



Facilities Planning and Construction
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AGREEMENT BETWEEN OWNER AND CONTRACTOR

CONTRACT NO. XXXXXXXX

This Agreement is made the xxth day of January, in the year 2014, by and between XYG Construction, Inc., hereinafter called the Contractor, and Texas State Technical College (TSTC), an institution of higher education and an agency of the State of Texas, hereinafter called the Owner.

WITNESSETH, that the Contractor and the Owner, for the consideration hereinafter named, agree as follows:

ARTICLE 1. SCOPE OF WORK: The Contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications for the project entitled “**TSTC 11-01 Hangar Abatement 2014**” in Waco, Texas” (Project No. FY140120). TSTC’s Uniform General Conditions (UGC) are incorporated by reference for all purposes, and attached hereto as **Exhibit 1**. The Contractor shall do everything required by this Agreement, the Uniform General Conditions, the Special Conditions, the Addenda, the Specifications, the Drawings, the Proposal (attached as **Exhibit 2**, including any unit prices stated therein), and the Historically Underutilized Business (HUB) Subcontracting Plan (attached as **Exhibit 3**.)

ALTERNATES: The following Alternate Proposals, fully described in the Specifications, are included as a part of this Contract: None

ARTICLE 2. TIME OF COMPLETION: The Owner shall provide a Notice to Proceed in which a date for commencement of the work shall be stated; such commencement date shall be 10 or more days after the date of the notice. The Contractor shall achieve substantial completion of the work within **xxxxxxxx (xx)** calendar days after such commencement date; as such completion date may be extended by approved Change Orders. The time set forth for completion of the work is an essential element of the Contract.

ARTICLE 3. THE CONTRACT SUM: The Owner shall pay the Contractor for performance of the Contract, subject to additions and deductions provided therein, the sum of xxx Thousand and xxxx Hundred Dollars and No Cents (\$,000.00), and make payment on account as hereinafter provided.

ARTICLE 4. HUB SUBCONTRACTING PLAN: The Owner has adopted a Policy on Utilization of Historically Underutilized Business ("Policy"), which is incorporated herein by reference. Contractor, as a provision of the Agreement must comply with the requirements of the Policy and adhere to the HUB Subcontracting Plan submitted with Contractor's Proposal and attached as **Exhibit 3**. No changes to the HUB Subcontracting Plan can be made by the Contractor without the prior written approval of the Owner in accordance with the Policy.

ARTICLE 5. DEFAULT: Owner may, by written notice of default to the Contractor terminate this Agreement, in whole or in part, for cause if the Contractor fails to perform in full compliance with the contract requirements, through no fault of Owner. Owner will provide a thirty (30) day written notice of termination to the Contractor (delivered by certified mail, return receipt requested) of intent to terminate, and Owner will provide the Contractor with an opportunity for consultation with Owner prior to termination.

ARTICLE 6. LIQUIDATED DAMAGES: For each consecutive calendar day after the substantial completion period set forth in Article 2 above that any work, including the correction of deficiencies found during the final testing and inspection, is not completed, the amount of Three Hundred Dollars (\$300.00) will be deducted from the money due or becomes due the Contractor, not as a penalty but as liquidated damages representing the parties' estimate at the time of contract execution of the damages which the Owner will sustain for late completion.

ARTICLE 7. CERTIFICATION OF NO ASBESTOS CONTAINING MATERIALS OR WORK:

The Contractor shall provide a certification statement, included with each materials submittal, stating that no asbestos containing materials or work is included within the scope of the proposed submittal.

The Contractor shall insure that Texas Department of Health licensed individuals, consultants or companies are used for any required asbestos work including asbestos inspection, asbestos abatement plans/specifications, asbestos abatement, asbestos project management and third-party asbestos monitoring.

The Contractor shall provide at Substantial Completion, a notarized affidavit to the Owner and the Architect stating that no asbestos containing materials or work was provided, installed, furnished or added to the Project.

The Contractor shall take whatever measures he deems necessary to insure that all employees, suppliers, fabricators, materialmen, subcontractors, or their assigns, comply with this requirement.

