

**AGREEMENT  
BETWEEN OWNER AND CONTRACTOR FOR  
CONSTRUCTION CONTRACT**

THIS AGREEMENT is by and between

**“OWNER”**

THE CITY OF BOERNE  
402 E. BLANCO RD.  
BOERNE, TEXAS 78006  
PHONE: (830) 249-9511  
FAX: (830) 249-9264

**“CONTRACTOR”**

CAPITAL EXCAVATION COMPANY  
2967 BUSINESS PARK  
BUDA, TEXAS 78610  
PHONE: (512) 440-1717  
FAX: (512) 440-0844

OWNER and CONTRACTOR, in consideration of the mutual covenants set forth herein, agree as follows:

**ARTICLE 1 - WORK**

1.01 CONTRACTOR shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:

Work consists of two trail segments: Boerne Trails South and Boerne Trails North. Overall, improvements for the two segments include a ten-foot wide concrete trail, prefabricated steel pedestrian bridges, and low flow culverts, trail heads and amenities.

South Segment - Boerne Trails South will provide connection along Old No. 9 Trail for a distance of approximately 1.45 miles, between Boerne City Park at the northern end, and a direct connection to Charger Blvd. and Trails of Herff Ranch Subdivision at the southern end.

North Segment - Boerne Trails North will provide connection from the existing Old No. 9 Trail for a distance of approximately 0.11 miles to Boerne City Campus and Patrick Heath Public Library.

**ARTICLE 2 - THE PROJECT**

2.01 The Project for which the Work under the Contract Documents may be the whole or only a part is generally described as follows:

CITY OF BOERNE TRAIL SYSTEM EXPANSION; CSJ #0915-11-033

## ARTICLE 3 - ENGINEER

3.01 The Project has been designed by

POZNECKI CAMARILLO, INC.  
5835 CALLAGHAN RD. STE. 200  
SAN ANTONIO, TX 78228  
(210) 349-3273

(ENGINEER), who is to act as OWNER's representative, assume all duties and responsibilities, and have the rights and authority assigned to ENGINEER in the Contract Documents in connection with the completion of the Work in accordance with the Contract Documents.

## ARTICLE 4 - CONTRACT TIMES

### 4.01 Time of the Essence

- A. All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

### 4.02 Days to Achieve Substantial Completion and Final Payment

- A. The Work will be substantially completed within ONE-HUNDRED FORTY-NINE (149) WORKING DAYS after the date when the Contract Times commence to run as provided in Item 8L, and completed and ready for final payment in accordance with paragraph Item 9L within ONE-HUNDRED SIXTY-NINE (169) WORKING DAYS from the date when the Contract Time commences to run.
- B. Final payment will occur upon Final Completion of the Work. Final Completion means actual completion of the Work, including any extras or Change Orders reasonably required or contemplated under the Contract Documents other than warranty work that may be required pursuant to the Contract Documents.

### 4.03 Liquidated Damages

- A. **THE CONTRACTOR ACKNOWLEDGES AND RECOGNIZES THAT THE OWNER IS ENTITLED TO FULL AND BENEFICIAL OCCUPANCY AND USE OF THE COMPLETED WORK FOLLOWING EXPIRATION OF THE CONTRACT TIME. CONTRACTOR AND OWNER RECOGNIZE THAT TIME IS OF THE ESSENCE OF THIS AGREEMENT AND THAT OWNER WILL SUFFER ACTUAL DAMAGES IF THE WORK IS NOT COMPLETED WITHIN THE TIMES SPECIFIED IN PARAGRAPH 4.02 ABOVE, PLUS ANY EXTENSIONS THEREOF ALLOWED IN ACCORDANCE WITH ITEM 8L. THE PARTIES ALSO RECOGNIZE THE DELAYS, EXPENSE, AND DIFFICULTIES INVOLVED IN PROVING IN A LEGAL OR ARBITRATION PROCEEDING THE ACTUAL DAMAGES SUFFERED BY OWNER IF THE WORK IS NOT COMPLETED ON TIME. ACCORDINGLY, INSTEAD OF REQUIRING ANY SUCH PROOF, OWNER AND CONTRACTOR AGREE THAT AS LIQUIDATED DAMAGES FOR DELAY (BUT NOT AS A PENALTY), CONTRACTOR SHALL PAY OWNER ONE-THOUSAND DOLLARS (\$1000.00) FOR EACH DAY THAT EXPIRES AFTER THE TIME SPECIFIED IN PARAGRAPH 4.02 FOR SUBSTANTIAL COMPLETION UNTIL THE WORK IS SUBSTANTIALLY COMPLETE. AFTER SUBSTANTIAL COMPLETION, IF CONTRACTOR SHALL NEGLECT, REFUSE, OR**

