



PUBLICATION DATE: January 31, 2019

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SUPPLEMENTARY CONDITIONS OF THE CONSTRUCTION CONTRACT

Supplementary Conditions

These Supplementary Conditions of the Construction Contract ("Supplementary Conditions") amend or supplement the General Conditions of the Construction Contract ("General Conditions"). All provisions that are not so amended or supplemented remain in full force and effect.

The terms used in these Supplementary Conditions have the meanings stated in the General Conditions. Additional terms used in these Supplementary Conditions have the meanings stated below, which are applicable to both the singular and plural thereof.

The address system used in these Supplementary Conditions is the same as the address system used in the General Conditions, with the prefix "SC" added thereto.

ARTICLE 1 – DEFINITIONS AND TERMINOLOGY

- SC-1.01. Add to the list of definitions in Paragraph 1.01.A by inserting the following as numbered items in their proper alphabetical positions:

Geotechnical Baseline Report (GBR) — The interpretive report prepared by or for Owner regarding subsurface conditions at the Site, and containing specific baseline geotechnical conditions that may be anticipated or relied upon for bidding and contract administration purposes, subject to the controlling provisions of the Contract, including the GBR's own terms. The GBR is a Contract Document.

Geotechnical Data Report (GDR) — The factual report that collects and presents data regarding actual subsurface conditions at or adjacent to the Site, including Technical Data and other geotechnical data, prepared by or for Owner in support of the Geotechnical Baseline Report. The GDR's content may include logs of borings, trenches, and other site investigations, recorded measurements of subsurface water levels, the results of field and laboratory testing, and descriptions of the investigative and testing programs. The GDR does not include an interpretation of the data. If opinions, or interpretive or speculative non-factual comments or statements appear in a document that is labeled a GDR, such opinions, comments, or statements are not operative parts of the GDR and do not have contractual standing. Subject to that exception, the GDR is a Contract Document.

ARTICLE 5 – AVAILABILITY OF LANDS; SUBSURFACE AND PHYSICAL CONDITIONS; HAZARDOUS ENVIRONMENTAL CONDITIONS

SC-5.03 Subsurface and Physical Conditions

SC/GBR-5.03 and 5.04. Delete Paragraphs 5.03 and 5.04 of the General Conditions in their entireties and replace with the following provisions:

SC/GBR-5.03 Subsurface and Physical Conditions

A. Reports and Drawings:

1. The Supplementary Conditions hereby identify those reports and drawings known to Owner of explorations and tests of subsurface conditions at or adjacent to the Site (other than any Geotechnical Data Report or Geotechnical Baseline Report). Such reports and drawings are as follows:

- a. [ADD DETAILED INFORMATION ABOUT THE ENVIRONMENTAL SITE ASSESSMENT REPORTS TO BE PROVIDED TO THE BIDDERS.]
- b. [ADD DETAILED INFORMATION ABOUT ANY ENVIRONMENTAL DRAWINGS TO BE PROVIDED TO THE BIDDERS.]
- c. [ADD DETAILED INFORMATION ABOUT ANY FAULT REPORTS TO BE PROVIDED TO THE BIDDERS.]

2. *No Reliance by Contractor on Reports or Drawings Authorized:*

None of the contents of such reports and drawings include Technical Data, and the accuracy of such reports and drawings shall not be relied upon by Contractor. Such reports and drawings are not Contract Documents and are provided to Contractor for informational purposes only. Contractor may not rely upon or make any Claim against Owner or Engineer, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors, with respect to:

- a. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or
- b. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or
- c. any Contractor interpretation of or conclusion drawn from any data, interpretations, opinions, or information included in such reports or shown or indicated in such drawings.

B. *NOT USED.*

C. *Geotechnical Baseline Report (GBR) and Geotechnical Data Report (GDR):*

1. This Contract contains a Geotechnical Baseline Report (“GBR”), identified as follows: [ADD DETAILED INFORMATION ABOUT THE GBR(S) TO BE PROVIDED TO THE BIDDERS.] This Contract also contains a Geotechnical Data Report (GDR), identified as follows: [ADD DETAILED INFORMATION ABOUT THE GDR(S) TO BE PROVIDED TO THE BIDDERS.]
2. The GBR and GDR are incorporated as Contract Documents. The GBR and GDR are to be used in conjunction with other Contract Documents, including the Drawings and Specifications. If there is a conflict between the terms of the GBR and the GDR, the GBR’s terms shall prevail.
3. The GBR describes certain select subsurface conditions that are anticipated to be encountered by Contractor during construction in specified locations (referred to here in the Supplementary Conditions as “Baseline Conditions”). These may include ground, geological, groundwater, and other subsurface geotechnical conditions, and baselines of anticipated Underground Facilities or subsurface structures.
4. The Baseline Conditions shall be used to assist in the administration of the Contract’s differing site conditions clause at locations where subsurface conditions have been baselined. If a condition is baselined in the GBR, then only the pertinent Baseline Conditions shall be used to determine whether there is a differing site condition; and no other indication of that condition in the Contract Documents or Technical Data, or of a condition that describes, quantifies, or measures a similar characteristic of the subsurface, shall be used for the differing site condition determination.
5. The Baseline Conditions shall not be used to make differing site conditions determinations at locations that have not been baselined in the GBR, or at any location with respect to subsurface conditions that the Baseline Conditions do not address. If Underground Facilities or Hazardous Environmental Conditions are expressly addressed in the Baseline Conditions, then comparison to such Baseline Conditions shall be the primary means of determining (a) whether an Underground Facility was shown or indicated with reasonable accuracy, as provided in Paragraph 5.05 of the General Conditions, or (b) whether a Hazardous Environmental Condition was shown or indicated in the Contract Documents as indicated in Paragraph 5.06.H of the General Conditions. As indicated in Paragraph SC-5.04 below, the GDR shall be the primary resource for differing site conditions determinations in cases in which the GBR is inapplicable.
6. The descriptions of subsurface conditions provided in the GBR and/or GDR are based on geotechnical investigations, laboratory tests, interpretation, interpolation, extrapolation, and analyses. Neither Owner, Engineer, the DPOR, nor any geotechnical or other consultant warrants or guarantees that actual subsurface conditions will be as described in the GBR and/or the GDR,

nor is the GBR or GDR intended to warrant or guarantee the use of specific means or methods of construction.