All materials used on this Project shall be certified as non-Asbestos Containing Building Materials (ACBM). The Contractor shall insure compliance with the following acts from all of his subcontractors and assigns:

Asbestos Hazard Emergency Response Act (AHERA—40 CFR 763-99 (7));

National Emission Standards for Hazardous Air Pollutants (NESHAP—EPA 40 CFR 61, National Emission Standard for Asbestos)

Texas Asbestos Health Protection Rules (TAHRP—Tex. Admin. Code Title 25, Part 1, Ch. 295C, Asbestos Health Protection)

Every subcontractor shall provide a notarized statement that no ACBM has been used, provided, or left on this Project.

The Contractor shall provide, in hard copy and electronic form, all necessary material safety data sheets (MSDS) of all products used in the construction of the Project to the Texas Department of Health licensed inspector or Project Architect or Engineer who will compile the information from the MSDS and, finding no asbestos in any of the product, make a certification statement.

At Final Completion the Contractor shall provide a notarized certification statement per TAC Title 25 Part 1, Ch. 295.34, par. c.1 that no ACBM was used during construction of the Project.

ARTICLE 8. INDEPENDENT CONTRACTOR: Both parties hereto, in the performance of this contract, shall act in an individual capacity and not as agents, employees, partners, joint ventures or associates of one another. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever. The Contractor shall be responsible for providing all necessary unemployment and workers' compensation insurance for the Contractor's employees.

ARTICLE 9. INSURANCE: The Contractor shall procure and maintain, at its expense, during the term of the contract or any extensions thereof, insurance as listed below. Insurance shall be written by companies acceptable to Owner and authorized to do business in the State of Texas. Policies shall include terms and provisions indicated below. The Contractor shall provide and furnish evidence of the following insurance:

Workers Compensation – Minimum coverage for employer liability in the amount of One Million Dollars (\$1,000,000.00) per occurrence and One Million Dollars (\$1,000,000.00) annual aggregate;

Business Automobile Liability Insurance - Minimum coverage for employer liability in the amount of One Million Dollars (\$1,000,000.00) per occurrence;

Comprehensive General Liability - Minimum coverage for employer liability in the amount of One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) annual aggregate.

Contractor shall obtain and maintain in full force at all times during the term of this contract insurance coverage naming the State of Texas, acting through Texas State Technical College Waco, as an additional insured and loss payee on its policies described above.

Each policy of required insurance shall provide for ten (10) days written notice of cancellation to Owner and include the following provisions: "It is a condition of this policy that the Company shall furnish written notice to Texas State Technical College Waco, 3801 Campus Drive, Waco, Texas 76705 ten (10) days in advance of any reduction in, or cancellation of this policy."

Insurance shall be effective and evidence of acceptable insurance furnished to Owner prior to commencing any operations under this Agreement.

ARTICLE 10. BONDS: Contractor is required to tender to Owner, prior to commencing the Work, performance and payment bonds, as required by Chapter 2253, *Texas Government Code*.

Each bond shall be executed by a corporate surety or sureties authorized to do business in the State of Texas and acceptable to Owner, on Owner's form, and in compliance with the relevant provisions of the *Texas Insurance Code*. If any bond is for more than ten (10) percent of the surety's capital and surplus, Owner may require certification that the company has reinsured the excess portion with one or more reinsurers authorized to do business in the State. A reinsurer may not reinsure for more than ten (10) percent of its capital and surplus. If a surety upon a bond loses its authority to do business in the State, Contractor shall, within thirty (30) days after such loss, furnish a replacement bond at no added cost to Owner.

Contractor shall provide Performance and Payment bonds before the execution of this Agreement. Each bond shall be accompanied by a valid power of attorney (issued by the surety company and attached, signed and sealed with the corporate embossed seal, to the bond) authorizing the attorney-in-fact who signs the bond to commit the company to the terms of the bond, and stating any limit in the amount for which the attorney can issue a single bond.

IF FOR ANY REASON A STATUTORY PAYMENT OR PERFORMANCE BOND IS NOT HONORED BY THE SURETY, CONTRACTOR SHALL FULLY INDEMNIFY AND HOLD OWNER HARMLESS OF AND FROM ANY COSTS, LOSSES, OBLIGATIONS OR LIABILITIES IT INCURS AS A RESULT.

ARTICLE 11. ACCEPTANCE OF BID OR AWARD OF CONTRACT: By signing this Agreement, the undersigned certifies as follows:

Assignment. This Agreement is a personal service contract for the services of Construction, and Contractor's interest in this Agreement, duties hereunder and/or fees due hereunder may not be assigned or delegated to a third party.

