



December 13, 2017

Via E-Mail

Ms. Michele Berry, AICP
Senior Planner
City of Keller
1100 Bear Creek Pkwy
Keller, Texas 76248

Re: Old Town Keller Phase II Infrastructure Improvements Conceptual Level Design Professional Services Agreement

Dear Ms. Berry

Kimley-Horn and Associates, Inc. ("Kimley-Horn" or "the Consultant") is pleased to submit this letter agreement (the "Agreement") to the City of Keller (the "Client" or "City") to provide professional services. Our project understanding, scope of services, schedule, and fee are below.

Project Understanding

The project will consist of developing a conceptual plan and implementation strategy plan for Old Town Keller Phase II infrastructure improvements. The project is in the Old Town Keller commercial district, located east of US 377 (Main Street), west of Elm Street, south of Keller Parkway and north of Bear Creek Parkway (study area). This work will include:

- Task 1 – Project Management
- Task 2 – Public Engagement
- Task 3 – Data Collection and Analysis
- Task 4 – Opportunity Evaluation and Conceptual Plan Development

Scope of Services

Kimley-Horn will provide the services specifically set forth below.

Task - 1: Project Management

- 1.1. *Project Work Plan* – Kimley-Horn will prepare a Project Work Plan. This document will provide a brief understanding of the project, highlight the Kimley-Horn team members involved, and provide a milestone schedule that assigns target dates to each major task item within the project. Project contacts and invoicing procedures also will be discussed in this document. As a subcomponent to the Project Work Plan, Kimley-Horn will develop a Communication Protocol. The intent of this section is to identify the project contacts, and their roles and responsibilities, within the Kimley-Horn and City Staff. The task managers for each effort within the project will be identified. Information in this protocol will be used to maintain smooth coordination and enhance communication with the public, stakeholders, and the City. Kimley-Horn will provide a draft Project Work Plan that will be reviewed by the City. One round of edits to this document are included in this scope of work. The milestone schedule, in the form of a Gantt chart, will be updated periodically as work tasks are completed. It is important that the work plan incorporate schedule float and flexibility to ensure the project can

- be responsive to public input and any related changes in direction for the project.
- 1.2. *Status Reports and Invoicing* – Kimley-Horn will provide status reports outlining what has been completed, what are the goals for the following month, and what information is needed from the City. The status report will also include a detailed schedule and milestone checklist. The status report will be updated monthly and distributed to the people designated on the Project Work Plan. The status reports will be distributed with the monthly invoice.
 - 1.3. *Kick-off Meeting with City Staff* – Prepare for and attend a kick-off meeting with the City to discuss the findings of the data collection.

Task – 2: Public, Staff and Agency Engagement & Input

- 2.1 *Public Engagement Plan* - Kimley-Horn will develop a detailed plan for overall communications and for the public engagement process for City review and approval. The Plan will identify methods for stakeholder identification, pre and post-meeting communication techniques and tools, a schedule of stakeholder and public engagement meetings, necessary activities in preparation for meetings, and tools and techniques to be utilized during stakeholder and community workshops to facilitate engagement and encourage feedback. The Public Engagement Plan will specify the level of resources to be provided for these activities by the Kimley-Horn team and by the City staff such as:
 - 2.1.1 Engagement through Community Events – Kimley-Horn will work with City Staff to identify opportunities to involve the community through outreach at City events and festivals and at the regular meetings of partner organizations. The Kimley-Horn team will prepare up to two (2) rounds of materials for use at different points in the planning process. These opportunities could include materials for pop-up meetings and presentations to local organizations. The specific events and type of engagement activities to be initiated at each one will be detailed in the Public Engagement Plan. It is assumed that two (2) Kimley-Horn team members will attend two events and the remainder will be manned by City Staff.
 - 2.1.2 Public Engagement Coordination –
 - **Coordination with Public Information Officer (PIO)** - It is assumed that the City's Public Information Officer will manage and update the web-based and social media engagement. Kimley-Horn will coordinate with the PIO to provide any content needed for City lead meetings, social media or online engagement. Kimley-Horn will also coordinate with the PIO to obtain information to implement into Task 4. It is assumed that this task will involve up to nine (9) hours of Kimley-Horn's time.
 - **Online Surveys** - It is assumed that the City's PIO will issue any online surveys needed throughout the public engagement process. Kimley-Horn will provide up to thirteen (13) hours of coordination with the PIO to provide any content needed as well as compiling information obtained from the online surveys for use during Task 4.
- 2.2 *Community Workshops* – Kimley-Horn will prepare materials, attend, and document as needed for up to two (2) community workshops. The following are the community workshops anticipated:

