



## BROWN THEATER DIMMING RACK REPLACEMENT (PHASE 2) INVITATION TO BID

- ISSUE DATE: February 24, 2022
- DUE DATE: **2:00 P.M.** on **March 29, 2022** (“Submission Deadline”)
- INSTRUCTIONS: Bidders are to submit one fully-completed and signed Bid Form and Diversity participation information in a sealed envelope by mail, in person, or via courier. Please write “**Dimming Rack Replacement**” clearly on the outside of the sealed package. Submittals received by email, fax, or after the Submission Deadline will be rejected.
- SUBMIT TO: Houston First Corporation, Attn: Mitch Miszkowski, 701 Avenida de las Americas, Suite 200, Houston, TX 77010.
- CONTACT INFO: Any questions concerning this Invitation to Bid must be submitted by email to [bids@houstonfirst.com](mailto:bids@houstonfirst.com) no later than **10:00 a.m.** on **March 21, 2022**. Material questions will be answered collectively in one or more Letter(s) of Clarification to be made available at [www.houstonfirst.com/do-business](http://www.houstonfirst.com/do-business). Questions received may be edited or combined for clarity or length at the discretion of HFC.
- BID OPENING: Bids will be opened and publicly announced at 2:30 p.m. on the Submission Deadline at 701 Avenida de las Americas, Suite 200, Houston, TX 77010.

### OVERVIEW AND SCOPE

Houston First Corporation (“HFC”) requests bids from qualified contractors for the second of three phases in the replacement of the Wortham Theater Center Theatrical Dimming Systems. The subject dimming system includes six dimmer racks and dimmers for the Brown Theater located in the 7th Floor dimmer room. The dimming systems were installed in 1986 and have reached the end of their useful life, as suitable replacement parts are no longer available.

It is intended that components from the demoed system will be used to keep the remaining dimming systems functioning until they can be replaced at a later time. No modifications outside of the 7th Floor dimmer room are required for this phase of the project. Project work includes supervision, labor, materials and all equipment to remove and replace existing dimmer racks and dimmers with a complete and functioning replacement dimming system. All work scheduled shall be coordinated with HFC to ensure no events are interrupted.

On-site work is to begin on June 27, 2022. The contractor selected is to achieve substantial completion by August 5, 2022 and complete the project no later than August 26, 2022.

Project Specifications and Drawings are available online at <http://www.houstonfirst.com/do-business/>.

## **BACKGROUND**

HFC is a local government corporation created by the City of Houston to facilitate economic growth through the promotion of the greater Houston area and the business of conventions, meetings, tourism, and the arts. HFC is the primary entity responsible for marketing Houston and increasing awareness of its many attractions and amenities.

HFC is responsible for the operation and management of the George R. Brown Convention Center, Avenida Houston, Partnership Tower, Wortham Theater Center, Jones Hall for the Performing Arts, Miller Outdoor Theatre, an array of outdoor properties, and parking facilities that can accommodate nearly 10,000 vehicles.

Opened in 1987, the iconic Wortham Theater Center is a 437,500-square foot performing arts facility featuring two theaters, the 2,405-seat Alice and George Brown Theater and the 1,100-seat Lillie and Roy Cullen Theater. Wortham Theater Center is home to Houston Ballet and Houston Grand Opera and has welcomed arts groups and patrons from around the world.

## **PRE-BID MEETING**

A Pre-Bid Meeting will be held for the benefit of all prospective Bidders by video teleconference call at **10:00 a.m. on March 8, 2022**. Bidders who expect to attend must register in advance by clicking [here](#); further instructions for joining the meeting will be sent to each registrant. An in-person site tour will be discussed during the Pre-Bid Meeting. While attendance is not mandatory, all interested bidders are encouraged to attend.

## **MANNER OF SELECTION**

HFC expects to enter into a contract with the Bidder providing the lowest responsible bid received; provided, however, that HFC reserves the right to select or reject all or part of any bid, waive minor technicalities, and accept one or more bids in the manner and to the extent that they serve the best interests of HFC. This solicitation does not commit HFC to award a contract or issue a purchase order. HFC will not pay any costs incurred in the preparation of a bid in response to this solicitation. HFC reserves the right to request clarifications or additional information from some or all Bidders prior to accepting any offer.

## **LETTERS OF CLARIFICATION**

Responses to all material questions timely submitted by potential Bidders, as well as any revisions incorporated into this Invitation to Bid, will be confirmed collectively, rather than individually, in a letter made available online at <http://www.houstonfirst.com/do-business/> (each, a "Letter of Clarification"). When issued, Letters of Clarification become part of this Invitation to Bid and automatically supersede any previous terms, conditions, specifications, or provisions in conflict therewith. By submitting their bid, Bidders shall be deemed to have reviewed all Letters of Clarification, considered all responses, as well as any revisions, and incorporated them into their submittal. Verbal responses by any HFC officer, director or employee cannot alter the terms, conditions, specifications, or provisions as stated herein. It is the responsibility of Bidders to monitor the foregoing link and ensure they review any such Letters of Clarification and incorporate them in their bid.

## **DIVERSITY PARTICIPATION**

The Bidder selected will be required to use good-faith efforts to award subcontracts to diversity participants certified by any of the identified certification agencies as defined in the [HFC Diversity Program](#). HFC has established the following goal for these services: **20%** of the total value of the Agreement. Bidders should note if they are certified as a diversity participant in their submittal; however, such certification shall not lessen or otherwise alter the requirement to use good faith efforts to award subcontracts to diversity participants. Diversity participation information provided by Bidders should be delivered with the bid in a **separately-sealed envelope** labelled "**Diversity**".

## **FORM OF AGREEMENT**

By submitting a response to this Invitation to Bid, Bidder agrees, upon notice of selection, to promptly enter into the [Brown Theater Dimming Rack Replacement Agreement](#) provided below. Any requests for clarification or modification to the terms thereof must be timely submitted by email to [bids@houstonfirst.com](mailto:bids@houstonfirst.com), and responses to material questions and issues will be included in a Letter of Clarification. Bidders are advised that additional or conflicting terms, alternative pricing bids, pre-printed forms, or other objections submitted by a Bidder with their bid shall be disregarded and may result in a bid being deemed, in HFC's discretion, as non-responsive.

## **NO SALES TAX**

As HFC is exempt from states sales and use tax, bidders should assume that there will be no sales taxes due for the purchase of materials incorporated into the project.