7. The behavior of the ground during construction depends substantially upon the Contractor's selected means, methods, techniques, sequences, and procedures of construction. If ground behavior conditions are baselined in the GBR or GDR, they are based on stated assumptions regarding construction means and methods.
8. The GBR and GDR shall not reduce or relieve Contractor of its responsibility for the planning, selection, and implementation of safety precautions and programs incident to Contractor's means, methods, techniques, sequences, and procedures of construction, or to the Work.

SC/GBR-5.04 Differing Subsurface or Physical Conditions

A. *Notice:* If Contractor believes that any subsurface condition that is uncovered or revealed at the Site:

1. differs materially from conditions shown or indicated in the GBR; or
2. differs materially from conditions shown or indicated in the GDR, to the extent the GBR is inapplicable; or
3. differs materially from conditions shown or indicated in Contract Documents other than the GBR or GDR, to the extent the GBR and GDR are inapplicable; or
4. to the extent the GBR and GDR are inapplicable, is of such a nature as to establish that any Technical Data on which Contractor is entitled to rely as provided in Paragraph 5.03 is materially inaccurate; or
5. to the extent the GBR and GDR are inapplicable, is of such a nature as to require a change in the Drawings or Specifications; or
6. to the extent the GBR and GDR are inapplicable, is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents;

then Contractor shall, as soon as reasonably practicable and in no event later than seven (7) days after becoming aware thereof and before further disturbing the subsurface conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 7.15), notify Owner and Engineer in writing about such condition. The Contractor acknowledges and understands it is imperative that Owner be given timely, specific notice of any potential differing subsurface or physical condition which may cause an increase in the Contract Price or Contract Times such that the Owner is afforded the maximum opportunity to mitigate cost and/or time impacts associated with such differing condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except with respect to an emergency) until receipt of a written statement permitting Contractor to do so.

- B. *Engineer's Review:* After receipt of written notice as required by the preceding paragraph, Engineer will promptly review the subsurface or physical condition in question; determine the necessity of Owner's obtaining additional exploration or tests with respect to the condition; conclude whether the condition falls within any one or more of the differing site condition categories in Paragraph SC/GBR 5.04.A above; obtain any pertinent cost or schedule information from Contractor; prepare recommendations to Owner regarding the Contractor's resumption or continuation of Work in connection with the subsurface or physical condition in question and the need for any change in the Drawings or Specifications; and advise Owner in writing of Engineer's findings, conclusions, and recommendations.
- C. *Owner's Statement to Contractor Regarding Site Condition:*
After receipt of Engineer's written findings, conclusions, and recommendations, Owner shall issue a written statement to Contractor (with a copy to Engineer) regarding the subsurface or physical condition in question, addressing the resumption or continuation of Work in connection with such condition, indicating whether any change in the Drawings or Specifications will be made, and adopting or rejecting Engineer's written findings, conclusions, and recommendations, in whole or in part.
- D. *Possible Price and Times Adjustments:*
1. Contractor shall be entitled to an equitable adjustment in Contract Price or Contract Times, or both, to the extent that the existence of a differing subsurface or physical condition, or any related delay, disruption, or interference, causes an increase or decrease in Contractor's cost of, or time required for, performance of the Work; subject, however, to the following:
 - a. such condition must fall within any one or more of the categories described in Paragraph SC/GBR 5.04.A;
 - b. with respect to Work that is paid for on a unit price basis, any adjustment in Contract Price will be subject to the provisions of Paragraph 13.03 of the General Conditions; and,
 - c. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work on the Critical Path within the Contract Times.
 2. Contractor shall not be entitled, and specifically waives any right, to any adjustment in the Contract Price or Contract Times with respect to a subsurface or physical condition if:
 - a. Contractor knew of the existence of such condition at the time Contractor made a commitment to Owner with respect to Contract Price and Contract Times by the submission of a Bid or becoming bound under a negotiated contract, or otherwise; or
 - b. the existence of such condition reasonably could have been discovered or revealed in the exercise of the Standard of Care through an examination, investigation, exploration, test, or study of the Site and

contiguous areas expressly required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such commitment; or

- c. Contractor failed to give the written notice as required by Paragraph SC/GBR 5.04.A.
3. If Owner and Contractor agree regarding Contractor's entitlement to and the amount or extent of any adjustment in the Contract Price or Contract Times, or both, then any such adjustment shall be set forth in a Change Order.
4. Contractor may submit a Change Proposal regarding its entitlement to or the amount or extent of any adjustment in the Contract Price or Contract Times, or both, no later than 30 days after Owner's issuance of the Owner's written statement to Contractor regarding the subsurface or physical condition in question.

SC-5.06.A and B. Delete Paragraphs 5.06.A and 5.06.B of the General Conditions in their entireties and replace with the following provisions.

