

## **MATERIAL TESTING SERVICES AGREEMENT**

This Material Testing Services Agreement ("Agreement") is made by and between Houston First Corporation ("HFC"), whose address is 1001 Avenida de las Americas, Houston, Texas 77010 and [TBD] ("Contractor"), whose address is [TBD]. In consideration of the mutual promises contained herein, the parties hereby agree as follows:

### **ARTICLE 1: TERMS AND OVERVIEW**

1.1 The term "Project" means the planned construction improvements on a portion of Block 287 in downtown Houston, Texas, consisting of an approximate 12,000 square foot building, stage, surface parking and other facilities intended for use as an entertainment venue scheduled to begin in mid-June 2016 and is to be completed within 150 days.

1.2 The term "Work" means the material testing and related services performed by Contractor, whether related to the Project or not, and includes all labor, materials, supervision, transportation, tools, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations.

1.3 The term "Work Order" means the document issued to Contractor by HFC, on an as-needed basis, directing Contractor to perform Work. Each Work Order will include a specific scope of services required, time for completion, and any work-hour, project-specific or other restrictions.

1.4 The term of this Agreement shall commence on the Effective Date and end on June 30, 2017 ("Term"). HFC may, in its discretion, renew the Term for two additional one-year terms (each a "Renewal Term" and collectively, "Renewal Terms") on the same terms and conditions as set forth herein. HFC may exercise such option by notifying Contractor in writing prior to the expiration of the Term or applicable Renewal Term. No expiration of the Term, or sooner termination of this Agreement, shall affect, impair or abridge Contractor's duties and responsibilities, or liabilities with regard to, the services performed during the Term.

1.5 Work performed by Contractor shall be as ordered by HFC on an as-needed basis in its sole and absolute discretion, to be initiated upon issuance by HFC of a Work Order to Contractor. Contractor acknowledges and agrees that HFC has not and shall not represent a guaranteed minimum payment or amount of work to be awarded during the Term.

**1.6 CONTRACTOR AND HFC ACKNOWLEDGE AND AGREE THAT THE WORK AND PROJECT CONSTITUTE AND SHALL BE CONSIDERED TO BE A PUBLIC WORKS PROJECT OF A MUNICIPALITY FOR ALL PURPOSES, INCLUDING CHAPTER 151 OF THE TEXAS INSURANCE CODE.**

### **ARTICLE 2: RESPONSIBILITIES OF CONTRACTOR**

2.1 Contractor shall perform the Work in accordance with this Agreement and in a manner consistent with the professional skill and care ordinarily provided by experienced material-testing contractors practicing in the same or similar locality under the same or similar circumstances. Contractor shall perform the Work expeditiously to ensure the orderly progress of the Project or specific tasks ordered by HFC.

2.2 Contractor shall supervise the Work, using Contractor's best skill and attention. All Work shall be performed by, or under the direct supervision of, one or more Texas-registered professional engineers.

2.3 Contractor shall be solely responsible for, and have control over, means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Agreement.

2.4 Contractor shall comply and perform all Work in accordance with applicable federal, state and local statutes, regulations, standards, codes, and ordinances, as well as applicable requirements of the current reference standards of the American Association of State Highway and Transportation Officials, American Concrete Institute, American Institute of Steel Construction, American Society for Testing and Materials, and American Welding Society.

2.5 Contractor shall obtain, maintain, and pay for all licenses, permits, and certificates including all professional licenses required by any statute, ordinance, rule, or regulation to perform the Work. Contractor shall maintain

valid certification by the American Association for Laboratory Accreditation during the term of this Agreement and shall provide proof of valid certification upon request from HFC. Contractor shall immediately notify HFC of any suspension, revocation, or other detrimental action against any such license.

2.6 All payments shall be made by check payable to Contractor and addressed to Contractor at its address specified herein for notice. Neither partial payments made hereunder nor approval of invoices or services by HFC shall be construed as final acceptance or approval of that part of Contractor's Work to which such partial payment or approval relates nor shall such payments be construed as relieving Contractor of any of its obligations hereunder with respect thereto.

2.7 Contractor is solely responsible for providing all equipment, labor, supervision, and transportation necessary to complete the Work.

2.8 Contractor shall identify a representative authorized to act on behalf of and bind Contractor with respect to the Work.

2.9 Contractor shall manage and coordinate the Work with those services provided by HFC, its contractors and agents, and any third party managing or performing work on the Project.

2.10 Contractor shall make good faith efforts to award subcontracts equal to **33%** of the value of this Agreement to certified, diverse suppliers of goods and services in accordance with the Diversity Program established by HFC, which is made a part hereof for all purposes. Contractor shall disclose to HFC the manner and extent to which it has made good faith efforts to achieve such goal and submit reports on forms provided by HFC with each invoice, or as directed by HFC.

### **ARTICLE 3: COMPENSATION**

3.1 Payments to Contractor shall be based on the hourly rates for services set forth in Exhibit **[TBD]** attached hereto and made a part hereof for all purposes.