## **RESTRICTIONS ON COMMUNICATIONS**

Throughout the selection process, commencing with the Issue Date, Bidders are directed not to communicate, directly or indirectly, with any HFC employee, officer, director, or selection committee member regarding their bid, or any matter relating to this Invitation to Bid, other than through [bids@houstonfirst.com](mailto:bids@houstonfirst.com), during the Pre-Bid Meeting, or in response to a direct inquiry from the HFC Purchasing Agent or General Counsel Department. Bidders who disregard the Restrictions on Communications provision do so at their peril, as **HFC shall have the right to reject any bid due to violation of this provision.**

## **CONFLICTS OF INTEREST**

Bidders are advised that they have an affirmative obligation to disclose any affiliation or business relationship with an HFC employee, officer, or director creating a conflict of interest (or appearing to a reasonable person to potentially exist). Those who need the disclosure form may find it online at <https://www.ethics.state.tx.us/data/forms/conflict/CIQ.pdf>. By submitting a bid, Bidders represent to HFC that they have complied with the requirements of Chapter 176 of the Texas Local Government Code.

## **VENDOR CODE OF CONDUCT**

Bidders who do business or seek to do business with HFC are expected to interact with HFC with high ethics and integrity. To promote ethical conduct by its existing and potential contractors, HFC has adopted a Code of Conduct for Vendors, available online at [www.houstonfirst.com/do-business](http://www.houstonfirst.com/do-business). HFC requires that all Bidders be familiar with and abide by the Code of Conduct for Vendors.

## **PROTEST PROCEDURES**

Any protest relating to the form, terms and conditions, selection criteria, specifications, exhibits, or any other material bid content must be filed by the actual or potential Bidder with the Purchasing Agent no later than five business days prior to the Submission Deadline. If the protest consists of a dispute regarding the Bidder recommended by the selection committee, or otherwise relates to the alleged misapplication of selection criteria, then the Purchasing Agent must receive the protest from an actual Bidder after the Submission Deadline, but at least three business days prior to consideration of a contract resulting from this Invitation to Bid by an HFC committee or Board of Directors, whichever is earlier.

All protests must be made in writing and delivered to Houston First Corporation, Attn: Purchasing Agent, 701 Avenida de las Americas, Ste. 200, Houston, TX 77010. To be considered by HFC, protests must be timely received and include, at a minimum, all of the following information: (a) The name, address and contact information of the Bidder, with sufficient information to establish that a bona fide Bidder is the person or entity filing the protest; (b) The full title of the Invitation to Bid; (c) Material grounds for the protest, including the provisions of the Invitation to Bid and the applicable law or regulation that serves as the basis for the protest; (d) A statement of the specific relief requested by the Bidder; (e) Reference to and attachment of any pertinent documents or sources relied upon by the protestor that the protesting party wishes to have HFC consider; and (f) An affidavit attached to support any factual allegations stated in the submission. The Purchasing Agent will notify the Bidder promptly to acknowledge receipt of a protest.

## **BID PACKETS**

A complete copy of this Invitation to Bid, including exhibits, necessary forms and other relevant information, is available on-line at [www.houstonfirst.com/do-business](http://www.houstonfirst.com/do-business). This Invitation to Bid provides the information necessary to prepare and submit a bid for consideration and ranking by HFC.

## **PUBLIC INFORMATION**

As HFC is subject to the Texas Public Information Act ("TPIA"). Information submitted by Bidders is subject to release under the provisions of the TPIA set forth in Chapter 552 of the Texas Government Code, any page including confidential or proprietary information appears must be labeled as such clearly and unambiguously. Bidders will be advised of any request for public information that implicates their materials and may, in accordance with applicable law, elect to assert objections to disclosure with the Texas Attorney General at their cost and expense.

## **WITHDRAWAL; ERROR**

Bids may be withdrawn due to errors or for any other reason by a written request received by [bids@houstonfirst.com](mailto:bids@houstonfirst.com) prior to the Submission Deadline.

# BROWN THEATER DIMMING RACK REPLACEMENT (PHASE 2)

## BID FORM

Bidders are asked to provide their best pricing for performance of services and completion of the Brown Theater Dimming Rack Replacement (Phase 2) Project.

### BID AMOUNT

In exchange for the following amount, Bidder offers to furnish all labor, materials, supplies, equipment, supervision, permits, bonds, and insurance necessary to complete the Brown Theater Dimming Rack Replacement (Phase 2) Project in strict accordance with the Brown Theater Dimming Rack Replacement Agreement, including the Specifications and Drawings.

Bid Amount: \$ \_\_\_\_\_

### BIDDER CONTACT INFORMATION

Bidder Name: \_\_\_\_\_

Address: \_\_\_\_\_

Contact Name/Title: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Is the Bidder a certified diversity entity under the HFC [Diversity Program](#)? \_\_\_\_\_

### BID TERMS AND REPRESENTATIONS

- a. Submission of a bid represents an offer by Bidder to contract that may be relied upon by Houston First Corporation.
- b. Bid is intended to and shall remain valid for 120 days from the Submission Deadline.
- d. Bidder is prepared to complete the Project, no later than August 26, 2022, in strict accordance with the Brown Theater Dimming Rack Replacement Agreement.

### ACKNOWLEDGMENT AND SIGNATURE

By signing below, Bidder represents and warrants to HFC that all of the information provided by Bidder in this Bid Form is true, correct and may be relied upon by Houston First Corporation without exception.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Name/Title: \_\_\_\_\_

## **BROWN THEATER DIMMING RACK REPLACEMENT AGREEMENT**

This Brown Theater Dimming Rack Replacement Agreement (“Agreement”) is made by and between Houston First Corporation (“HFC”), whose address is 701 Avenida de las Americas, Suite 200, Houston, TX 77010 and [TBD] (“Contractor”), whose address is [TBD]. In consideration of the mutual promises contained herein, the parties hereby agree as follows:

### **1.0 Project Overview**

1.1 The name of this project is the Brown Theater Dimming Rack Replacement Project (Phase 2) (the “Project”). The location of the Project is the Wortham Theater Center, located at 501 Texas Ave., Houston, Texas 77072.

1.2 Contractor agrees to and shall undertake and complete the Work to achieve the Project in strict accordance with this Agreement, including the Terms & Conditions, Specifications and Drawings.