SC-5.06.A. *Reports and Drawings:* The Supplementary Conditions hereby identify those reports and drawings known to Owner relating to Hazardous Environmental Conditions that have been identified at or adjacent to the Site. Such reports and drawings are as follows:

1. [ADD DETAILED INFORMATION ABOUT ANY HEC REPORTS TO BE PROVIDED TO THE BIDDERS.]
2. [ADD DETAILED INFORMATION ABOUT ANY HEC DRAWINGS TO BE PROVIDED TO THE BIDDERS.]

SC-5.06.B. *No Reliance by Contractor on Reports or Drawings Authorized:* None of the contents of the reports and drawings listed above in Paragraph SC-5.06.A include Technical Data, and the accuracy of such reports and drawings shall not be relied upon by Contractor. Such reports and drawings are not Contract Documents and are provided to Contractor for informational purposes only. Contractor may not rely upon or make any Claim against Owner or Engineer, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors, with respect to:

1. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or
2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or
3. any Contractor interpretation of or conclusion drawn from any data, interpretations, opinions, or information included in such reports or shown or indicated in such drawings.

ARTICLE 7 – CONTRACTOR’S RESPONSIBILITIES

SC-7.02 Labor; Working Hours

SC-7.02.C. Add the following new paragraph immediately after Paragraph 7.02.B:

Except to the extent caused by Contractor’s errors, Owner shall be responsible for the cost of any overtime pay or other expense incurred by the Owner for Engineer’s services (including those of the Resident Project Representative, if any), Owner’s representative, and construction observation services, occasioned by the performance of Work on Saturday, Sunday, any legal holiday, or as overtime on any regular work day. If Contractor is responsible but does not pay, or if the parties are unable to agree as to the amount owed, then Owner may impose a reasonable set-off against payments due under Article 15.

ARTICLE 9 – OWNER’S RESPONSIBILITIES

SC-9.13 Owner’s Site Representative

SC-9.13 Add the following new paragraph immediately after Paragraph 9.12 of the General Conditions:

SC-9.13 Owner may furnish an “Owner’s Site Representative” to represent Owner at the Site and assist Owner in observing the progress and quality of the Work. Owner will provide written notice to Contractor if an Owner’s Site Representative is selected by the Owner.

ARTICLE 10 – ENGINEER’S STATUS DURING CONSTRUCTION

SC-10.03 Add the following new paragraphs immediately after Paragraph 10.03.A:

- B. The Resident Project Representative (RPR) will be Engineer's representative at the Site, will act as directed by and under the supervision of Engineer, and will confer with Engineer regarding RPR's actions.
1. General: RPR's dealings in matters pertaining to the Work in general shall be with Engineer and Contractor. RPR's dealings with Subcontractors shall only be through or with the full knowledge and approval of Contractor. RPR shall generally communicate with Owner only with the knowledge of and under the direction of Engineer.
 2. Schedules: Review the progress schedule, schedule of Shop Drawing and Sample submittals, and Schedule of Values prepared by Contractor and consult with Engineer concerning acceptability.
 3. Conferences and Meetings: Attend meetings with Contractor, such as preconstruction conferences, progress meetings, job conferences, and other Project-related meetings, and prepare and circulate copies of minutes thereof.

4. Liaison:
 - a. Serve as Engineer's liaison with Contractor. Working principally through Contractor's authorized representative or designee, assist in providing information regarding the provisions and intent of the Contract Documents.
 - b. Assist Engineer in serving as Owner's liaison with Contractor when Contractor's operations affect Owner's on-Site operations.
 - c. Assist in obtaining from Owner additional details or information, when required for proper execution of the Work.
5. Interpretation of Contract Documents: Report to Engineer when clarifications and interpretations of the Contract Documents are needed and transmit to Contractor clarifications and interpretations as issued by Engineer.
6. Shop Drawings and Samples:
 - a. Record date of receipt of Samples and Contractor-approved Shop Drawings.
 - b. Receive Samples which are furnished at the Site by Contractor, and notify Engineer of availability of Samples for examination.
 - c. Advise Engineer and Contractor of the commencement of any portion of the Work requiring a Shop Drawing or Sample submittal for which RPR believes that the submittal has not been approved by Engineer.
7. Modifications: Consider and evaluate Contractor's suggestions for modifications in Drawings or Specifications and report such suggestions, together with RPR's recommendations, if any, to Engineer. Transmit to Contractor in writing decisions as issued by Engineer.
8. Review of Work and Rejection of Defective Work:
 - a. Conduct on-Site observations of Contractor's work in progress to assist Engineer in determining if the Work is in general proceeding in accordance with the Contract Documents.
 - b. Report to Engineer whenever RPR believes that any part of Contractor's work in progress is defective, will not produce a completed Project that conforms generally to the Contract Documents, or will imperil the integrity of the design concept of the completed Project as a functioning whole as indicated in the Contract Documents, or has been damaged, or does not meet the requirements of any inspection, test or approval required to be made; and advise Engineer of that part of work in progress that RPR believes should be corrected or rejected or should be uncovered for observation, or requires special testing, inspection or approval.