- 2.2.1 Concept Plan Development Meeting – The focus of the workshop will be to present concept plan options from the initial data collection process. This meeting will have an interactive interface (text or keypad polling) to obtain feedback on priorities the public would like to see move forward to construction with this phase of the project within the budget.
 - 2.2.2 Preferred Concept Plan Meeting – The focus of the workshop will be to communicate what the City will be moving forward with for design and construction with the current budget.
 - 2.3 *City Council Workshops* - Kimley-Horn will prepare for and attend up to two (2) meetings with City Council. The first meeting will be to present conceptual design options and to solicit input and support for moving forward. The second meeting will be to present the preferred final concept.
 - 2.4 *Visualization Tools* – Kimley-Horn will prepare the following visual graphics for public communication in addition to the plan view concept options described in other tasks.
 - 2.4.1 Kimley-Horn will update the two (2) perspective sketches that Kimley-Horn provided in the SOQ. It is assumed no more than fifteen (15) hours will be spent on updating the existing perspective sketches.
 - 2.5 *Interagency Engagement and Coordination*

The meetings listed below are design coordination meetings with the City, Franchise Utility Providers, and TxDOT. These are in addition to meetings listed above under Public Engagement.

 - 2.5.1. Design Coordination Meetings – Conduct and document regularly scheduled coordination meetings after the data collection phase. The meetings will include the project design team and appropriate City departments. This assumes ten (10) coordination meetings for the conceptual design phase of the project. Three (3) of these meetings are assumed to be telecommunication meetings and seven (7) are assumed to be in-person. Following each meeting, Kimley-Horn will provide notes to the City as outlined in the communication plan. The meetings will also include the following groups as needed throughout the project:
 - Police and Fire
 - Franchise Utility Companies
 - TxDOT Staff
 - Public Art
 - Parks and Rec
 - Economic Development
 - 2.5.2. Franchise Utility Coordination. Two (2) on-site meetings with franchise utility companies as needed throughout the conceptual design phase. The meetings are included in Task 2.5.1

- Coordination – Kimley-Horn will coordinate with the franchise utility companies within the study area to determine relocation options and associated estimated costs.
- Assumptions – Up to ten (10) hours are assumed for franchise utility coordination.

2.5.3. TxDOT Coordination

- Conduct and document up to two (2) meetings with TxDOT. These are assumed to be included with the regularly scheduled design meetings.
- Coordinate as needed with TxDOT for design improvements on US 377/Main Street. It is estimated that no more than ten (10) hours will be needed for coordination throughout the conceptual design process.

Task - 3: Data Collection and Analysis

- 3.1. *Right-of-Way Boundary Survey* – Kimley-Horn will obtain right-of-way boundary survey information along US 377/Main Street, Elm Street, Tayler St, E. Hill St, E. Vine St, Bates St, Olive St, and Pecan St. Tasks associated with the boundary research are:
 - 3.1.1. Gather existing plat information
 - 3.1.2. Gather property owner and record information
 - 3.1.3. Gather existing City right-of-way and easement information. Identify easements available through typical research methodologies (i.e. plats, court house filings, etc.). Undocumented easements may not be identified.
 - 3.1.4. Perform a field survey to identify and locate existing property corner monumentation
- 3.2. *Data Research* – Kimley-Horn will collect data to develop a base map, this information will be utilized to analyze existing constraints and issues for the development of the conceptual design.
 - 3.2.1. Aerial Photography – Kimley-Horn will collect aerial photography for the project corridor from NearMaps and/or available aerial photos from the City.
 - 3.2.2. LIDAR – Kimley-Horn will gather LIDAR data (1' contour information) available from USGS.
 - 3.2.3. Available Survey Information – Kimley-Horn will collect from the City any readily available survey information within the project limits.
 - 3.2.4. Available Record Drawings and Development Plans – Kimley-Horn will collect from the City any available record drawings (roadway, drainage, water, sewer, etc.) within the project limits and any proposed development plans.
 - 3.2.5. Existing and Proposed Utility Information – Kimley-Horn will collect from the City existing and proposed water, storm, and sewer utility information for project limits.
 - 3.2.6. Texas 811 Field Location Request – Kimley-Horn will coordinate with Texas 811 to locate and mark existing franchise and public utilities such as: underground

electric, underground cable and fiber, underground, gas distribution lines, and gas line crossings.

