coverage</u>   | <u>Minimum Limits of Liability</u>                 |
|--|--|
| 1. Worker's Compensation Statutory and Employer's Liability                                | \$100,000 each accident                            |
| 2. General Liability: Comprehensive, contractual, independent contractors, personal injury |  |
| A. Bodily Injury   | \$500,000 each person<br>\$500,000 each occurrence |
| B. Property Damage   | \$100,000 each occurrence<br>\$300,000 aggregate   |
| 3. Automobile Liability: comprehensive, owned, hired, non-owned                            |  |
| A. Bodily Injury   | \$500,000 each person<br>\$500,00 each occurrence  |
| B. Property Damage   | 300,000 each occurrence                            |
| 4. Professional Liability: errors and omissions  | \$1,000,000<br>Annual Claims Made                  |

4.2 Consultant shall submit evidence at the time of execution of this Agreement that it has in full force and effect professional liability errors and omissions insurance. Consultant shall maintain such insurance in full force and effect throughout the duration of this Agreement and thereafter for a period of one year. In the event

that it becomes commercially infeasible to maintain it during the period required by this Agreement, Consultant shall supply HISD with equivalent assurance to the required insurance acceptable to HISD.

- 4.3 Consultant shall furnish evidence to HISD of insurance in the form of certificates from insurance carriers acceptable to HISD. Such certificates shall indicate an agreement by each carrier not to cancel or significantly diminish coverage without thirty (30) days' written notice to HISD. In the event there is a deductible on any policy, Consultant shall furnish evidence that it is able to satisfy the deductible.

## **ARTICLE 5 INDEMNIFICATION**

- 5.1 **Consultant shall indemnify, and hold harmless and defend HISD and each of their respective past, present, and future officers, trustees, agents, and employees in their individual and official capacities, from and against all claims, losses or damages, including attorneys' fees, court costs and expenses incurred by HISD and their officers, trustees, agents, and employees, for injury, including death, to persons, or damage to or destruction of property, and demands or causes of action of whatsoever kind or nature based upon, resulting from or arising out of or in connection with any negligent act, error, omission, misrepresentation, or misconduct by the consultant or its employees, officers, sub-consultants, or agents arising out of the performance of this Agreement. Such indemnification shall also include reasonable attorneys' fees and court costs and expenses.**
- 5.2 **All obligations as set forth in this Article 5 shall survive the termination of this Agreement.**
- 5.3 **It is agreed with respect to any legal limitations now or hereafter in effect and affecting the validity or enforceability of the indemnification obligation under paragraph 7.1, such legal limitations are made a part of 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 obligation shall continue in full force and effect.**

## **ARTICLE 6 TERMINATION**

- 6.1 This Agreement may be terminated by HISD without cause for any reason upon not less than seven (7) consecutive days' written notice to the Consultant. This Agreement may be terminated by HISD for cause upon forty-eight (48) hours' notice to the Consultant.

- 6.2 In the event of termination not the fault of the Consultant, the Consultant shall be compensated for services performed prior to termination in accordance with the terms of this Agreement. In the event of termination because of substantial breach of this Agreement, Consultant will not be entitled to any further payments and will be obligated to HISD for any remedies applicable under the law.
- 6.3 If HISD substantially breaches this Agreement, then Consultant may terminate this Agreement if Consultant gives HISD written notice of the basis on which it seeks to terminate and HISD has failed to cure any default within ten (10) days of receipt of such notice.

## **ARTICLE 7 MISCELLANEOUS PROVISIONS**

- 7.1 This Agreement shall be governed by the laws of the State of Texas and venue for all purposes incident to this Agreement shall be in Harris County, Texas.
- 7.2 HISD and the Consultant each bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, corporate officers, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither HISD nor the Consultant shall assign, sublet or transfer its interest in this Agreement without the written consent of the other.
- 7.3 This Agreement represents the entire and integrated agreement between HISD and Consultant and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both HISD and Consultant. In the event that any terms or conditions in the Consultant's proposals or Exhibit "A" hereto contradict or conflict with any terms or conditions in this Agreement, the terms and conditions of this Agreement shall control.
- 7.4 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either HISD or Consultant.
- 7.5 If any portion of this Agreement is deemed to be unenforceable, the remainder of the Agreement shall be construed as if such unenforceable provision had never been contained herein.
- 7.6 References made in the singular shall include the plural, and the masculine shall include the feminine or the neuter.
- 7.7 Consultant shall not disclose or permit the disclosure of any confidential information, except to its agents, employees or other consultants who need such confidential information in order to properly perform their duties relative to this Agreement.

- 7.8 No waiver of a breach of any provision of this Agreement shall be construed to be a waiver of any breach of any other provision. No delay in acting with regard to any breach of any provision shall be construed to be a wavier of such breach.
- 7.9 The Consultant within ten (10) days after execution of this contract shall report their M/WBE participation goal as a percent of the total compensation. This information shall be identified per firm, discipline and participation. Consultant acknowledges that HISD has a goal for M/WBE participation of at least 30 percent of the compensation payable to Consultant.
- 7.10 In the event that HISD is required to furnish information or records compiled by Consultant in the performance of this Agreement pursuant to the Texas Public Information Act, Consultant shall furnish such information and records to HISD and HISD shall have the right to release such information and records.
- 7.11 HISD does not waive or relinquish any governmental immunities or defenses on behalf of itself and its trustees, officers, employees, or agents as a result of the execution of this Agreement and performance of the functions or obligations described herein. Nothing herein shall be construed as creating any personal liability on the part of any officer, or director, or employee or representative of HISD.
- 7.12 Any notice required to be given under the provisions of this Agreement shall be in writing and shall be duly served when it shall be hand-delivered to the addresses set out below, or shall have been deposited duly registered or certified, return receipt requested, in a United States Post Office addressed to the other party at the following addresses:

To:

To: Houston Independent School District  
Attn: Richard Lindsay  
Rebuild HISD Bond Program  
1100 Roy St.  
Houston, TX 77007

Any party may designate a different address by giving the other party ten (10) days' written notice in the manner provided above.