9. Inspections, Tests, and System Start-ups:
 - a. Verify that tests, equipment, and systems start-ups and operating and maintenance training are conducted in the presence of appropriate Owner's personnel, and that Contractor maintains adequate records thereof.
 - b. Observe, record, and report to Engineer appropriate details relative to the test procedures and systems start-ups.
10. Records:
 - a. Prepare a daily report or keep a diary or log book, recording Contractor's hours on the Site, Subcontractors present at the Site, weather conditions, data relative to questions of Change Orders, Field Orders, Work Change Directives, or changed conditions, Site visitors, deliveries of equipment or materials, daily activities, decisions, observations in general, and specific observations in more detail as in the case of observing test procedures; and send copies to Engineer.
 - b. Record names, addresses, fax numbers, e-mail addresses, web site locations, and telephone numbers of all Contractors, Subcontractors, and major Suppliers of materials and equipment.
 - c. Maintain records for use in preparing Project documentation.
11. Reports:
 - a. Furnish to Engineer periodic reports as required of progress of the Work and of Contractor's compliance with the Progress Schedule and schedule of Shop Drawing and Sample submittals.
 - b. Draft and recommend to Engineer proposed Change Orders, Work Change Directives, and Field Orders. Obtain backup material from Contractor.
 - c. Immediately notify Engineer of the occurrence of any Site accidents, emergencies, acts of God endangering the Work, force majeure or delay events, damage to property by fire or other causes, or the discovery of any Constituent of Concern or Hazardous Environmental Condition.
12. Payment Requests: Review applications for payment with Contractor for compliance with the established procedure for their submission and forward with recommendations to Engineer, noting particularly the relationship of the payment requested to the Schedule of Values, Work completed, and materials and equipment delivered at the Site but not incorporated in the Work.
13. Certificates, Operation and Maintenance Manuals: During the course of the Work, verify that materials and equipment certificates, operation and maintenance manuals and other data required by the Contract Documents to be assembled and furnished by Contractor are applicable to the items actually installed and in accordance with the Contract Documents, and have these

documents delivered to Engineer for review and forwarding to Owner prior to payment for that part of the Work.

14. Completion:

- a. Participate in Engineer's visits to the Site to determine Substantial Completion, assist in the determination of Substantial Completion and the preparation of a punch list of items to be completed or corrected.
- b. Participate in Engineer's final visit to the Site to determine completion of the Work, in the company of Owner and Contractor, and prepare a final punch list of items to be completed and deficiencies to be remedied.
- c. Observe whether all items on the final list have been completed or corrected and make recommendations to Engineer concerning acceptance and issuance of the notice of acceptability of the work.

C. The RPR shall not:

1. Authorize any deviation from the Contract Documents or substitution of materials or equipment (including "or-equal" items).
2. Exceed limitations of Engineer's authority as set forth in the Contract Documents.
3. Undertake any of the responsibilities of Contractor, Subcontractors, or Suppliers.
4. Advise on, issue directions relative to, or assume control over any aspect of the means, methods, techniques, sequences or procedures of Contractor's work.
5. Advise on, issue directions regarding, or assume control over security or safety practices, precautions, and programs in connection with the activities or operations of Owner or Contractor.
6. Participate in specialized field or laboratory tests or inspections conducted off-site by others except as specifically authorized by Engineer.
7. Accept Shop Drawing or Sample submittals from anyone other than Contractor.
8. Authorize Owner to occupy the Project in whole or in part.

ARTICLE 12 – CLAIMS AND DISPUTES

Except as otherwise expressly set forth herein, delete Article 12 of the General Conditions in its entirety and replace with the following provisions:

SC-12.01 *Definitions and General Provisions*

- A. The term Dispute Resolution Board (“DRB” or “Board”) hereinafter as used or set forth in the Contract Documents shall mean the entity that shall be established to assist in the resolution of Disputes as provided in these Supplementary Conditions.
- B. Unless otherwise agreed to by the parties, as a condition precedent to initiation of the DRB process described herein, the following steps shall be taken by the parties:
1. The Owner’s representative and the Contractor’s representative shall meet and attempt to resolve the Dispute.
 2. If the matter is not resolved by these representatives within fifteen (15) days after the Dispute arose, then Owner and Contractor shall each designate a senior executive-level representative (with similar or equivalent organizational stature). The senior representatives of each party shall meet at a mutually agreeable time and place within thirty (30) days after the date the Dispute arose. A member of the Owner’s Board shall be present at this meeting and shall have authority to make recommendations to the Owner’s Board regarding resolution of the Dispute; the senior representative of the Contractor present at this meeting shall have authority to settle the Dispute.
- C. If the Dispute is not resolved within 15 days after the senior representatives of the parties meet pursuant to Paragraph SC-12.01.B.2, above, the parties, by written agreement, may elect to attend a mediation conducted pursuant to Paragraph 12.01.C of the General Conditions prior to initiation of the DRB process described herein. Provided, however, in the event such election is made by the parties, the parties shall be obligated to follow the DRB process described herein if the parties are unable to settle the Dispute within 15 days after attending such mediation. If no such election is made by the parties, the parties shall follow the requirements of Paragraph SC-12.01.D, below.
- D. If the Dispute is not resolved within 15 days after the senior representatives of the parties meet pursuant to Paragraph SC-12.01.B.2, above, and the parties do not elect to mediate pursuant to Paragraph SC-12.01.C, above, the parties shall submit the Dispute to the DRB in accordance with the requirements of these Supplementary Conditions. Provided, however, if the Dispute arises after Final Completion of the Project, the parties shall not be required to submit the Dispute to the DRB and may instead follow the dispute resolution procedures established in Article 12 of the General Conditions.
- E. Mediation conducted pursuant to Paragraph 12.01.C of the General Conditions shall be a condition precedent to initiation of litigation regardless of whether the mediation occurs prior to or after submission of a Dispute to the DRB.
- F. Any litigation proceedings shall be initiated in a state district court in Harris County, Texas, which both parties agree has sole and exclusive jurisdiction to adjudicate all Disputes.

SC-12.02 *Membership*

- A. The Dispute Resolution Board shall consist of one (1) member selected by the Owner and approved by the Contractor, and one (1) member selected by the

Contractor and approved by the Owner. The first two (2) members shall select and agree on a third member. The third member shall act as Chairman for all Board activities.