**FAIL TO COMPLETE THE REMAINING WORK WITHIN THE CONTRACT TIME OR ANY PROPER EXTENSION THEREOF GRANTED BY OWNER, CONTRACTOR SHALL PAY OWNER ONE-THOUSAND DOLLARS (\$1000.00) FOR EACH DAY THAT EXPIRES AFTER THE TIME SPECIFIED IN PARAGRAPH 4.02 FOR COMPLETION AND READINESS FOR FINAL PAYMENT UNTIL THE WORK IS COMPLETED AND READY FOR FINAL PAYMENT. THE LIQUIDATED DAMAGES SHALL BE IN LIEU OF ANY AND ALL OTHER DAMAGES WHICH MAY BE INCURRED BY OWNER AS A RESULT OF THE FAILURE OF CONTRACTOR TO COMPLETE WITHIN THE CONTRACT TIME.**

#### ARTICLE 5 - CONTRACT PRICE

5.01 CONTRACTOR shall perform the Work in the Contract Documents for the amounts shown in the bid form. The OWNER shall pay CONTRACTOR for completion of the Work in accordance with the bid form in current funds.

#### ARTICLE 6 - PAYMENT PROCEDURES

##### 6.01 Submittal and Processing of Payments

- A. CONTRACTOR shall submit Applications for Payment in accordance with Item 9L. Applications for Payment will be processed by ENGINEER as provided in the General Conditions.

##### 6.02 Progress Payments; Retainage

- A. OWNER shall make progress payments on account of the Contract Price on the basis of CONTRACTOR's Applications for Payment on or about the last day of each month during performance of the Work as provided in Paragraphs 6.02.A.1 and 6.02.A.2 below. All such payments will be measured by the unit prices on the bid form established based on the number of units completed:
  - 1. Prior to Substantial Completion, progress payments will be made in an amount computed as indicated below but, in each case, less the aggregate of payments previously made and less such amounts as ENGINEER may determine that OWNER may withhold, including but not limited to liquidated damages, in accordance with Item 9L:
    - a. Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of five percent (5%). Pending final determination of cost to the OWNER of changes in the Work, amounts not in dispute shall be included;
    - b. Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the OWNER, suitably stored off the site at a location agreed upon in writing), less retainage of five percent (5%);
    - c. Subtract the aggregate of previous payments made by the OWNER; and

- d. Subtract amounts, if any, for which the ENGINEER has withheld or nullified a Certificate for Payment.
- 2. Upon Substantial Completion, OWNER shall pay an amount sufficient to increase total payments to CONTRACTOR to 95 percent of the Work completed, less such amounts as ENGINEER shall determine in accordance with Item 9L.

#### 6.03 Final Payment

- A. Upon Final Completion and acceptance of the Work in accordance with Item 9L, OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER.

### ARTICLE 7 - INTEREST

7.01 All moneys not paid when due as provided in Item 9L shall bear interest at the maximum rate allowed by law at the place of the Project.

### ARTICLE 8 – CONTRACTOR’S REPRESENTATIONS

8.01 In order to induce OWNER to enter into this Agreement CONTRACTOR makes the following representations:

- A. CONTRACTOR has examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents.
- B. CONTRACTOR has visited the Site and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
- C. CONTRACTOR is familiar with and is satisfied as to all federal, state, and local Laws and Regulations that may affect cost, progress, and performance of the Work.
- D. CONTRACTOR has carefully studied all: (1) reports of explorations and tests of subsurface conditions at or contiguous to the Site and all drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site (except Underground Facilities) which have been identified in the Supplementary Conditions as provided in Item 4L and (2) reports and drawings of a Hazardous Environmental Condition, if any, at the Site which has been identified in the Supplementary Conditions.
- E. CONTRACTOR has obtained and carefully studied (or assumes responsibility for doing so) all additional or supplementary examinations, investigations, explorations, tests, studies, and data concerning conditions (surface, subsurface, and Underground Facilities) at or contiguous to the Site which may affect cost, progress, or performance of the Work or which relate to any aspect of the means, methods, techniques, sequences, and procedures of construction to be employed by CONTRACTOR, including any specific means, methods, techniques, sequences, and procedures of construction expressly required by the Bidding Documents, and safety precautions and programs incident thereto.
- F. CONTRACTOR does not consider that any further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract Times, and in accordance with the other terms and conditions of the Contract Documents.