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

1.4 Wortham Theater Operating Company (“WCOC”), the backstage operating services contractor at Wortham Theater Center, has or will retain the services of Stanton Engineering Group, LLC (“Engineer”) to perform certain professional services relating to the Project.

1.5 Contractor agrees to and shall commence the Work at the Project Site on **June 27, 2022**, achieve substantial completion by **August 5, 2022**, and shall complete the Project no later than **August 26, 2022** (“Contract Time”). Contractor agrees that time is of the essence.

### **2.0 Payment**

2.1 Subject to the terms of this Agreement, HFC agrees to pay Contractor **\$(TBD)** (“Contract Sum”). The Contract Sum represents the total compensation to Contractor for performance of the Work and is not subject to modification except as expressly set forth in this Agreement or the Terms and Conditions.

2.2 Contractor may request a progress payment from HFC based on the percentage of completion of the Work using the schedule of values to be approved in advance by HFC. HFC agrees to pay Contractor within 30 calendar days of the receipt and approval by HFC of each such invoice by check or electronic funds transfer, at the sole option of HFC.

2.3 If any item in any invoice is disputed by HFC for any reason, including lack of supporting documentation, then HFC shall delete the disputed item and pay the remaining amount of the invoice; provided, however, that HFC shall promptly notify Contractor of the dispute and request clarification and/or remedial action. After any dispute shall have been settled, Contractor shall include the disputed amount on a subsequent regularly scheduled invoice or on a special invoice for the disputed item only.

2.4 Neither partial payments made hereunder nor approval of invoices by HFC shall be construed as final acceptance or approval of that part of Contractor’s Work to which such partial payment or approval relates, nor shall such payments be construed as relieving Contractor of any of its obligations hereunder with respect thereto.

2.5 In no event shall HFC pay Contractor more than **90%** of the Contract Sum prior to the final completion of the Project, notwithstanding any provision in the Agreement to the contrary.

### **3.0 Warranties and Representations**

3.1 Contractor shall provide HFC with a warranty on materials and workmanship equal to one year, subject to the provisions of this Section 3.0. Warranty periods shall commence the date on which HFC approves final completion of the Project (the "Date of Completion").

3.2 Contractor hereby transfers and assigns to HFC all manufacturer's warranties for materials used in connection with this Project and shall complete and execute all forms required to further evidence such transfer and assignment. The parties agree that no warranty made by Contractor under the Contract Documents is intended to limit, nor shall it be construed as limiting in any manner or to any extent, any manufacturer's or supplier's warranty. Upon request from HFC, Contractor agrees to provide reasonable assistance in enforcing such warranties against the manufacturer or supplier at no additional cost to HFC.

3.2 Warranty work shall be completed at Contractor's sole cost and expense. Without limiting the foregoing, Contractor shall be, with regard to warranty work to be performed off site, responsible for all shipping and/or freight expense from HFC's designated location to Contractor's facility for all warranty repair and/or maintenance and return to HFC's designated location.

3.3 Work performed by the Contractor shall be in accordance with the latest City of Houston Building Codes. Contractor represents that all electricians, plumbers and other tradespersons employed by Contractor or its Subcontractors shall be licensed by the Texas Department of Licensing and Regulation.

3.4 Contractor shall protect all areas and equipment when working at the Project Site. Caution warning signs shall be placed near any slippery or wet surfaces.

3.5 Contractor is solely responsible for any necessary permits, licenses and inspections by government agencies necessary for proper execution and completion of the Work. Contractor acknowledges that the affiliation of HFC with the City of Houston does not in any way relieve Contractor from compliance with any City of Houston ordinances, codes or requirements relating to performance of the Work.

3.6 Contractor shall on a daily basis or as requested by HFC, clean the Project Site and any adjacent areas affected by the Project. Contractor shall promptly remove and dispose of demolished items such as piping removed by Contractor and other debris from the Project Site in a safe, environmentally responsible manner at its sole cost and expense.

3.7 Contractor represents and warrants that services performed by Contractor shall conform to the standards declared by OSHA, including, but not limited to, compliance with federal and state safety standards/directives for setting-up and utilizing platforms, lifts, ladders, scaffolding, safety lines and belts, and similar equipment used for construction.

3.8 Contractor's employees, agents, contractors and subcontractors shall use personal protective equipment, safety harnesses, fall protection equipment, hard hats or other equipment required to perform the Work in safe manner. Contractor will hold safety training, safety briefings or other meetings to ensure all staff are fully prepared to perform the Work with safety in mind.

3.9 Contractor shall conduct daily safety and health inspections of the Project Site. Contractor shall promptly report any accidents, injuries, spills, or near misses to HFC.

**4.0 Insurance**

4.1 With no intent to limit, and without limiting, Contractor’s liability hereunder, Contractor shall provide and maintain in full force and effect, for the duration of the Work, at least the following insurance and available limits of liability:

- a. Commercial General Liability Coverage shall include personal injury/advertising injury, broad form property damage coverage, products/completed operations, medical payments, and fire legal liability with per occurrence limits of \$2,000,000 per occurrence, a products/completed operations aggregate of \$2,000,000, and a general aggregate of \$3,000,000. Products and completed operations coverage shall extend for a period of not less than 10 years following final completion of the Work. Must be occurrence written on occurrence basis.
- b. Automobile Liability Insurance \$1,000,000 combined single limit including Owned, Hired, and Non-Owned and Auto Coverage
- c. Workers’ Compensation Statutory amounts for Workers’ Compensation (Contractor shall not self-insure Workers’ Compensation)
- d. Employer’s Liability Bodily Injury by accident \$1,000,000 (each accident); Bodily Injury by disease \$1,000,000 (policy limit); and Bodily Injury by disease \$1,000,000 (each employee)
- e. Owner’s and Contractor’s Protective Liability \$1,000,000 combined single limit
- f. Builder’s Risk Coverage for all structures under construction, temporary structures, property, and materials shall be provided in an amount equal at all time to the full cost of the Work, including change orders and cost of debris removal for any single occurrence. Coverage shall be at least as broad as an unmodified ISO Special form and shall be provided on a completed-value basis

4.2 Insurance may be in one or more policies of insurance, form of which is subject to approval by HFC. Contractor acknowledges and agrees, however, that nothing HFC does or fails to do with regard to insurance policies relieves Contractor in any manner from its duties to provide required coverage and HFC’s actions or inactions will never be construed as waiving HFC’s rights.