Records of expenses pertaining to Additional Services and services performed on the basis of a Worker Wage Rate or Monthly Salary Rate shall be kept on the basis of generally accepted accounting principles and in accordance with cost accounting standards promulgated by the Federal Office of Management and Budget Cost Accounting Standards Board and shall be available for audit by the Owner or the Owner's authorized representative on reasonable notice.

Family Code Child Support Certification. Pursuant to Section 231.006, Texas Family Code, Contractor certifies that it is not ineligible to receive the specified grant, loan or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.

Background Checks. Contractor is required to do a Department of Public Safety background check on each and every person on the project site. The Contractor also ensures that any employees or assigns that are noted on the Department of Public Safety background reporting are in compliance with federal laws and the laws of the State of Texas.

Access and Identification. All personnel, while on the project site, must have all of the following:

1. A valid State of Texas ID or driver's license.
2. A photo ID bearing:
 - a. the name of the company for which the individual works,
 - b. the individual's name,
 - c. a recent photo of the individual.

Sexual Offender Search. TSTC recognizes that some sexual offenders, after having served their sentence, are no longer considered to be a threat to society, and the State of Texas has approved them to work in Higher Educational environments. The Respondent ensures that it, and all of its subcontractors and assigns that will be on TSTC property have been searched on the Texas Public Sex Offender Registry. The Contractor also ensures that any employees or assigns that are on the Texas Public Sex Offender Registry or any other state or federal sexual offender registry are in compliance with federal laws and the laws of the State of Texas regarding sexual offenders. The Texas Public Sex Offender Registry website is: <https://records.txdps.state.tx.us/SexOffender>. The National Sex Offender Public Website is: <http://www.nsopw.gov/>. Any employees, subcontractors, or assigns that are shown on the sexual offender registries must be documented. Documentation shall include explanation and verification of any employees, assigns or subcontractors that appear on the sexual offender lists; and show that those on the lists have met the requirements of the State of Texas to work on the property of higher education facilities.

Eligibility Certification. Pursuant to Section 2155.004, Texas Government Code, Contractor certifies that the individual or business entity named in this Agreement is not ineligible to receive the award of or payments under this Agreement and acknowledges that this Agreement may be terminated and payment withheld if this certification is inaccurate.

Franchise Tax Certification. A corporate or limited liability company Contractor certifies that it is not currently delinquent in the payment of any Franchise Taxes due under Chapter 171 of the Texas Tax Code, or that the corporation or limited liability company is exempt from the payment of such taxes, or that the corporation or limited liability company is an out-of-state corporation or limited liability company that is not subject to the Texas Franchise Tax, whichever is applicable.

Payment of Debt or Delinquency to the State. Pursuant to Sections 2107.008 and 2252.903, Texas Government Code, Contractor agrees that any payments owing to Contractor under this Agreement may be applied directly toward any debt or delinquency that Contractor owes the State of Texas or any agency of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.

Entire Agreement; Modifications. This Agreement supersedes all prior agreements, written or oral, between Contractor and Owner and shall constitute the entire Agreement and understanding between the parties with respect to the Project. This Agreement and each of its provisions shall be binding upon the parties and may not be waived, modified, amended or altered except by a writing signed by Contractor and Owner.

Counterparts. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same agreement. Signatures to this Agreement transmitted by facsimile transmission, by electronic mail in "portable document format" (".pdf") form, or by any other electronic means intended to preserve the original graphic and pictorial appearance of a document, will have the same effect as physical delivery of the paper document bearing the original signature.

Captions. The captions of paragraphs in this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.

Governing Law and Venue. This Agreement and all of the rights and obligations of the parties and all of the terms and conditions shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas without reference to its conflicts of law provisions. The county where the Project is located shall be the sole place of venue for any legal action arising from or related to this Agreement or the Project in which the Owner is a party.

Waivers. No delay or omission by either party in exercising any right or power arising from non-compliance or failure of performance by the other party with any of the provisions of this Agreement shall impair or constitute a waiver of any such right or power. A waiver by either party of any covenant or condition of this Agreement shall not be construed as a waiver of any subsequent breach of that or of any other covenant or condition of the Agreement.

Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties and their respective permitted assigns and successors.

Appointment. Owner hereby expressly reserves the right from time to time to designate by notice to Contractor a representative(s) to act partially or wholly for Owner in connection with the performance of Owner's obligations. Contractor shall act only upon instructions from the designated representative(s) unless otherwise specifically notified to the contrary.