- 3.2.7. Franchise Utility Information – Kimley-Horn will contact utility company providers to obtain maps of existing and/or proposed facilities.
 - 3.2.8. Field Observation – Kimley-Horn will conduct a planning level in-field observation to obtain measurements and locate visible above-ground elements that may be critical to the plan development. The field measurement will supplement the aerial photography. Two (2) site visits are assumed. Kimley-Horn will rely upon field measurements and aerial photography to develop the concept drawing base map, topographic survey will not be obtained.
 - 3.2.9. Traffic Counts and Accident Data – Kimley-Horn will request and obtain available accident data and traffic counts from the City within the study area.
 - 3.2.10. Assessment of Existing Conditions – After the field observations Kimley-Horn will document the existing conditions within the project study area.
- 3.3. *Proposed Traffic Operations Improvement Exhibit* – Using the traffic data collected from the City, Kimley-Horn will provide an exhibit documenting the proposed traffic operations improvements in the project limits. The recommendations are anticipated to include the following:
- 3.3.1. Roundabout lane configuration at S. Elm and Pecan
 - 3.3.2. Roundabout lane configuration at S. Elm and Bear Creek Parkway
 - 3.3.3. Cross section recommendation for S. Elm Street
 - 3.3.4. S. Main Street pedestrian crossing recommendations
- 3.4. *Preliminary Drainage Report*
- 3.4.1 Using LiDAR from Task 3.3. and site observations, Kimley-Horn will develop a preliminary Drainage Report that will be used during the final design for drainage improvements within the study area. The drainage report will include the following tasks:
 - Develop an Existing Drainage Area Map using LiDAR contours and existing runoff calculations. The map will indicate existing drainage areas, outfall locations, and flow directions.
 - Develop a Conceptual Proposed Drainage Area Map using proposed conceptual improvements and proposed runoff calculations. This drainage area map will not be developed using proposed grading and will need to be modified once the conceptual plan moves into final design. The purpose of this map is to indicate any upsizing of existing storm drain infrastructure needed and how much runoff will need to be contained within proposed storm drain infrastructure. The proposed improvements will be designed during the final design phase.

- Conceptual horizontal layout of storm drain pipes and structures. The purpose of the storm drain layout is to identify any locations of potential conflicts with existing City and franchise utility companies.

Task - 4: Opportunity Evaluation and Conceptual Plan Development

During this phase, concept options and ideas will be identified and evaluated based upon Tasks 2 and 3. The exact methods of evaluation will be determined by Kimley-Horn in collaboration with the City. This information will be used to create the preferred concept plan for Old Town Keller Phase II.

- 4.1. *Opportunity Evaluation* – Evaluate Old Town Keller opportunities to see which project option combinations most closely align with the goals established by the public engagement process. Kimley-Horn will identify a list of project opportunities that correspond to the goals such as:

- Pedestrian Crossing for US 377 (Main Street)
- Improved mobility
- Traffic signalization
- Traffic calming
- Bates Street Park Improvements
- Sidewalk and trails
- Parking improvements
- Increasing Parking
- Wayfinding
- Public Art
- Illumination
- Landscape and Streetscape
- Trash and mail consolidation
- Franchise utility consolidation
- Roadway improvements
- Drainage improvements

- 4.2. *High-Level Conceptual Opinion of Probable Construction Cost (OPCC)* – For each opportunity, a high level OPCC will be developed so that the options can be evaluated for feasibility and prioritization.

- 4.3. *Developing an Implementation Plan* – Kimley-Horn will coordinate with the City to evaluate the proposed opportunities and combine them into projects. Those projects will then be prioritized using influencing factors related to the projects such as implementation timeframe, economic benefit, parking, cost, and mobility. The Implementation Plan will then be developed using the projects and the prioritization. The final Implementation Plan deliverable will outline a program that that illustrates all the proposed projects, which we call a “packet of projects”.