- B. It is desirable that all Dispute Resolution Board members have not less than fifteen (15) years' experience with the type of construction involved in this Project and experienced in the interpretation of contract documents. The goal in selecting the third member is to complement the construction experience of the first two (2) members, thus furnishing technical expertise that will facilitate the Board's operations.
- C. It is imperative that Board members show no partiality to either the Contractor or the Owner, or have any conflict of interest.
- D. The criteria and limitations for membership shall be as follows:
 - 1. No member shall have an ownership interest in any party to the Contract or a financial interest in the Contract, except for payment for services on the Dispute Resolution Board.
 - 2. Except for fee-based consulting services on other projects, no member shall have ever been employed by, or had financial ties to either party.
 - 3. No member shall have had substantial prior involvement in the Project, of a nature that could compromise his/her ability to impartially participate in the Board's activities.
 - 4. No member shall have had a recent (within three (3) years), close, professional or personal, relationship with any key member of any party to the Contract. This requirement may be waived if the parties agree to waive the conflict of interest upon disclosure and notice.
 - 5. No member shall be employed by any party to the Contract during the life of the Contract, except as a Dispute Resolution Board member.
 - 6. During his/her tenure as a Dispute Resolution Board member, no member shall engage in a discussion or make an agreement, with any party to the Contract for employment after the Contract is completed.
 - 7. All Dispute Resolution Board members shall have residence in the continental United States.
- E. Prior to their appointment, the first two (2) prospective members shall submit complete disclosure statements for the acceptance of both the Owner and the Contractor. Each statement shall include a resume of experience and a declaration describing all past, present, and anticipated or planned future relationships to this project and with all parties involved in this construction contract. The third Board member shall supply such a statement to the first two (2) Board members and to the Owner and the Contractor before his/her appointment is finalized.
- F. The Owner and the Contractor shall each select their respective member within sixty (60) days after the Effective Date of the Contract. The Owner will notify the members selected by the Owner and Contractor to begin selection of the third

member. The first two members shall ensure that the third member meets all of the criteria listed above. The third member shall be selected within thirty (30) days after the first two members are notified to proceed with the selection of the third member. In the event of an impasse in the selection of the third member, that member shall be selected by mutual agreement of the Owner and the Contractor. In doing so, they may, but are not required to, consider the nominees offered by the first two members.

- G. All three members of the Dispute Resolution Board and the authorized representatives of the Owner and the Contractor shall execute a Dispute Resolution Board Three-Party Agreement in the form attached hereto and incorporated by reference herein as **Attachment SC-1** within two (2) weeks after the selection of the third member.
- H. Members of the Dispute Resolution Board may be terminated or replaced as provided in the Three-Party Agreement and as otherwise agreed to by the parties.

SC-12.03 *Authority and Duties of the Dispute Resolution Board*

- A. The Board shall provide special expertise to assist and facilitate the timely and equitable resolution of Disputes between the Owner and the Contractor, in an effort to avoid construction delay and litigation.
- B. It is not intended for the Owner or the Contractor to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning them to the Board. Instead, it is intended that the mere existence of the Board will encourage the Owner and Contractor to resolve potential Disputes without resorting to this appeal procedure.
- C. The recommendations of the Dispute Resolution Board shall not be binding on either the Owner or the Contractor.
- D. The Board shall fairly and impartially consider disputes referred to it and shall provide written recommendations to the Owner and Contractor, to assist in the resolution of these disputes.
- E. Unless otherwise required by the Owner, the Dispute Resolution Board shall formulate its own rules of operation and shall publish such rules to the parties. It is not desirable to adopt hard and fast rules for the functioning of the Board. The entire procedure shall be kept flexible to adapt to changing situations. The Board shall initiate, with the Owner's and the Contractor's concurrence, new rules, or modifications to old ones, whenever this is deemed appropriate.
- F. The Owner will provide a conformed set of Contract Documents to each Board member. The Escrow Bid Documents (as defined in Spec 00823) shall also be made available to the Board at the Board's request.
- G. In order to keep abreast of construction developments and progress, the members will be promptly informed of construction activity with regular written progress reports and other relevant data from the Owner and the Contractor. The Board shall visit the Project at regular intervals and/or at times of critical construction events and meet with the Owner, the Engineer and the Contractor. The frequency

of these visits shall be not less than quarterly, and shall be as agreed among the Owner, the Engineer, the Contractor and the Board, depending on the progress of the Work.

- H. Regular meetings shall be held at the job site at least quarterly starting six (6) months after the Notice of Award, or as otherwise directed by the Owner or the Engineer. Each meeting shall consist of an informal round table discussion and a field inspection of the Work being performed on the Contract. Selected personnel of the Engineer and the Contractor shall attend the round table discussion. Agenda for regular meetings of the Dispute Resolution Board shall generally include the following:
 - 1. Meeting opened by the Chairman of the Dispute Resolution Board.
 - 2. Opening Remarks by the Owner/ Engineer.
 - 3. A description by the Contractor of work accomplished since the last meeting, current status of the work schedule, schedule for the future, potential problems, proposed solutions for these problems.
 - 4. Discussion by the Engineer of the work schedule as the Engineer views it, potential new Disputes or Claims, status of past Disputes.
 - 5. Set tentative date for next meeting.
- I. The Engineer will prepare minutes of all meetings and circulate them for comments and/or proposed revisions of all concerned.
- J. The field inspection will cover all active segments of the Work. Both the Engineer and Contractor shall accompany the Board. Seeking a Board member's advice or consultation during a field inspection is expressly prohibited.