3.2 For Work Orders completed within 30 calendar days of issuance, Contractor will be paid within 30 calendar days after receipt of an itemized invoice approved by HFC. For Work Orders not completed within 30 calendar days of issuance, Contractor may request a progress payment from HFC based on Work completed for review and approval by HFC.

3.3 All payments shall be made by check payable to Contractor and addressed to Contractor at its address specified herein for notice. Neither partial payments made hereunder nor approval of invoices or services by HFC shall be construed as final acceptance or approval of that part of Contractor's Work to which such partial payment or approval relates nor shall such payments be construed as relieving Contractor of any of its obligations hereunder with respect thereto.

### **ARTICLE 4: RESPONSIBILITIES OF HFC**

4.1 HFC agrees to respond to inquiries from Contractor within a reasonable time and provide information in a timely manner regarding requirements for and limitations on the Project, including HFC's objectives, constraints, space requirements, flexibility, expandability and site requirements.

4.2 HFC will identify a representative authorized to act on HFC's behalf with respect to the Project. HFC will render decisions and approve Contractor's submittals, if any, in a timely manner in order to avoid unreasonable delay in the orderly and sequential progress of Contractor's services. HFC will coordinate the services of its own contractors with those services provided by Contractor.

### **ARTICLE 5: INSURANCE AND INDEMNIFICATION**

5.1 With no intent to limit Contractor's liability under indemnification provisions, Contractor shall provide and maintain in full force and effect from the date of execution of the Agreement until final completion of all work related to the Projects, including all extensions and amendments thereto, at least the following insurance and available limits of liability:

Coverage Limit of Liability	Commercial General Liability Bodily Injury and Property Damage, Combined Limits of \$1,000,000 each Occurrence and \$2,000,000 aggregate
Professional Liability	\$1,000,000 per claim/aggregate
Workers' Compensation	Statutory limits for Workers' Compensation
Employer's Liability	Bodily Injury by Disease \$1,000,000 (policy limit) Bodily Injury by Disease \$1,000,000 (each employee)

5.2 The issuer of any policy shall have a Certificate of Authority to transact insurance business in the State of Texas or have a Best's rating of at least A- and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide, Property-Casualty United States.

5.3 Each policy, except those for Workers' Compensation, Employer's Liability and Professional Liability, must include an additional insured endorsement in favor of HFC and the City of Houston on the original policy and all renewals or replacements during the term of this Agreement.

5.4 Each policy, except Professional Liability, must contain an endorsement approved by HFC waiving any claim or right in the nature of subrogation.

5.5 Contractor shall be solely responsible for payment of all insurance premiums hereunder. Contractor shall be responsible for and bear any claims or losses to the extent of any deductible amounts and waives any claim it may ever have for same against HFC, its officers or employees.

5.6 Each policy hereunder, except Worker's Compensation and Professional Liability insurance, shall be primary insurance to any other insurance available to the Additional Insured with respect to claims arising hereunder.

**5.7 CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD HFC, THE CITY OF HOUSTON, THEIR RESPECTIVE AGENTS, EMPLOYEES, OFFICERS, AND DIRECTORS (COLLECTIVELY "INDEMNITEES") HARMLESS FROM AND AGAINST ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, BY REASON OF COPYRIGHT INFRINGEMENT) FOR (I) INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY ARISING OUT OF THE NEGLIGENT OR INTENTIONAL ACTS OR OMISSIONS OF CONTRACTOR IN THE PERFORMANCE OF THE WORK OR WHILE WITHIN OR ABOUT THE PROJECT SITE; PROVIDED, THAT CONTRACTOR IS NOT OBLIGATED TO INDEMNIFY ANY OF INDEMNITEES FOR THEIR NEGLIGENCE, AND (II) ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL OR STATE EMPLOYMENT LAWS, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT, INCLUDING WITHOUT LIMITATION, ANY CLAIMS AND CAUSES OF ACTION BROUGHT AGAINST INDEMNITIES BY CONTRACTOR'S PERSONNEL AND/OR GOVERNMENT AGENCIES ARISING FROM, RELATING TO, OR INVOLVING CONTRACTOR'S PERSONNEL UNDER THIS AGREEMENT.**

5.8 If HFC or Contractor receive notice of any claim or circumstances which could give rise to an indemnified loss, then the receiving party shall give written notice to the other party within 10 calendar days. The notice must include the following: (i) a description of the indemnification event in reasonable detail, (ii) the basis on which indemnification may be due, and (iii) the anticipated amount of the indemnified loss.

5.9 This notice does not prevent HFC from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If HFC does not provide this notice within the 10-day period, it does not waive any right to indemnification except to the extent that Contractor is prejudiced, suffers loss, or incurs expense because of the delay.

5.10 Contractor may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably qualified. Contractor shall then control the defense and any negotiations to settle the claim. Within 10 calendar days after receiving written notice of the indemnification request, Contractor must advise HFC as to whether or not it will defend the claim. If Contractor does not assume the defense, then HFC shall assume and control the defense, and all defense expenses constitute an indemnified loss.