4.3 Each policy, except Workers’ Compensation and Owner’s and Contractor’s Protective Liability, must include an additional insured endorsement in favor of HFC, WCOG, and the City of Houston equivalent to CG2037 and CG2010. Each policy shall be endorsed to require the carrier(s) to notify HFC at least 30 calendar days prior to any cancellation or non-renewal of any required insurance (10 calendar days’ notice



for cancellation due to non-payment of premium). No commercial general liability policies shall be written with deductibles in excess of \$25,000 unless authorized in writing in advance by HFC.

4.4. Each policy, except Workers' Compensation and Owner's and Contractor's Protective Liability, must contain an endorsement that the policy is primary insurance to any other insurance carried by or available to HFC. Contractor represents to HFC that there shall be no sub-limits for coverage on covered risks.

4.5 Each policy must include endorsements waiving any claim or right in nature of subrogation to recover against HFC, WCOC, and the City of Houston.

4.6 The issuer of any policy shall have a Certificate of Authority to transact insurance business in Texas or be an eligible non-admitted insurer in the State of Texas and have a minimum financial strength of A-VI by the A.M. Best Key Rating Guide.

### **5.0 Release**

**CONTRACTOR AGREES TO AND DOES HEREBY RELEASE HFC, WCOC, AND THE CITY OF HOUSTON FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR OTHER LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE BY CONTRACTOR UNDER THIS AGREEMENT, EXCEPT TO THE EXTENT CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF HFC, WCOC, OR THE CITY OF HOUSTON.**

### **6.0 Indemnification**

**6.1 TO THE FULLEST EXTENT ALLOWED UNDER APPLICABLE LAW, CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD HFC, WCOC, AND THE CITY OF HOUSTON, INCLUDING THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS (COLLECTIVELY, "INDEMNITEES") HARMLESS FROM AND AGAINST ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, TICKETS, CITATIONS, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR ANY INJURY, DEATH, DAMAGE, OR OTHER LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO THE WORK OR PERFORMANCE BY CONTRACTOR UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY OR RELATING TO CONTRACTOR AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS' (COLLECTIVELY, "CONTRACTOR'S") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS; INDEMNITEES' AND CONTRACTOR'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, EXCEPT TO THE EXTENT CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF INDEMNITEES; MATERIAL FAILURE OF CONTRACTOR TO PERFORM OR OBSERVE ANY OF THE COVENANTS, TERMS AND CONDITIONS OF THIS AGREEMENT; OR ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL, STATE OR LOCAL ENVIRONMENTAL AND/OR EMPLOYMENT LAWS BY CONTRACTOR, INCLUDING, WITHOUT LIMITATION, ALL CLAIMS AND CAUSES OF ACTION BROUGHT AGAINST INDEMNITEES BY CONTRACTOR'S PERSONNEL AND/OR GOVERNMENT AGENCIES ARISING FROM, RELATING TO, OR INVOLVING SERVICES OF CONTRACTOR'S EMPLOYEES, AGENTS, OR CONTRACTORS OF ANY TIER.**

**6.2 CONTRACTOR SHALL REQUIRE ITS SUBCONTRACTORS TO RELEASE AND INDEMNIFY THE INDEMNITEES TO THE SAME EXTENT AND IN SUBSTANTIALLY THE SAME FORM AS CONTRACTOR'S RELEASE AND INDEMNITY TO INDEMNITEES.**

**7.0 Indemnification Procedures**

7.1 If HFC or Contractor receive notice of any claim or circumstances, which could give rise to an indemnified loss, the receiving party shall give written notice to the other party within 30 calendar days. The notice must include a description of the indemnification event in reasonable detail, the basis on which indemnification may be due, and the anticipated amount of the indemnified loss.

7.2 This notice does not stop or prevent HFC from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If HFC does not provide this notice within the 30-calendar-day period, it does not waive any right to indemnification except to the extent that Contractor is prejudiced, suffers loss, or incurs expense because of the delay.

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

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

7.5 Contractor's indemnification obligations hereunder shall survive the completion of the Work or the sooner termination of this Agreement.

**8.0 Diversity Commitment**

8.1 Contractor shall make good faith efforts to award subcontracts equal to **20%** of the Contract Sum to certified, diverse suppliers of goods and services in accordance with the Diversity Program established by HFC, which is incorporated herein by this reference. Contractor shall disclose to HFC the manner and extent to which it has made good faith efforts to achieve such goal and submit reports on forms provided by HFC.

**9.0 Prevailing Wage Requirement**

9.1 Contractor shall comply with governing statutes providing for labor classification of wage scales for each craft or type of laborer, worker, or mechanic.

9.2 Prevailing wage rates applicable to the Work may be one or a combination of the prevailing wage rates available online at [www.houstonfirst.com/dobusiness](http://www.houstonfirst.com/dobusiness) made a part hereof for all purposes by this reference.

9.3 Contractor warrants and represents that it has carefully examined the classifications for each craft or type of worker needed to execute the Work and determined that such classifications include all necessary

categories to perform the Work. If Contractor believes that an additional classification for a particular craft or type of worker is necessary to perform Work under the Contract, it must submit such request to HFC to use an additional labor classification not listed therein and specify the proposed new classification. If HFC decides that a new classification is necessary, it will determine the appropriate prevailing wage rate for any resurveyed, amended, new, or additional craft or type of worker not covered. Such determination will be made by HFC in compliance with applicable law.

9.4 Each week, Contractor shall submit directly to the HFC project manager certified copies of payrolls showing classifications and wages paid by Contractor, subcontractors, and suppliers for each employee under the Contract, for any day included in the Contract.

## **10.0 Time is of the Essence**

10.1 Timely performance by both parties is essential to this Agreement.

## **11.0 Termination**

11.1 Either party may terminate this Agreement for cause if the other party defaults and fails to cure the default after receiving notice thereof, subject, however, to the provisions of Section 11.2 below. Default occurs if a party fails to perform one or more of its duties under this Agreement. If a default occurs, then the injured party shall deliver a written notice to the defaulting party describing the default and the proposed termination date. Subject to the provisions of Section 11.2 below, the date must be at least 30 calendar days after receipt of the notice. The injured party, at its sole option, may extend the proposed termination date to a later date. If the defaulting party cures the default before the proposed termination date, then the proposed termination is ineffective. If the defaulting party does not cure the default before the proposed termination date, then the injured party may terminate this Agreement on the termination date.