SC-12.04 *Continuance of Work*

- A. At all times during the course of the dispute resolution process, the Contractor shall continue with the Work as directed, in a diligent manner and without delay, or conform to the Engineer's decision or order, and shall be governed by all applicable provisions of the Contract. Records of the Work shall be kept in sufficient detail to enable payment in accordance with the provisions in the Contract, if this should become necessary.

SC-12.05 *Procedure and Schedule for Dispute Resolution*

- A. Disputes shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps shall be omitted as agreed by both parties, in writing, and the time periods stated below may be shortened in order to hasten resolution to the extent agreed to, in writing.
 - 1. While Disputes are pending before the DRB, both parties are encouraged to collaborate and work together to achieve a mutually acceptable resolution to the Dispute. The Engineer's and/or Owner's negotiation and/or written response to a Claim, Dispute, or other issue shall in no way waive the Owner's right to assert that the Contractor's Claim has been waived as a result of the

failure to provide written notice or otherwise comply with the dispute resolution procedures in the Contract Documents.

2. When a Dispute is appealed to the Dispute Resolution Board, it shall first be decided when to conduct the hearing. If the matter is not urgent, it may be scheduled for the time of the next regular DRB meeting. For an urgent matter, the DRB shall meet at its earliest convenience.
 3. The Contractor and the Owner shall each be afforded an opportunity to be heard by the Board and to offer evidence. The Board's recommendations for resolution of the dispute will be given in writing, to both the Owner and the Contractor, within two (2) weeks of completion of the hearings. In exceptionally difficult cases, this time may be extended by mutual agreement of all parties.
 4. Within two (2) weeks of receiving the Board's recommendations, both the Owner, and the Contractor shall respond to the other and to the Board in writing, signifying either acceptance or rejection of the Board's recommendations. The failure of the Contractor to respond within the two-week period shall be deemed an acceptance by the Contractor of the Board's recommendations. If the Owner and the Contractor are able to resolve the dispute with the aid of the Board's recommendation, the parties will promptly execute necessary documents to reflect and effect such resolution. If the Owner rejects the Board's recommendation, in whole or in part, the Owner's written rejection shall become final and conclusive unless the Contractor appeals the decision of the Board back to the Board or initiates mediation or litigation pursuant to the requirements of these Supplementary Conditions. The Contractor expressly waives its rights to object to any such reinstated written decision of the Owner unless it appeals the DRB decision back to the Board or initiates mediation or litigation pursuant to the requirements of these Supplementary Conditions.
- B. Although both the Engineer and the Contractor agree to place great weight on the Dispute Resolution Board recommendations, they are not binding. If the Board's recommendations do not resolve the dispute, all records and written recommendations, including any minority recommendations will be admissible as evidence in any subsequent litigation.

SC-12.06 *Conduct of Hearing*

- A. The Board may request that written documentation and arguments from both parties be sent to each member for study before the hearing begins.
- B. Normally the hearing will be conducted at the job site. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory. Private sessions of the Board may be held at a location other than the job site.
- C. The third member of the Board will act as Chairman of the hearing, or may appoint one of the other members. It may not be necessary for the Board to keep a formal record of its sessions during the consideration of a dispute. This will depend on the

nature and magnitude of the dispute and on the attitude of the parties. If possible, it is desirable to keep the hearings informal.

- D. The Owner and the Contractor shall have representatives at all hearings. Each party will be allowed to discuss the Dispute and respond to the other party's assertions until all aspects are fully covered. The Board members may ask questions, request clarification, or ask for additional data. In large or complex cases, additional hearings may be necessary in order to consider and fully understand all the evidence presented by both parties.
- E. During the hearings, no Board member shall express any opinion concerning the merit of any facet of the case.
- F. After the hearings are concluded, the Board shall meet in private to formulate recommendations supported by two (2) or more members. All Board deliberations shall be conducted in private, with all individual views kept strictly confidential. The Board's recommendations, together with discussion of its reasoning, shall be submitted as a written report to both parties. The recommendations shall be based on the pertinent provisions of the Contract Documents and Applicable Laws and the facts and circumstances involved in the dispute.
- G. The Board shall make every effort to reach a unanimous decision. If this proves impossible, the dissenting member may prepare a minority report.

SC-12.07 *Advisory Opinions*

- A. When mutually agreed by the Owner and the Contractor, the DRB may, at its discretion, provide an advisory opinion on any issue.
- B. An advisory opinion serves as a method for potentially avoiding a DRB hearing. It is not intended to replace the dispute resolution process specified herein, but may be implemented as part of the good-faith negotiations conducted between the parties.

SC-12.08 *Compensation*

- A. The Contractor shall include an Allowance that will be used as required to cover the fees and expenses related to the operation of the Dispute Resolution Board. This shall be limited to the fees of the Board members and the direct expenses of the Board. This shall not include the Board's administrative services, which shall be provided by the Engineer.
- B. The Owner and the Contractor shall otherwise each separately bear their own respective in-house and related third-party costs for activities related to the DRB proceedings.

ATTACHMENT SC-1

FORM OF DISPUTE RESOLUTION BOARD THREE-PARTY AGREEMENT

THIS AGREEMENT is made this ___ day of _____, 20_, between the West Harris County Regional Water Authority (“Owner”), _____ (“Contractor”), with its principal place of business located at _____, and [LIST DRB MEMBERS AS FOLLOWS:

1. _____ (selected by the Owner)
2. _____ (selected by the CONTRACTOR)
3. _____ (Chair – selected by the DRB Members)]

Owner, Contractor, and all of the DRB parties are each individually referred to herein as a “Party” or collectively as the “Parties.”