- 4.4. *Preferred Concept Plan Determination* – Kimley-Horn will work with the City to determine the Preferred Concept Plan that will be implemented in the next phase of the project (final design). The preferred concept plan will be a combination of projects from the Implementation Plan that most closely aligns with the result of community outreach and budget. The preferred concept plan will be presented to the City and Council.

- 4.4.1. The final deliverable will consist of a rendered plan layout with images of treatments. An example of what can be included in the concept plan design are:

- Roadway, parking and sidewalk improvements
- Landscape and streetscape improvements
- Park plan and landscape
- Wayfinding signage
- Park and public open space improvements
- Traffic calming treatments

Comments received from the Public or City Council will be addressed in the next phase of the project.

Additional Services

Any services not specifically identified in the Scope of Services shall be considered Additional Services. These may be performed on an individual basis upon written authorization by the City at our then current hourly rates under the existing Agreement if budget allows.

Additional Services include, but are not limited to, the following:

- Additional meetings;
- Additional City Council presentations;
- Additional visualization documents;
- Final Design Services;
- Bidding or Construction Phase Services;
- Right-of-way or Easement Acquisition;
- Geotechnical Evaluation;
- Topographic Survey;
- Subsurface Utility Engineering (SUE);
- Traffic Study; and
- Any services not listed above

Information Provided by Client

Kimley-Horn shall be entitled to rely on the completeness and accuracy of all information provided by the Client.

Schedule

Tasks 1-4 will be completed a mutually agreed upon schedule. Additional services, if desired, will be performed within a mutually agreed upon schedule, once authorized by the Client in writing.

Fee and Expenses

Kimley-Horn will perform the services in Tasks 1 through 4 for the total lump sum fee below. Individual task amounts are informational only. All permitting, application, and similar project fees will be paid directly by the Client.

Task 1	Project Management	\$ 8,000
Task 2	Public, Staff and Agency Engagement & Input	
	Task 2.1 Public Engagement Plan	\$10,150
	Task 2.2 Community Workshops	\$12,000
	Task 2.3 Council Workshops	\$ 3,000
	Task 2.4 Visualization Tools	\$ 2,600
	Task 2.5 Interagency Engagement and Coordination	
	Task 2.5.1 Coordination Meetings	\$15,810
	Task 2.5.2 and 2.5.3 Agency Coordination	\$ 5,000
Task 3	Data Collection and Analysis	
	Task 3.1 ROW Boundary Survey	\$22,000
	Task 3.2 Data Research	\$11,000
	Task 3.3 Proposed Traffic Operations Improvement Exhibit	\$ 5,000
	Task 3.4 Preliminary Drainage Report	\$11,000
<u>Task 4 Opportunity Evaluation and Conceptual Plan Development</u>		<u>\$44,000</u>
Total Lump Sum Fee		\$149,560

Lump sum fees will be invoiced monthly based upon the overall percentage of services performed. Payment will be due within 30 days of your receipt of the invoice and should include the invoice number and Kimley-Horn project number.

Closure

In addition to the matters set forth herein, our Agreement shall include and be subject to, and only to, the terms and conditions in the attached Standard Provisions, which are incorporated by reference. As used in the Standard Provisions, the term "the Consultant" shall refer to Kimley-Horn and Associates, Inc., and the term "the Client" shall refer to the City of Keller, Texas.

Kimley-Horn, in an effort to expedite invoices and reduce paper waste, submits invoices via e-mail in an Adobe PDF format. We can also provide a paper copy via regular mail if requested. Please include the invoice number and Kimley-Horn project number with all payments. Please provide the following information:

_____ Please email all invoices to _____

_____ Please copy _____

If you concur in all the foregoing and wish to direct us to proceed with the services, please have authorized persons execute both copies of this Agreement in the spaces provided below, retain one copy, and return the other to us. We will commence services only after we have received a fully-executed agreement. Fees and times stated in this Agreement are valid for sixty (60) days after the date of this letter.

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We appreciate the opportunity to provide these services to you. Please contact us if you have any questions.

Very truly yours,

KIMLEY-HORN AND ASSOCIATES, INC.