11.2 In addition to the foregoing, the following shall constitute a default under the Contract Documents by Contractor:

(a) Contractor fails to make payment to Subcontractors and such failure continues for a period of three calendar days following written notice to Contractor;

(b) if (1) an order for relief is entered on behalf of Contractor pursuant to Title 11 of the United States Code, (2) if any other similar order is entered under any other debtor relief laws, (3) if Contractor makes a general assignment for the benefit of its creditors, (4) if a receiver is appointed for the benefit of its creditors, or (5) if a receiver is appointed on account of its insolvency, that any such event could impair or frustrate Contractor's performance of the Contract Documents. Upon the occurrence of any such events, HFC shall be entitled to request of Contractor to its successor in interest, adequate assurance of future performance in accordance with the terms and conditions of the Contract Documents. Failure to comply with such request within 10 calendar days of delivery of the request shall entitle HFC to terminate the Contract Documents. Upon the occurrence of one of the events described above, during the pendency of HFC's receipt of adequate assurance of performance and actual performance in accordance therewith, HFC shall be entitled to proceed with the Work with its own forces or with other Contractors on a time and materials or other appropriate basis, the cost of which will be back charged against the Contract Sum.

11.3 HFC may terminate this Agreement for its convenience at any time by giving 10 calendar days' written notice to Contractor. HFC's right to terminate this Agreement for convenience is cumulative of all rights and remedies that exist now or in the future. On receiving such notice, Contractor shall, unless the

notice directs otherwise, immediately discontinue all services under this Agreement. As soon as practicable after receiving the termination notice, Contractor shall submit an invoice to HFC showing in detail the services performed under this Agreement up to the termination date. HFC shall then pay the amount due Contractor for services actually performed, but not paid previously, based on the percentage of completion using the approved schedule of values. **TERMINATION OF THIS AGREEMENT AND RECEIPT OF PAYMENT FOR SERVICES RENDERED ARE CONTRACTOR'S EXCLUSIVE REMEDIES FOR TERMINATION FOR CONVENIENCE BY HFC, WHICH DOES NOT CONSTITUTE A DEFAULT OR BREACH OF THIS AGREEMENT. CONTRACTOR WAIVES ANY CLAIM (OTHER THAN ITS CLAIM FOR PAYMENT FOR SERVICES PERFORMED), IT MAY HAVE NOW OR IN THE FUTURE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM HFC'S TERMINATION FOR CONVENIENCE.**

11.4 Upon a determination by a court of competent jurisdiction that termination of Contractor pursuant to either Section 11.1 or Section 11.2 was wrongful, such termination will be deemed converted to a termination for convenience pursuant to Section 11.3 and Contractor's sole and exclusive remedy for wrongful termination shall be limited to recovery of the payments permitted for termination for convenience as set forth in Section 11.3.

## **12.0 Miscellaneous**

12.1 Access to Records. Contractor grants HFC, including its authorized representatives, access and the right to examine and review Contractor's books, documents, papers, and records that are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts, and transcriptions. Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed. Contractor shall maintain such books, records, and billing documents for three years after the cessation of Contractor's services under this Agreement. Nothing in this Section shall affect the time for bringing a cause of action or the applicable statute of limitations.

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

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

12.4 Venue and Applicable Law. Contractor shall strictly comply with all applicable laws, ordinances, codes, and regulations that affect performance by Contractor hereunder. Agreement shall be construed and enforced in accordance with the laws of the State of Texas, notwithstanding any choice-of-law or conflicts-of-law rules to the contrary. Any action to enforce this Agreement, or any litigation or claims

otherwise regarding this Agreement, must be brought in a court of competent jurisdiction in Harris County, Texas. Contractor and consents to the exclusive jurisdiction of such courts and hereby waives any defenses or objections based on venue, inconvenient forum, or lack of personal jurisdiction.

12.5 Independent Contractor. The relationship of Contractor to HFC shall be that of an independent contractor. No principal/agent, partnership, joint venture, joint employer, or other relationship, other than an independent contractor relationship, is created or intended by this Agreement. Services provided by Contractor under this Agreement are non-exclusive and may be supplemented or augmented by HFC at any time, without notice to Contractor, in the sole and absolute discretion of HFC.

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

12.7 Terms & Conditions. The Terms & Conditions are attached hereto as Exhibit "A" and made a part hereof for all purposes by this reference.

12.8 Assignment. Contractor shall not assign this Agreement in whole or in part without the express prior written consent of HFC. For purposes hereof, any transfer of ownership interests in Contractor, direct or indirect, occurring after the Effective Date shall be deemed an assignment by Contractor requiring prior written consent of HFC. HFC may assign this Agreement in whole or in part, including any enforcement rights granted hereunder, at any time upon written notice to Contractor.

12.9 Severability. Each and every agreement contained in this Agreement is, and shall be construed as, a separate and independent agreement. If any provision of this Agreement should be held to be invalid or unenforceable, then the validity and enforceability of the remaining provisions of this Agreement to another person or circumstance shall not be affected thereby.

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

12.11 Contractor's Representations and Warranties. Contractor represents and warrants to HFC as follows:

(a) It is duly organized, validly existing and in good standing under the laws of its jurisdiction of formation with all requisite power and authority to enter into the Contract Documents and to conduct its respective business.

(b) The Contract Documents constitute the legal, valid and binding obligation of the party enforceable in accordance with its terms.

(c) No consents or approvals are required from any governmental authority or other person or entity for the party to enter into and perform the Contract Documents. All corporate or partnership action on the part of the party necessary for the authorization, execution and delivery of the Contract Documents, and the consummation of the transactions contemplated hereby, have been duly taken.

(d) The execution and delivery of the Contract Documents by the party, and the consummation of the transactions contemplated hereby, do not conflict with or contravene the provisions of its organizational documents or any agreement or instrument by which it or its properties are bound or any law, rule, regulation, order or decree to which it or its properties are subject.

(e) It has not retained any broker, finder or other commission or fee agent, and no such person has acted on its behalf in connection with the execution and delivery of the Contract Documents.

(f) It has sought, or had the opportunity to seek and elected not to seek, advice from an attorney of its own choosing to review and provide legal advice and counsel with regard to the Contract Documents and has read and fully understands all of the terms and provisions of, and requirements of, the Contract Documents. Each provision of the Contract Documents shall be construed as to their fair meaning, and not for or against any party based upon any attribution to such party as the source of the language in question.