I. CONTRACT

- A. The Contractor has entered into an Agreement dated _____ between the Owner and Contractor (the “Construction Contract”) for the construction of the [LIST THE NAME OF THE PROJECT HERE], hereinafter referred to as the Project. Unless otherwise defined herein, all defined or capitalized terms shall have the meaning set forth in the Construction Contract and Contract Documents for the Project.
- B. The Contract Documents provide for the establishment and operation of a DRB to assist in resolving disputes.
- C. The DRB is composed of three (3) members, selected in accordance with the Supplementary Conditions of the Construction Contract.

II. PURPOSE OF DRB

To assist in and facilitate avoidance of disputes and the timely and impartial resolution of disputes that are referred to it.

III. DRB SCOPE OF WORK

The DRB members shall perform their duties as follows:

- A. General:
 1. Stay abreast of Project developments by means of periodic meetings and site visits, review of progress reports, meeting minutes, and other Contract Documents, and by other means as mutually agreed by Owner and Contractor.
 2. Examine site conditions or specific construction problems relating to an existing or potential dispute, unless such examination is not practical, or, in the judgment of either Owner or Contractor, would result in a delay to the Project.
 3. One of the selected members shall serve as Chair (as designated above).
 4. Execute this Agreement at the first meeting with representatives of Owner and Contractor.
- B. Establish DRB operating procedures consistent with the requirements and general guidelines set forth in the Contract Documents for the Project as follows:

1. Establish operating procedures mutually agreeable to all parties, such as administrative duties; conduct progress meetings and site visits to provide the DRB with information on the status of the Project; establish content and format of information which may be presented at DRB hearings; conduct of hearings; establish content of DRB written recommendations and invoicing procedures. Such procedures should be established at the first meeting with representatives of Owner and Contractor and shall be consistent with the provisions of the Contract Documents for the Project.
 2. Initiate new procedures or modify existing procedures as mutually agreed to by Owner and the Contractor.
 3. Provide Owner and Contractor with these operating procedures, including all modified procedures, in written form.
- C. Recommend Resolution of Disputes:
1. Meet not less than quarterly with Owner and Contractor at the Project Site or other mutually agreeable location based on the circumstances to discuss the Work for the Project and related issues identified in the meeting agenda developed by the DRB Chair with input from the Owner, Contractor, and DRB members. Between each DRB meeting, Owner shall provide the DRB members with copies of Project records that provide periodic progress reporting updates or report on the status of any Work or related unresolved issues discussed at any prior DRB meeting.
 2. Upon receipt by the DRB of a referral of a dispute from either the Owner or Contractor (properly submitted in accordance with the Supplementary Conditions of the Construction Contract), the DRB Chair shall schedule a hearing at a time and location set by the DRB following consultation with the Owner and Contractor and taking into consideration the time the Owner and Contractor require for preparation and submittal of position papers and rebuttals and their review by the DRB.
 3. When proper evaluation of the dispute requires expertise that is not within the collective experience of the DRB, engage, with the prior written approval of the Owner and the Contractor, the services of one or more outside consultants as may be needed to advise the DRB.
 4. Convene internal meetings as needed to review and discuss the dispute, and to formulate the DRB written recommendations.
 5. Following each hearing and DRB deliberation, issue timely executed DRB written recommendations to Owner and Contractor, including a concise statement of the dispute and the two opposing positions, the DRB's findings as to the facts of the dispute, the recommendation, and the supporting rationale for the DRB recommendations. The minority findings and recommendations will be included in the DRB written recommendations, along with the majority findings and recommendations.
 6. When requested and deemed appropriate by the DRB, provide executed written responses to requests for clarification or reconsideration made by either Owner or Contractor to the DRB written recommendations.

7. All DRB recommendations and responses to requests for clarification or reconsideration shall be signed by all three DRB members.
- D. Perform services and assume responsibilities, as agreed by all parties, as may be required, including those necessary but not listed herein, to achieve the purpose of this Agreement.

IV. RESPONSIBILITIES OF THE PARTIES

A. DRB Responsibilities:

1. Maintain impartiality and avoid conflicts of interest by continuing to meet the specified requirements for nominees for DRB members set forth in the Supplementary Conditions of the Construction Contract. Promptly advise all parties upon becoming aware of any development that could be perceived as a conflict of interest.
2. Do not discuss, individually or collectively, issues with Owner or Contractor that could possibly be construed as compromising the DRB's ability to impartially resolve future disputes, such as the conduct of the Work and the resolution of disputes and construction problems.
3. Do not express an individual or collective opinion of merit, in whole or in part, for any potential or other dispute at any time prior to the issuance of DRB written recommendations, except, if applicable, in the case of an advisory opinion.
4. Except as required when performing the duties of the Chair or conducting a hearing that Owner or Contractor refuses to attend, do not meet or communicate with either Owner or Contractor in the absence of the other.
5. Consider the facts and conditions forming the basis for a referred dispute impartially and independently and evaluate the merits based on careful consideration of all contract requirements, applicable law and regulations, and the facts and circumstances of the dispute. Do not:
 - a. Ignore or undermine the clear intent of the Contract Documents, or disregard or alter any requirements of the Contract Documents or allocation of risk specified therein.
 - b. Supplant or otherwise interfere with the respective rights, authority, duties, and obligations of either Owner or Contractor as set forth in the Contract Documents.
6. Make every effort to reach unanimous recommendations. If this cannot be accomplished, include written minority recommendations and supporting rationale with the DRB written recommendations.

B. Owner Responsibilities (which may be performed by the Owner or the Owner's Management Team (defined in the Construction Contract) at the discretion of the Owner):

1. Except for participation in the DRB's activities as provided in the Contract Documents and this Agreement, do not solicit advice or consultation from the DRB or its members on matters dealing with the conduct of the Work or resolution of problems which might compromise the DRB's ability to impartially resolve future disputes.