- 7.13 At no time will the Consultant, its employees or its sub-consultants communicate with the public or make documents available to the public pertaining to the services performed except with the prior written consent of HISD.



- 7.14 This Agreement is the joint product of the parties hereto. Each party hereto acknowledges and agrees that it enters into this Agreement voluntarily, with advice of counsel, and that each party hereto and their respective counsel have had opportunity to revise and have revised the language of this Agreement by negotiation and bargaining, at "arm's length." Consequently, in the construction and/or enforcement of this Agreement, or any of its terms, the participation of any party in the drafting of this Agreement shall not be construed, in any way, against such party.
- 7.15 Consultant and all of its consultants shall execute a Consultant E.E.O.C. Affidavit in the form at Exhibit B attached hereto before commencing work on the Project.
- 7.16 The Consultant shall not subcontract services provided under this agreement without prior written approval by HISD.

#### **ARTICLE 8 ACCOUNTS, RECORDS, ACCOUNTING REPORTS AND AUDITS**

- 8.1 The Consultant shall provide reasonable access to HISD and allow for inspection and audit of all data, documents, proceedings and activities related to this Agreement. Such right of access and audit shall continue for a period of five (5) years from the date of termination of this Agreement or until pending litigation has been completely and fully resolved, whichever occurs last. HISD shall have access to any and all books, documents, papers and records of the Consultant, which are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts and transcriptions.
- 8.2 During the course of pursuing agreements, and the course of performance of this Agreement, Consultant will maintain business ethics standards aimed at avoiding real or apparent impropriety or conflicts of interest. No substantial gifts, entertainment, payments, loans or other considerations beyond that which would be collectively categorized as incidental shall be made to any personnel of HISD, its Contractors, Consultants, or its Construction Managers, or to family members of any of them. At any time Consultant believes there may have been a violation of this obligation, Consultant shall notify HISD of the possible violation. HISD is entitled to request a representation letter from Consultant, its Professional Consultants or vendors at any time to disclose all things of value passing from Consultant, its Professional Consultants or vendors to HISD's personnel, its, Contractors, Consultants and Construction Managers.

#### **ARTICLE 9 NON-WAIVER**

- 9.1 Failure of an employee or representative of the HISD during the progress of this Agreement to discover or reject services not in accordance with this Agreement, shall not be deemed an acceptance thereof nor a waiver of the HISD's right to a proper implementation of this Agreement or any part of it by the Consultant.

## **ARTICLE 10 DELAY**

- 10.1 In no event shall HISD be liable or responsible to the Consultant, or any other person for or on account of, any stoppage or delay in the work herein.

## **ARTICLE 11 INDEPENDENT CONSULTANT**

- 11.1 It is expressly understood and agreed that the Consultant shall perform all services described herein as an Independent Contractor and Consultant and not as an officer, agent, servant or employee of HISD; that the Consultant shall have control of and the right to control the details of the services provided hereunder, and all persons providing the same; that the Consultant shall be solely responsible for the acts and omissions of its officers, agents, employees and sub-consultants; that nothing herein shall be construed as creating an employment, agency, partnership or joint enterprise between HISD and Consultant. No person performing any of the services described hereunder shall be considered an officer, agent, servant or employee of HISD.

## **ARTICLE 12 CONSULTANT'S RESPONSIBILITY**

- 12.1 The Consultant shall be responsible for the accuracy of its services and shall promptly make necessary revisions resulting from its errors, omissions or negligent acts without compensation.

## **ARTICLE 13 TERM**

- 13.1 The term of this Agreement shall commence, upon execution date of this contract and shall continue throughout the construction period and until one year after final completion and final payment to the Project Contractor for the construction.

## **ARTICLE 14 SEVERABILITY AND CAPTIONS**

- 14.1 In the event that any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision thereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein. The captions at the beginning of the Articles are guides and labels and shall be given no effect in construing this Agreement and shall not be restrictive of the subject matter of any article, section or part of this Agreement.

## **ARTICLE 15**

### **Mediation**

- 15.1 At the sole option of HISD, any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to non-binding mediation as a condition precedent to the institution of legal or equitable proceedings by either party.
- 15.2 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in Houston, Texas.

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In testimony whereof, the parties hereto have caused this instrument to be executed, in triplicate, each to have the force and effect of an original, on this  day of  of .

OWNER:

HOUSTON INDEPENDENT SCHOOL DISTRICT

MATERIALS TESTING CONSULTANT:

By: \_\_\_\_\_

Abelardo Saavedra, Ph.D  
Superintendent of Schools

By: \_\_\_\_\_

\_\_\_\_\_  
Name (Type or Print)

\_\_\_\_\_  
Title

Approved as to Funding and Business Terms:

By: \_\_\_\_\_

Melinda Garrett  
Chief Financial Officer

Approved as to Form:

By: \_\_\_\_\_

Donald Boehm, Attorney, HISD

The Texas Board of Professional Engineers has jurisdiction over individuals licensed under the Texas Engineering Practice Act, Texas Revised Civil Statutes, Article 3271a.