Dana Shumard, P.E.
Project Manager



Scott R. Arnold, P.E.
Assistant Secretary

CITY OF KELLER, TEXAS
A Municipality

By: _____ Date: _____

(Print or Type Name and Title)

(Email Address)

_____ Witness

(Print or Type Name)

Attachment – Standard Provisions

KIMLEY-HORN AND ASSOCIATES, INC.

STANDARD PROVISIONS

(1) **Consultant's Scope of Services and Additional Services.** The Consultant's undertaking to perform professional services extends only to the services specifically described in this Agreement. However, if requested by the Client and agreed to by the Consultant, the Consultant will perform Additional Services, which shall be governed by these provisions. Unless otherwise agreed to in writing, the Client shall pay the Consultant for any Additional Services an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including telecommunications, in-house reproduction, postage, supplies, project related computer time, and local mileage. Other direct expenses will be billed at 1.10 times cost.

(2) **Client's Responsibilities.** In addition to other responsibilities described herein or imposed by law, the Client shall:

- (a) Designate in writing a person to act as its representative with respect to this Agreement, such person having complete authority to transmit instructions, receive information, and make or interpret the Client's decisions.
- (b) Provide all information and criteria as to the Client's requirements, objectives, and expectations for the project including all numerical criteria that are to be met and all standards of development, design, or construction.
- (c) Provide to the Consultant all previous studies, plans, or other documents pertaining to the project and all new data reasonably necessary in the Consultant's opinion, such as site survey and engineering data, environmental impact assessments or statements, upon all of which the Consultant may rely.
- (d) Arrange for access to the site and other private or public property as required for the Consultant to provide its services.
- (e) Review all documents or oral reports presented by the Consultant and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of the Consultant.
- (f) Furnish approvals and permits from governmental authorities having jurisdiction over the project and approvals and consents from other parties as may be necessary for completion of the Consultant's services.
- (g) Cause to be provided such independent accounting, legal, insurance, cost estimating and overall feasibility services as the Client may require.
- (h) Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the scope, timing, or payment of the Consultant's services or any defect or noncompliance in any aspect of the project.
- (i) Bear all costs incidental to the responsibilities of the Client.

(3) **Period of Services.** Unless otherwise stated herein, the Consultant will begin work timely after receipt of a properly executed copy of this Agreement and any required retainer amount. This Agreement is made in anticipation of conditions permitting continuous and orderly progress through completion of the services. Times for performance shall be extended as necessary for delays or suspensions due to circumstances that the Consultant does not control. If such delay or suspension extends for more than six months (cumulatively), Consultant's compensation shall be renegotiated.

(4) **Method of Payment.** Compensation shall be paid to the Consultant in accordance with the following provisions:

- (a) Invoices will be submitted periodically for services performed and expenses incurred. Payment of each invoice will be due within 30 days of receipt. The Client shall also pay any applicable sales tax. All retainers will be held by the Consultant for the duration of the project and applied against the final invoice. Interest will be added to accounts not paid within 30 days at the rate of 12% per annum beginning on the 30th day. If the Client fails to make any payment due to the Consultant under this or any other agreement within 30 days after the Consultant's transmittal of its invoice, the Consultant may, after giving notice to the Client, suspend services and withhold deliverables until all amounts due are paid in full and may commence proceedings, including filing liens, to secure its right to payment under this Agreement.
- (b) If the Client relies on payment or proceeds from a third party to pay Consultant and Client does not pay Consultant's invoice within 60 days of receipt, Consultant may communicate directly with such third party to secure payment.
- (c) If the Client objects to an invoice, it must advise the Consultant in writing giving its reasons within 14 days of receipt of the invoice or the Client's objections will be waived, and the invoice shall conclusively be deemed due and owing. If the Client objects to only a portion of the invoice, payment for all other portions remains due within 25 days of receipt.
- (d) If the Consultant initiates legal proceedings to collect payment, it may recover, in addition to all amounts due, its reasonable attorneys' fees, reasonable experts' fees, and other expenses related to the proceedings. Such expenses shall include the cost, at the Consultant's normal hourly billing rates, of the time devoted to such proceedings by its employees.
- (e) The Client agrees that the payment to the Consultant is not subject to any contingency or condition. The Consultant may negotiate payment of any check tendered by the Client, even if the words "in full satisfaction" or words intended to have similar effect appear on the check without such negotiation being an accord and satisfaction of any disputed debt and without prejudicing any right of the Consultant to collect additional amounts from the Client.