12.12 Notice. All notices and other communications required or permitted hereunder shall be in writing and given by registered or certified mail (return receipt requested and postage prepaid), by personal delivery or by a recognized overnight delivery service (such as DHL, Federal Express or UPS), and shall be determined to have been effectively given upon actual receipt or upon refusal of delivery or, if earlier and whether or not actually received, (i) one (1) business day after deposit with a recognized overnight delivery service for next business day delivery, properly addressed to the intended recipient, with delivery charges prepaid by, or billed to, the sender, or (ii) three (3) business days after deposit with the United States mail, registered or certified mail, return receipt requested, postage prepaid, properly addressed to the intended recipient. Notice must be addressed to the party to whom the notice is given at its address set out in this Agreement, or such other address the receiving party has designated previously by proper notice to the sending party.

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

12.14 Authority to Sign. The signer of this Agreement for Contractor hereby represents and warrants that he or she has full authority to execute this Agreement and bind Contractor.

[Signature block to follow in final agreement]

**Exhibit “A”**  
**Terms & Conditions**

**ARTICLE 1: GENERAL PROVISIONS**

1.1 The Contract Documents form the contract. The term “Contract Documents” consists of the Brown Theater Dimming Rack Replacement Agreement, Terms & Conditions, Drawings, and Specifications.

1.2 The Contract Documents represent the entire and integrated agreement between the parties hereto and supersede prior negotiations, representations or agreements, either written or oral. The Contract Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than HFC and Contractor. The Contract Documents may not be amended except as expressly set forth in a Change Order signed by the parties, or otherwise in a written instrument executed by the parties and that expressly provides that it is an amendment to the Contract Documents.

1.3 In the event of a conflict, the following order shall control: (i) Brown Theater Dimming Rack Replacement Agreement; (ii) Terms & Conditions; (iii) Drawings; and (iv) Specifications. The more stringent or strict term and condition shall control over the less strict term or condition.

1.4 The term “Work” means the equipment and services required by the Contract Documents and what is reasonably inferable therefrom, whether completed or partially completed, and includes all other labor, supervision, materials, personnel lifts, transportation, and services of any kind or type provided or to be provided by Contractor to fulfill Contractor’s obligations. The Work may constitute the whole or a part of the Project.

1.5 The term “Drawings” means the detailed Project drawings and specifications document prepared by the Engineer and made a part of the Contract Documents for all purposes by this reference.

1.6 The term “Specifications” means the Project document prepared by the Engineer and made a part of the Contract Documents for all purposes by this reference detailing the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

1.7 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by Contractor. The Contract Documents are complementary, and what is required by one shall be as binding upon Contractor as if required by all.

**ARTICLE 2: HFC**

2.1 HFC agrees to respond to inquiries from Contractor within a reasonable time and provide information in a timely manner regarding requirements for and limitations on the Project, including HFC’s objectives, constraints, space requirements, flexibility, expandability and site requirements. A “reasonable time” for purposes of this paragraph shall in no event be less than 10 calendar days.

2.2 HFC will endeavor to render decisions and approve Contractor’s submittals, if any, in a timely manner in order to avoid unreasonable delay in the orderly and sequential progress of the Work. HFC will coordinate the services of its own contractors with those services provided by Contractor. In no event shall HFC be deemed to have failed, for purposes of this paragraph, to have acted in a timely manner if HFC

renders decisions or approvals within 10 calendar days following Contractor's written request to HFC therefor.

2.3 No employee of HFC has the authority to authorize Contractor to perform an act or work contrary to the Contract Documents.

2.4 Except to the limited extent provided in Article 4, the Engineer does not have authority to represent or bind HFC with respect to any matter requiring HFC's approval or authorization.

### ARTICLE 3: CONTRACTOR

3.1 Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. Contractor shall designate a representative who shall have express authority to bind Contractor with respect to all matters under the Contract Documents. The term "Contractor" means Contractor or Contractor's authorized representative.

3.2 Contractor shall perform the Work expeditiously to ensure the orderly progress of the Project in strict accordance with the Contract Documents. Contractor shall manage and coordinate the Work with those services provided by HFC, its contractors and agents, and any third party managing or performing work on the Project.

3.3 Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents by activities or duties of Engineer in the administration of the Contract Documents, or by tests, inspections or approvals required or performed by persons or entities other than Contractor.

3.4 Execution of the Agreement by Contractor is a representation that Contractor has visited the Project Site, become familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

3.5 Because the Contract Documents are complementary, Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. Contractor shall promptly report to HFC and Engineer any errors, inconsistencies or omissions discovered by or made known to Contractor as a request for information in such form as HFC may require.

3.6 Contractor shall promptly report to HFC and Engineer any nonconformity discovered in the Contract Documents with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities as a request for information in such form as HFC may require.

3.7 Contractor shall supervise and direct the Work, using Contractor's best skill and attention. Contractor shall be solely responsible for, and have control over, means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract Documents, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning means, methods, techniques, sequences or procedures, Contractor shall evaluate the jobsite safety thereof and shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures.



3.8 Contractor shall be liable to HFC for acts and omissions of Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, Contractor or any of its Subcontractors. Contractor shall be solely responsible for conforming to the standards declared by OSHA, including but not limited to compliance with federal and state safety standards/directives for setting-up and utilizing platforms, lifts, ladders, scaffolding and safety lines/belts.

3.9 Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

3.10 Contractor shall provide and pay for labor, materials, equipment (including but not limited to personnel lifts), tools, machinery, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.11 Contractor may make substitutions only with the consent of HFC, after evaluation by Engineer and in accordance with a Change Order.

3.12 Contractor shall enforce strict discipline and good order among Contractor's employees and other persons carrying out the Work. Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.

3.13 Contractor warrants that it shall perform the Work in a good and workmanlike manner, meeting the standards of quality prevailing in Harris County, Texas for work of this kind. Contractor shall perform all work using trained and skilled persons having substantial experience performing the work required under the Contract Documents as more fully described herein.

3.14 With respect to any materials and equipment furnished under the Contract Documents, Contractor warrants: (i) that all items are free of defects in title, design, material, and workmanship, (ii) that each item meets or exceeds the requirements of the Contract Documents, (iii) that each replacement item is new, in accordance with original equipment manufacturer's specifications, and of a quality at least as good as the quality of the item which it replaces (when the replaced item was new), and will not cause any manufacturer's warranties to lapse or become invalid, and (iv) that no item or its use infringes any patent, copyright, or proprietary right.