2. Furnish to each DRB member one copy of the conformed Contract Documents, Construction Schedule and Progress Schedules, weekly progress reports, minutes of progress meetings with the Contractor, Construction Change Directives, Field Orders, Change Orders, and other documents pertinent to the performance of Contract and necessary for the DRB to conduct its operations and perform its services.
 3. Coordinate DRB operations in cooperation with Contractor.
 4. Arrange for or provide conference facilities at or near the Site, and provide copying Services.
 5. Cooperate with Contractor and DRB to facilitate prevention of disputes and the timely and impartial resolution of disputes.
- C. Contractor Responsibilities:
1. Except for participation in the DRB's activities as provided in the Contract Documents and this Agreement, do not solicit advice or consultation from the DRB or its members on matters dealing with the conduct of the Work or resolution of problems which might compromise the DRB's ability to impartially resolve future disputes.
 2. Furnish to each DRB member and to Owner, one copy of pertinent documents other than those furnished by Owner as may be requested.
 3. Cooperate with Owner and the DRB to facilitate prevention of disputes and the timely and impartial resolution of disputes that are referred to it.

V. TIME FOR BEGINNING AND COMPLETION OF DRB ACTIVITIES

- A. DRB activities shall commence with preparation for the first meeting, including preparation of the DRB operating procedures.
- B. This Agreement shall survive the termination, resignation or death of any member.
- C. The DRB's jurisdiction under this Agreement shall end on the date of Final Payment under the Contract Documents, unless terminated earlier or extended later by mutual agreement of Owner and Contractor.

VI. PAYMENT

- A. Payments made to the DRB members shall constitute full compensation for work performed, travel time and services rendered, and for all materials, supplies, and incidentals necessary to serve on the DRB.
- B. Payment for services rendered by DRB members shall be at the rate and conditions agreed to between Owner and Contractor and each DRB member.
- C. Subject to limitations imposed by the Contract Documents, DRB members shall be reimbursed for actual direct, non-salary expenses including automobile mileage, parking, travel expenses from the point of departure to the initial point of arrival, automobile rental, taxi fares, food and lodging, printing, long distance telephone, postage, and courier delivery.
- D. Payment made to DRB members in the form of bonus, commission, or consideration of any nature other than that specified hereinabove for performance and service provided under this Agreement, before, during, or after the period that this Agreement is in effect, is prohibited.

- E. DRB members shall individually submit invoices for work completed to Contractor and Owner:
 - 1. Not more often than once per month.
 - 2. Based on the agreed billing rate and conditions and on the number of hours expended, together with direct, non-salary expenses including an itemized listing supported by copies of original bills, invoices, and expense accounts.
 - 3. Accompanied by a description of activities performed daily during that period and billed in no less than one-half hour increments for each activity description.
- F. Contractor shall pay acceptable invoices, approved by Owner, within thirty (30) days of their receipt.
- G. Contractor shall be reimbursed for Owner's and Contractor's portion of the DRB costs in accordance with relevant provisions of the Contract Documents.

VII. CONFIDENTIALITY AND RECORDKEEPING

- A. No DRB member shall divulge information identified as confidential that has been acquired during DRB activities without obtaining prior written approval from the Owner and the Contractor.
- B. DRB members shall maintain cost records pertaining to this Agreement for inspection by Owner or Contractor for a period of three (3) years following the expiration or termination of this Agreement.

VIII. ASSIGNMENT

No party to this Agreement shall assign any duty established under this Agreement.

IX. TERMINATION

- A. This Agreement may be terminated by mutual written agreement of Owner and Contractor at any time upon not less than four (4) weeks written notice to the DRB members.
- B. Individual DRB members may be terminated only by agreement of both Owner and Contractor.
- C. If a DRB member resigns, is unable to serve, or is terminated, he or she shall be replaced within four (4) weeks in the same manner as he or she was originally selected. This Agreement shall be amended to indicate the member replacement.

X. LEGAL RELATIONS

- A. The parties to this Agreement expressly acknowledge that each DRB member, in the performance of his or her duties on the DRB, is acting in the capacity of an independent agent and not as an employee of Owner or Contractor.
- B. Owner and Contractor acknowledge that each DRB member is acting in a capacity intended to facilitate the resolution of disputes. Accordingly, it is agreed and acknowledged that, to the fullest extent permitted by law, each DRB member shall be accorded quasi-judicial immunity for any actions or decisions associated with DRB activities.

XI. DISPUTES REGARDING THIS THREE-PARTY AGREEMENT

- A. Disputes among the parties concerning this Agreement that cannot be resolved by negotiation and mutual concurrence and actions to enforce any right or obligation under this Agreement shall be initiated in state district court in Harris County, Texas.
- B. All questions shall be resolved by application of Texas law.
- C. The DRB members hereby consent to the personal jurisdiction of the state courts of Harris County, Texas.

XII. CONFLICTS OF TERMS

In the event of any conflict between the terms of the Contract Documents and this Agreement, the terms of the Contract Documents shall control.

The parties hereto have executed this Agreement as of the day and year first above written.

DRB MEMBERS:

By: _____	_____
(Signature)	(Printed Name)
By: _____	_____
(Signature)	(Printed Name)
By: _____	_____
(Signature)	(Printed Name)

CONTRACTOR:

OWNER:

By: _____	_____
(Signature)	(Signature)
By: _____	_____
(Printed Name)	(Printed Name)
Title: _____	Title: _____

END OF SUPPLEMENTARY CONDITIONS