(5) **Use of Documents.** All documents, including but not limited to drawings, specifications, reports, and data or programs stored electronically, prepared by the Consultant are related exclusively to the services described in this

Agreement, and may be used only if the Client has satisfied all of its obligations under this Agreement. They are not intended or represented to be suitable for use, partial use or reuse by the Client or others on extensions of this project or on any other project. Any modifications made by the Client to any of the Consultant's documents, or any use, partial use or reuse of the documents without written authorization or adaptation by the Consultant will be at the Client's sole risk and without liability to the Consultant, and the Client shall indemnify, defend and hold the Consultant harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, resulting therefrom. The Consultant's electronic files and source code developed in the development of application code remain the property of the Consultant and shall be provided to the Client only if expressly provided for in this Agreement. Any electronic files not containing an electronic seal are provided only for the convenience of the Client, and use of them is at the Client's sole risk. In the case of any defects in the electronic files or any discrepancies between them and the hardcopy of the documents prepared by the Consultant, the hardcopy shall govern. Because data stored in electronic media format can deteriorate or be modified without the Consultant's authorization, the Client has 60 days to perform acceptance tests, after which it shall be deemed to have accepted the data.

(6) **Opinions of Cost.** Because the Consultant does not control the cost of labor, materials, equipment or services furnished by others, methods of determining prices, or competitive bidding or market conditions, any opinions rendered as to costs, including but not limited to opinions as to the costs of construction and materials, shall be made on the basis of its experience and represent its judgment as an experienced and qualified professional, familiar with the industry. The Consultant cannot and does not guarantee that proposals, bids or actual costs will not vary from its opinions of cost. If the Client wishes greater assurance as to the amount of any cost, it shall employ an independent cost estimator. Consultant's services required to bring costs within any limitation established by the Client will be paid for as Additional Services.

(7) **Termination.** The obligation to provide further services under this Agreement may be terminated by either party upon seven days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party, or upon thirty days' written notice for the convenience of the terminating party. If any change occurs in the ownership of the Client, the Consultant shall have the right to immediately terminate this Agreement. In the event of any termination, the Consultant shall be paid for all services rendered and expenses incurred to the effective date of termination, and other reasonable expenses incurred by the Consultant as a result of such termination. If the Consultant's compensation is a fixed fee, the amount payable for services will be a proportional amount of the total fee based on the ratio of the amount of the services performed, as reasonably determined by the Consultant, to the total amount of services which were to have been performed.

(8) **Insurance.** The Consultant carries Workers' Compensation insurance, professional liability insurance, and general liability insurance. If the Client directs the Consultant to obtain increased insurance coverage, the Consultant will take out such additional insurance, if obtainable, at the Client's expense.

(9) **Standard of Care.** The standard of care applicable to Consultant's services will be the degree of care and skill ordinarily exercised by consultants performing the same or similar services in the same locality at the time the services are provided. No warranty, express or implied, is made or intended by the Consultant's undertaking herein or its performance of services, and it is agreed that the Consultant is not a fiduciary with respect to the Client.

(10) **LIMITATION OF LIABILITY.** In recognition of the relative risks and benefits of the Project to the Client and the Consultant, the risks have been allocated such that the Client agrees, to the fullest extent of the law, and notwithstanding any other provisions of this Agreement or the existence of applicable insurance coverage, that the total liability, in the aggregate, of the Consultant and the Consultant's officers, directors, employees, agents, and subconsultants to the Client or to anyone claiming by, through or under the Client, for any and all claims, losses, costs or damages whatsoever arising out of, resulting from or in any way related to the services under this Agreement from any cause or causes, including but not limited to, the negligence, professional errors or omissions, strict liability or breach of contract or any warranty, express or implied, of the Consultant or the Consultant's officers, directors, employees, agents, and subconsultants, shall not exceed twice the total compensation received by the Consultant under this Agreement or \$50,000, whichever is greater. Higher limits of liability may be negotiated for additional fee. Under no circumstances shall the Consultant be liable for extra costs or other consequences due to changed conditions, or for costs related to the failure of contractors to perform work in accordance with the plans and specifications. This Section 10 is intended solely to limit the remedies available to the Client or those claiming by or through the Client, and nothing in this Section 10 shall require the Client to indemnify the Consultant.