3.15 Work, materials, or equipment not conforming to the requirements of this Article shall be considered defective. If required by HFC, Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.16 Contractor shall pay before delinquent all sales, consumer, use and other taxes for the Work provided by Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

3.17 HFC is exempt from payment of Federal Excise and Transportation Tax and Texas Limited Sales and Use Tax. Contractor's invoices to HFC must not contain assessments of any of these taxes. HFC will furnish HFC's exemption certificate and federal tax identification number to Contractor if requested.

3.18 Contractor shall secure and pay for permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are legally required at the time bids are received or negotiations concluded.

3.19 Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

3.20 If Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, Contractor shall be liable for such Work and shall bear the costs attributable to correction.

3.21 Contractor shall include in the Contract Sum all allowances, if any, stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as HFC may direct, but Contractor shall not be required to employ persons or entities to whom Contractor has reasonable objection. Allowances cover the cost to Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts; and Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts are included in the Contract Sum but not in the allowances, and shall not reduce the amount of allowances available to HFC for materials and equipment.

3.22 Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project Site during performance of the Work. The superintendent shall represent Contractor, and communications given to the superintendent shall be as binding as if given to Contractor.

3.23 Prior to replacing Contractor's superintendent for the Project, Contractor agrees to and shall furnish in writing to HFC the name and qualifications of any proposed superintendent. HFC may reply within seven business days to Contractor in writing stating whether HFC has reasonable objection to the proposed superintendent or that HFC requires additional time to review. Failure of HFC to reply within the seven-business-day period shall constitute notice of no reasonable objection.

3.24 Contractor shall not employ a proposed superintendent to whom HFC has made reasonable and timely objection. Contractor shall not change the superintendent without HFC's consent, which shall not unreasonably be withheld or delayed.

3.25 Contractor shall confine operations at the site to areas designated by HFC and as permitted under applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment. Contractor shall obtain and maintain, at its sole cost and expense, all permits and licenses necessary for the proper execution and performance of the Work.

3.26 Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents.

3.27 Contractor shall not damage or endanger a portion of the Work or fully or partially completed work of HFC or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. Contractor shall not cut or otherwise alter such work by HFC or a separate contractor except

with written consent of HFC and of such separate contractor; such consent shall not be unreasonably withheld. Contractor shall not unreasonably withhold from HFC or a separate contractor Contractor's consent to cutting or otherwise altering the Work.

3.28 Contractor acknowledges and agrees that (i) the Project Site will be occupied throughout the course of the Work, (ii) the Work shall be subject to suspension, delay or interruption by HFC in its sole, but reasonable discretion due to events and other activities at the Project Site; and (iii) Contractor has anticipated the probability of such suspension, delay and interruption as part of the bid amount heretofore submitted by Contractor, upon which the Contract Sum and the Contract Time is based. Contractor shall not interfere with or disrupt access to and from, or use of, the parking garage that is located below the Project Site except for interruptions that are reasonably necessary (and then only for such duration as is reasonably necessary) to perform Work that is required to be performed by Contractor and that is performed diligently and in a manner required by the Contract Documents. Contractor shall notify HFC at least 10 business days in advance of any interferences or disruptions to normal parking garage use.

3.29 Contractor shall keep the Project Site free from accumulation of waste materials or rubbish caused by operations under the Contract Documents. At completion of the Work, Contractor shall remove waste materials, rubbish, Contractor's tools, equipment, machinery, and surplus materials from and about the Project Site.

3.30 If Contractor fails to clean up as provided in the Contract Documents, HFC may do so and HFC shall be entitled to reimbursement from Contractor.

3.31 Contractor shall provide HFC and Engineer access to the Work in preparation and progress wherever located.

3.32 Contractor shall use forms approved by HFC and Engineer, such as the latest AIA forms for payment requests, change orders, and substantial completion.

3.32 Contractor shall aid Engineer in periodic virtual tours of the site during construction, as needed.

#### ARTICLE 4: ENGINEER

4.1 The duties, responsibilities and limitations of authority of Engineer, as set forth in the Contract Documents, shall not be restricted, modified or extended without written consent of HFC, Contractor and Engineer.

4.2 If Engineer is terminated, then HFC will engage or arrange to provide a successor whose status under the Contract Documents shall be that of an Engineer immediately upon notice to Contractor.

4.3 HFC understands that the Engineer has been engaged by WCOC to provide administration of the Contract Documents and will be directed by WCOC to visit the Project Site at intervals appropriate to the stage of construction, or as otherwise agreed with HFC, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. Engineer will not have control over, charge of, or responsibility for, the means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work.

4.4 Engineer may review and approve, or take other appropriate action upon, Contractor's submittals such as shop drawings, product data and samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

4.5 Engineer may conduct inspections and consult with HFC (and subject to HFC's approval) to determine the date of final completion of the Work and issue a certificate of completion and receive and forward to HFC written warranties and related documents required by the Contract Documents and assembled by Contractor.

4.6 Engineer will be asked to review and respond to requests for information about the Contract Documents. Engineer's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If appropriate, Engineer may prepare and issue supplemental drawings or specifications in response to the requests for information.

#### ARTICLE 5: SUBCONTRACTORS

5.1 A "Subcontractor" is a person or entity who has a direct agreement with Contractor to perform a portion of the Work at the Project Site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

5.2 Contractor shall, as soon as practicable after execution of the Agreement, furnish in writing to HFC and Engineer the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed (and not previously disclosed to HFC) for each principal portion of the Work. Engineer may reply within 10 calendar days to Contractor in writing stating whether HFC or Engineer has reasonable objection to any such proposed person or entity or that Engineer requires additional time for review. Failure of HFC or Engineer to reply within such period shall constitute notice of no reasonable objection.

5.3 Contractor shall not contract with a proposed person or entity to whom HFC or Engineer has made reasonable and timely objection. Contractor shall not be required to contract with anyone to whom Contractor has made reasonable objection.

5.4 If HFC or Engineer have reasonable objection to a person or entity proposed by Contractor, then Contractor shall propose another to whom HFC or Engineer have no reasonable objection.

5.5 Contractor shall not substitute a Subcontractor, person or entity previously selected without prior approval by HFC.

5.6 Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to Contractor by terms of the Contract Documents, and to assume toward Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which Contractor, by these Contract Documents, assumes toward HFC and Engineer.

5.7 Each subcontract agreement shall preserve and protect the rights of HFC and Engineer under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against Contractor that Contractor, by the Contract Documents, has against HFC.