5.11 If Contractor elects to defend the claim, then HFC may retain separate counsel to participate in, but not control, the defense and to participate in, but not control, any settlement negotiations. Contractor may settle the claim without the consent or agreement of HFC, unless it: (i) would result in injunctive relief or other equitable remedies or otherwise require HFC to comply with restrictions or limitations that adversely affect HFC; (ii) would require HFC to pay amounts that Contractor does not fund in full; or (iii) would not result in HFC's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

## ARTICLE 6: TERMINATION

6.1 Either party may terminate this Agreement for cause if the other party defaults and fails to cure the default after receiving notice thereof. Default occurs if a party fails to perform one or more of its material duties under this Agreement. If a default occurs, then the injured party shall deliver a written notice to the defaulting party describing the default and the proposed termination date. The date must be at least 30 calendar days after receipt of the notice. The injured party, at its sole option, may extend the proposed termination date to a later date. If the defaulting party cures the default before the proposed termination date, then the proposed termination is ineffective. If the defaulting party does not cure the default before the proposed termination date, then the injured party may terminate this Agreement on the termination date.

6.2 HFC may terminate this Agreement for its convenience at any time by giving 15 calendar days' written notice to Contractor. HFC's right to terminate this Agreement for convenience is cumulative of all rights and remedies which exist now or in the future. On receiving such notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement. As soon as practicable after receiving the termination notice, Contractor shall submit an invoice to HFC showing in detail the services performed under this Agreement up to the termination date. HFC shall then pay the amount due Contractor for services actually performed, but not paid previously, in the same manner as prescribed herein.

## ARTICLE 7: MISCELLANEOUS PROVISIONS

7.1 Inspections and Audits. Upon reasonable notice, either party shall have the right to examine and review the other party's books, records and billing documents which are directly related to performance or payment under this Agreement. Nothing in this Section shall affect the time for bringing a cause of action or the applicable statute of limitations.

7.2 Limitation of Liability. **HFC SHALL NOT BE LIABLE TO CONTRACTOR FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, PUNITIVE, OR EXEMPLARY DAMAGES, INCLUDING, WITHOUT LIMITATION, LOST PROFITS (DIRECT OR INDIRECT) AND LOST REVENUES HOWSOEVER ARISING, WHETHER OR NOT CHARACTERIZED IN NEGLIGENCE, TORT, CONTRACT, OR OTHER THEORY OF LIABILITY, EVEN IF HFC HAS BEEN ADVISED OF THE POSSIBILITY OF OR COULD HAVE FORESEEN ANY SUCH DAMAGES.**

7.3 Force Majeure. Timely performance by both parties is essential to this Agreement. However, neither party will be liable for delays or other failures to perform its obligations under this Agreement to the extent the delay or failure is caused by Force Majeure. For purposes of this Agreement, Force Majeure means fires, floods, explosions, and other acts of God, war, terrorist acts, riots, court orders and the acts of superior governmental or military authority. This relief is not applicable unless the affected party (i) uses due diligence to remove the Force Majeure as quickly as possible; (ii) provides the other party with prompt written notice of the cause and its anticipated effect; and (iii) provides the other party with written notice describing the actual delay or non-performance incurred within 7 calendar days after the Force Majeure ceases.

7.4 Assignment. Contractor may not assign this Agreement or any of its obligations to perform under this Agreement without the express written consent of HFC.

7.5 Non-Waiver. Failure of either party hereto to insist on the strict performance of any of the agreements herein or to exercise any rights or remedies accruing hereunder upon default or failure of performance shall not be considered a waiver of the right to insist on and to enforce by any appropriate remedy, strict compliance with any other obligation hereunder or to exercise any right or remedy occurring as a result of any future default or failure of performance.

7.6 Notices. All notices required or permitted hereunder shall be in writing and shall be deemed received when actually received or if earlier, on the third day following deposit in a United States Postal Service post office or receptacle with proper postage affixed (certified mail, electronic return receipt requested) addressed to the other party at the address prescribed herein or at such other address as the receiving party may have theretofore prescribed by notice to the sending party.

7.7 Independent Contractor. The relationship of Contractor to HFC shall be that of an independent contractor. Contractor has the authority to select the means, methods and manner of providing services subject to the terms, conditions, and specifications in this Agreement. No principal/agent, partnership, joint venture, joint employer, or other relationship, other than an independent contractor relationship, is created or intended by this Agreement.

7.8 Survival. Contractor shall remain obligated to HFC under all clauses of this Agreement that expressly or by their nature extend beyond the expiration or termination of the term of this Agreement.

7.9 Governing Law/Venue. The Agreement shall be governed by the laws of the State of Texas, without regard to any conflict of law provisions. Litigation in connection with this Contract shall be in a court of competent jurisdiction in Harris County, Texas.

7.10 Severability. If any part of this Agreement is for any reason found to be unenforceable, all other parts remain enforceable unless the result materially prejudices either party.

7.11 Extent of Agreement. This Agreement, including the exhibits which are made a part hereof, represents the entire and integrated agreement between HFC and Contractor and supersedes all prior negotiations, representations or agreements either written or oral. This Agreement may not be altered or amended except in writing executed on behalf of all of the parties.

[Signature page to follow in final agreement]