Records. Records of Contractor's costs, reimbursable expenses pertaining to the Project and payments shall be available to Owner or its authorized representative during business hours and shall be retained for four (4) years after final Payment or abandonment of the Project, unless Owner otherwise instructs Contractor in writing.

Notices. All notices, consents, approvals, demands, requests or other communications relied on by the parties shall be in writing. Written notice shall be deemed to have been given when delivered in person to the designated representative of the Contractor or Owner for whom it is intended; or sent by U. S. Mail to the last known business address of the designated representative; or transmitted by fax machine to the last known business fax number of the designated representative. Mail notices are deemed effective upon receipt or on the third business day after the date of mailing, whichever is sooner. Fax notices are deemed effective the next business day after faxing.

Severability. Should any term or provision of this Agreement be held invalid or unenforceable in any respect, the remaining terms and provisions shall not be affected and this Agreement shall be construed as if the invalid or unenforceable term or provision had never been included.

Illegal Dumping. The Contractor shall ensure that it and all of its Subcontractors and assigns prevent illegal dumping of litter in accordance with Title 5, Texas Health and Safety Code, Chapter 365.

Conflict of Interest. Contractor certifies that no member of the Board of Regents of Texas State Technical College, the Owner, or Executive Officers, including component institutions, has a financial interest, directly or indirectly, in the transaction that is the subject of this contract.

Antitrust. Contractor represents and warrants that neither Contractor nor any firm, corporation, partnership, or institution represented by Contractor, or anyone acting for such firm, corporation or

institution has (1) violated the antitrust laws of the State of Texas under Tex. Bus. & Com. Code, Chapter 15, or the federal antitrust laws; or (2) communicated directly or indirectly the Proposal to any competitor or any other person engaged in such line of business during the procurement process for this contract.

Ethics Matters/No Financial Interest. Contractor and its employees, agents, representatives and subcontractors have read and understand TSTC's Conflicts of Interest Policy available at <http://iam.tstc.edu/users/cop/COP2.48-12-10-07.pdf> and http://www.system.tstc.edu/governance/sos/hr/HR_2_1_12.pdf, and applicable state ethics laws and rules available at <http://www.utsystem.edu/ogc/ethics/statelaws.htm>. Neither Contractor nor its employees, agents, representatives or subcontractors will assist or cause TSTC employees to violate TSTC's Conflicts of Interest Policy or applicable state ethics laws or rules. Contractor represents and warrants that no member of the Board has a direct or indirect financial interest in the transaction that is the subject of this Agreement.

ARTICLE 12. INDEMNIFICATION

CONTRACTOR SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE STATE OF TEXAS, ITS OFFICERS AND EMPLOYEES, AND TEXAS STATE TECHNICAL COLLEGE WACO, THE TEXAS STATE TECHNICAL COLLEGE SYSTEM, IT OFFICERS, REGENTS, EMPLOYEES AND CONTRACTORS, FROM AND AGAINST ALL CLAIMS, ACTIONS, SUITS, DEMANDS, PROCEEDINGS, COSTS, DAMAGES, AND LIABILITIES, INCLUDING WITHOUT LIMITATION ATTORNEYS' FEES AND COURT COSTS, ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM ANY ACTS OR OMISSIONS OF CONTRACTOR OR ANY AGENT, EMPLOYEE, SUBCONTRACTOR, OR SUPPLIER OF CONTRACTOR IN THE EXECUTION OR PERFORMANCE OF THIS CONTRACT. CONTRACTOR SHALL COORDINATE ITS DEFENSE WITH THE TEXAS ATTORNEY GENERAL AS REQUESTED BY TEXAS STATE TECHNICAL COLLEGE WACO.

THIS PARAGRAPH IS NOT INTENDED TO AND SHALL NOT BE CONSTRUED TO REQUIRE CONTRACTOR TO INDEMNIFY OR HOLD HARMLESS THE STATE OR TEXAS STATE TECHNICAL COLLEGE WACO OR TEXAS STATE TECHNICAL COLLEGE SYSTEM FOR ANY CLAIMS OR LIABILITIES RESULTING FROM THE NEGLIGENT ACTS OR OMISSION OF TEXAS STATE TECHNICAL COLLEGE WACO, TEXAS STATE TECHNICAL COLLEGE SYSTEM OR ITS EMPLOYEES.