#### ARTICLE 6: CHANGE ORDERS

6.1 Changes in the Work may be accomplished after execution of the Agreement, and without invalidating the Contract Documents, by Change Order, subject to the limitations stated in this Article 6 and elsewhere in the Contract Documents.

6.2 A Change Order is a written instrument prepared by the Contractor and signed by the Engineer and HFC, stating their agreement upon all of the following: (i) the change in the Work; (ii) the amount of the adjustment, if any, in the Contract Sum; and (iii) the extent of the adjustment, if any, in the Contract Time.

6.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and Contractor shall proceed promptly, unless otherwise provided in the Change Order.

6.4 In no event shall the aggregate amount of Change Orders under this Agreement exceed **25%** of the Contract Sum.

6.5 The schedule for the Work shall reflect all critical path activities (each a “Critical Path Activity”). In no event shall Contractor be entitled to any extension of the Contract Time pursuant to a Change Order or otherwise unless, then only to the extent that, Contractor is actually delayed in the commencement or progress of any Critical Path Activity by (i) an act or neglect of HFC (which is not remedied within 10 business days following written notice thereof from Contractor to HFC), or of an employee of either, or of a separate contractor employed by HFC (which is not remedied within 10 business days following written notice thereof from Contractor); or by changes ordered by HFC in the Work, (ii) by fire, unavoidable casualties, (iii) labor unrest that is associated with an industry-wide strike or (iv) government mandates prohibiting performance of construction and which are in no way attributable to Contractor’s failure to perform its obligations under the Contract Documents.

#### ARTICLE 7: PROTECTION OF PERSONS AND PROPERTY

7.1 Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract Documents.

7.2 Contractor shall take reasonable precautions for safety of, and shall provide protection to prevent damage, injury or loss to (i) Employees on the Project Site and other persons who may be affected thereby; (ii) the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of Contractor or Subcontractors; and (iii) other property at the Project Site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation or replacement in the course of construction.

7.3 Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

7.4 Contractor shall erect and maintain, as required by existing conditions and performance of the Contract Documents, reasonable safeguards for re-routing, safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

7.5 If use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, then Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

7.6 Contractor shall designate a responsible member of Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be Contractor's superintendent unless otherwise designated by Contractor in writing to HFC.

#### ARTICLE 8: BONDS

8.1 Contractor shall provide statutory performance and payment bonds for 100% of the Contract Sum on forms approved by HFC General Counsel covering faithful performance of the Work and payment of obligations arising thereunder as required in the Contract Documents pursuant to Chapter 2253 of the Texas Government Code.

8.2 A bond that is given or tendered to HFC pursuant to the Contract Documents must be executed by a surety company that is authorized and admitted to write surety bonds in the State of Texas.

8.3 If the amount of a bond is greater than \$100,000, then surety shall: (i) hold certificate of authority from the United States Secretary of Treasury to qualify as surety on obligations permitted or required under federal law; or, (ii) obtain reinsurance for any liability in excess of \$100,000 from a reinsurer that is authorized and admitted as a reinsurer in the State of Texas and holder of a certificate of authority from the United States Secretary of the Treasury to qualify as surety or reinsurer on obligations permitted or required under federal law.

8.4 Determination of whether surety on the bond or the reinsurer holds a certificate of authority from the United States Secretary of the Treasury is based on information published in Federal Register covering the date on which bond was executed.

8.5 Each bond given or tendered to HFC pursuant to the Contract Documents must be on forms approved by HFC General Counsel with no changes made by Contractor or surety, and must be dated, executed, and accompanied by power of attorney stating that the attorney in fact executing such the bond has requisite authority to execute such Bond. The bonds must be dated and must be no more than 30 calendar days old.

8.6 Surety shall designate in its bond, power of attorney, or written notice to HFC, an agent resident in Harris County to whom any requisite notices may be delivered and on whom service of process may be had in matters arising out of the suretyship.

8.7 Contractor shall furnish information to a payment bond beneficiary as required by Chapter 2253 of the Texas Government Code. Contractor shall deliver required bonds to HFC prior to commencing Work.

## ARTICLE 9: UNCOVERING AND CORRECTION OF WORK

9.1 If a portion of the Work is covered contrary to Engineer's request or to requirements specifically expressed in the Contract Documents, then it shall, if requested in writing by HFC, be uncovered by Contractor for examination by Engineer and replaced promptly thereafter at Contractor's sole cost and expense.

9.2 Contractor shall promptly correct Work rejected by Engineer or failing to conform to the requirements of the Contract Documents, whether discovered before or after Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for Engineer's services and expenses made necessary thereby, shall be at Contractor's expense.

9.3 In addition to Contractor's obligations under Article 3, if, within one year after the Date of Completion, any of the Work is found to be not in accordance with the requirements of the Contract Documents, then Contractor shall correct it within 30 calendar days after receipt of written notice from HFC to do so at no cost to HFC; provided, however, that the warranty period for goods, materials and equipment shall be equal to one year after the Date of Completion or the manufacturer's warranty, whichever is greater.

9.4 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Completion by the period of time between Completion and the actual completion of that portion of the Work. The one-year period for correction of Work shall not be extended by corrective Work performed by Contractor pursuant to this Article 9.

9.5 Contractor shall remove from the site portions of the Work that are not in accordance with the requirements of the Contract Documents and are neither corrected by Contractor nor accepted by HFC.

9.6 Contractor shall be liable for the cost of correcting destroyed or damaged construction, whether completed or partially completed, of HFC or separate contractors caused by Contractor's correction or removal of Work that is not in accordance with the requirements of the Contract Documents.

9.7 Nothing contained in this Article 9 shall be construed to establish a period of limitation with respect to other obligations Contractor has under the Contract Documents. Establishment of the period for correction of Work as described herein relates only to the specific obligation of Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish Contractor's liability with respect to Contractor's obligations other than specifically to correct the Work.

9.8 If HFC prefers to accept Work that is not in accordance with the requirements of the Contract Documents, then HFC may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable, as determined by HFC in its reasonable discretion. Such adjustment shall be effectuated whether or not final payment has been made. In no event shall HFC be deemed to have accepted Work that is not in accordance with the requirements of the Contract Documents unless (a) such acceptance is expressly contained in a document executed by HFC and delivered to Contractor and (b) such document expressly states that HFC is, pursuant to this Section, expressly agreeing to accept Work that is not in accordance with the Contract Documents.