(11) **Mutual Waiver of Consequential Damages.** In no event shall either party be liable to the other for any consequential, incidental, punitive, or indirect damages including but not limited to loss of income or loss of profits.

(12) **Certifications.** The Consultant shall not be required to execute certifications or third-party reliance letters that are inaccurate, that relate to facts of which the Consultant does not have actual knowledge, or that would cause the Consultant to violate applicable rules of professional responsibility.

(13) **Dispute Resolution.** All claims by the Client arising out of this Agreement or its breach shall be submitted first to mediation in accordance with the Construction Industry Mediation Procedures of the American Arbitration Association as a condition precedent to litigation. Any mediation or civil action by Client must be commenced within one year of the accrual of the cause of action asserted but in no event later than allowed by applicable statutes.

(14) **Hazardous Substances and Conditions.** In no event shall Consultant be a custodian, transporter, handler, arranger, contractor, or remediator with respect to hazardous substances and conditions. Consultant's services will be limited to professional analysis, recommendations, and reporting, including, when agreed to, plans and specifications for isolation, removal, or remediation. The Consultant shall notify the Client of hazardous substances or conditions not contemplated in the scope of services of which the Consultant actually becomes aware. Upon such notice by the Consultant, the Consultant may stop affected portions of its services until the hazardous substance or condition is eliminated.

(15) **Construction Phase Services.**

(a) If the Consultant's services include the preparation of documents to be used for construction and the Consultant is not retained to make periodic site visits, the Client assumes all responsibility for interpretation of the documents and for construction observation, and the Client waives any claims against the Consultant in any way connected thereto.

(b) If the Consultant provides construction phase services, the Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, sequence, schedule, safety programs, or safety practices, nor shall Consultant have any authority or responsibility to stop or direct the work of any contractor. The Consultant's visits will be for the purpose of endeavoring to provide the Client a greater degree of confidence that the completed work of its contractors will generally conform to the construction documents prepared by the Consultant. Consultant neither guarantees the performance of contractors, nor assumes responsibility for any contractor's failure to perform its work in accordance with the contract documents.

(c) The Consultant is not responsible for any duties assigned to the design professional in the construction contract that are not expressly provided for in this Agreement. The Client agrees that each contract with any contractor shall state that the contractor shall be solely responsible for job site safety and for its means and methods; that the contractor shall indemnify the Client and the Consultant for all claims and liability arising out of job site accidents; and that the Client and the Consultant shall be made additional insureds under the contractor's general liability insurance policy.

(16) **No Third-Party Beneficiaries; Assignment and Subcontracting.** This Agreement gives no rights or benefits to anyone other than the Client and the Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole benefit of the Client and the Consultant. The Client shall not assign or transfer any rights under or interest in this Agreement, or any claim arising out of the performance of services by Consultant, without the written consent of the Consultant. The Consultant reserves the right to augment its staff with subconsultants as it deems appropriate due to project logistics, schedules, or market conditions. If the Consultant exercises this right, the Consultant will maintain the agreed-upon billing rates for services identified in the contract, regardless of whether the services are provided by in-house employees, contract employees, or independent subconsultants.

(17) **Confidentiality.** The Client consents to the use and dissemination by the Consultant of photographs of the project and to the use by the Consultant of facts, data and information obtained by the Consultant in the performance of its services. If, however, any facts, data or information are specifically identified in writing by the Client as confidential, the Consultant shall use reasonable care to maintain the confidentiality of that material.

(18) **Miscellaneous Provisions.** This Agreement is to be governed by the law of the State of Texas. This Agreement contains the entire and fully integrated agreement between the parties and supersedes all prior and contemporaneous negotiations, representations, agreements or understandings, whether written or oral. Except as provided in Section 1, this Agreement can be supplemented or amended only by a written document executed by both parties. Provided, however, that any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. Any provision in this Agreement that is unenforceable shall be ineffective to the extent of such unenforceability without invalidating the remaining provisions. The non-enforcement of any provision by either party shall not constitute a waiver of that provision nor shall it affect the enforceability of that provision or of the remainder of this Agreement.