ARTICLE 13. BREACH OF CONTRACT CLAIMS:

- a. To the extent that Chapter 2260, *Texas Government Code*, as it may be amended from time to time ("Chapter 2260"), is applicable to this Agreement and is not preempted by other applicable law, the dispute resolution process provided for in Chapter 2260 shall be used, as further described herein, by Owner and Contractor to attempt to resolve any claim for breach of contract made by Contractor:**
 - i. Contractor's claims for breach of this Agreement that the parties cannot resolve pursuant to other provisions of this Agreement or in the ordinary course of business shall be submitted to the negotiation process provided in subchapter B of Chapter 2260. To initiate the process, Contractor shall**

submit written notice, as required by subchapter B of Chapter 2260, to Owner in accordance with the notice provisions in this Contract. Contractor's notice shall specifically state that the provisions of subchapter B of Chapter 2260 are being invoked, the date and nature of the event giving rise to the claim, the specific Agreement provision that Owner allegedly breached, the amount of damages Contractor seeks, and the method used to calculate the damages. Compliance by Contractor with subchapter B of Chapter 2260 is a required prerequisite to Contractor's filing of a contested case proceeding under subchapter C of Chapter 2260. The Chief Business Officer of Owner, or such other officer of Owner as may be designated from time to time by Owner by written notice thereof to Contractor in accordance with the notice provisions in this Contract, shall examine Contractor's claim and any counterclaim and negotiate with Contractor in an effort to resolve such claims.

- ii. If the parties are unable to resolve their disputes under subparagraph (a.) of this section, the contested case process provided in subchapter C of Chapter 2260 is Contractor's sole and exclusive process for seeking a remedy for any and all of Contractor's claims for breach of this Agreement by Owner.
 - iii. Compliance with the contested case process provided in subchapter C of Chapter 2260 is a required prerequisite to seeking consent to sue from the Legislature under Chapter 107 of the Texas Civil Practices and Remedies Code. The parties hereto specifically agree that (1) neither the execution of this Agreement by Owner nor any other conduct, action or inaction of any representative of Owner relating to this Agreement constitutes or is intended to constitute a waiver of Owner's or the state's sovereign immunity to suit and (2) Owner has not waived its right to seek redress in the courts.
- b. The submission, processing and resolution of Contractor's claim is governed by the published rules adopted by the Texas Attorney General pursuant to Chapter 2260, as currently effective, hereafter enacted or subsequently amended. Owner and Contractor agree that any periods set forth in this Agreement for notice and cure of defaults are not waived.

ARTICLE 14. TEXAS PUBLIC INFORMATION ACT: Notwithstanding any provisions of this Agreement to the contrary, the Contractor understands that Owner will comply with the Texas Public Information Act, Chapter 552, *Texas Government Code*, as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. Owner agrees to notify Contractor of a request for information related to Contractor's work under this Agreement. The Contractor will cooperate with Owner in the production of documents responsive to the request. The Contractor may request that Owner seek an opinion from the Attorney General of the State of Texas. However, Owner will not honor Contractor's request for an opinion if the request is not based upon a reasonable interpretation of the Texas Public Information Act. Additionally, the Contractor will notify Owner's General Counsel of receipt of any third party requests for information that was provided by the State of Texas for use in conducting this Agreement. This Agreement and all data and other information generated or otherwise

obtained in the performance of its responsibilities under this Agreement may be subject to the Texas Public Information Act. Contractor agrees to maintain the confidentiality of information received from the State of Texas during the performance of this Agreement, including information which discloses confidential personal information particularly, but not limited to, social security numbers.

BY SIGNING THE SIGNATURE PAGE BELOW, the Parties have executed and bound themselves to this Agreement as of the day and year first above written.



SIGNATURE PAGE

(SEAL)

ATTEST:

By: _____
(original signature)

(name and title printed)

Date: _____

CONTRACTOR:

By: _____
(original signature)

(name and title printed)

(company name printed)

Date: _____

CONTENT PREPARED BY:

By: _____
(original signature)

Name: Selby Holder
Title: Director of Physical Plant, TSTC Waco

Date: _____

TSTC:

By: _____
(original signature)

Name: Kevin Dorton
Title: Vice President of Administrative
Services, TSTC Waco

Date: _____

FORM APPROVED:

By: _____
(original signature)

Susan Shafer
Associate General Counsel
Texas State Technical College Waco

Date: _____