- G. CONTRACTOR is aware of the general nature of work to be performed by OWNER and others at the Site that relates to the Work as indicated in the Contract Documents.
- H. CONTRACTOR has correlated the information known to CONTRACTOR, information and observations obtained from visits to the Site, reports and drawings identified in the Contract Documents, and all additional examinations, investigations, explorations, tests, studies, and data with the Contract Documents.
- I. CONTRACTOR has given ENGINEER written notice of all conflicts, errors, ambiguities, or discrepancies that CONTRACTOR has discovered in the Contract Documents, and the written resolution thereof by ENGINEER is acceptable to CONTRACTOR.
- J. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.
- K. Under Section 231.006, Family Code, the vendor or applicant certifies that the individual or business entity named in this contract, bid, or application 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.

## ARTICLE 9 - CONTRACT DOCUMENTS

### 9.01 Contents

- A. The Contract Documents consist of the following:
  - 1. This Agreement (8 pages)
  - 2. Special/Supplementary Conditions (2 pages)
  - 3. Bid Form (4 pages)
  - 4. Addenda (3 pages)
  - 5. Bid Bond (4 pages)
  - 6. Items 1L through 9L Local Government Requirements & Covenants as listed in Project Manual (56 pages)
  - 7. Performance bond (3 pages)
  - 8. Payment bond (3 pages)
  - 9. Project Manual Transportation Alternatives Program City of Boerne Trail System Expansion CSJ No: 0915-11-033, July 25, 2017 (162 pages and Appendix A1 & A2)
  - 10. Drawings with title sheet labeled City of Boerne Trail System Expansion, Construction of Hike and Bike Trails CSJ No: 0915-11-033 (Approved for Letting July 21, 2017) and each sheet bearing the following general title: Boerne Trail System City of Boerne, Texas. (Sheets 1A-193)

11. Specifications as listed in the table of contents of the Project Manual and Adopted TXDOT Standard Specifications for Construction & Maintenance (Nov. 1, 2014).
  12. Documentation submitted by the CONTRACTOR prior to Notice of Award
    - a. Statement of Qualification of Bidders (6 pages)
    - b. Disclosure of Lobbying Activities Statement (1 page)
    - c. Certificate Regarding Lobbying for Contracts, Grants, Loans, and Cooperative Agreements (1 page)
    - d. Noncollusion Affidavit of Prime Bidder (1 page)
    - e. Certificate of Absence of Suspension, Debarment, Voluntary Exclusion, or Determination of Ineligibility (2 pages)
    - f. Certificate of Interested Parties (1 page)
    - g. Conflict of Interest Questionnaire (1 page)
    - h. State of Texas Child Support Business Ownership Form (1 page)
  13. The following which may be delivered or issued on or after the Effective Date of the Agreement and are not attached hereto:
    - a. CONTRACTOR's Certificate(s) of Insurance
    - b. Notice of Award
    - c. Notice to Proceed
    - d. Work Change Directives.
    - e. Change Order(s).
- B. The documents listed in Paragraph 9.01.A are attached to this Agreement (except as expressly noted otherwise above).
- C. There are no Contract Documents other than those listed above in this Article 9.

## ARTICLE 10 - MISCELLANEOUS

### 10.01 Terms

- A. Terms used in this Agreement will have the meanings stated in the Items 1L-9L and the Supplementary Conditions.

### 10.02 Assignment of Contract

- A. No assignment by a party hereto of any rights under or interests in the Contract will be binding on another party hereto without the written consent of the party sought to be bound; and, specifically but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

### 10.03 Successors and Assigns

- A. OWNER and CONTRACTOR each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

#### 10.04 Severability

- A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and CONTRACTOR, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

#### 10.05 Texas Government Code Chapter 2270

CONTRACTOR verifies that it: (a) does not “boycott Israel”; and (b) will not “boycott Israel” during the term of this contract. For the purposes of this Section only, the terms “company” and “boycott Israel” have the meaning assigned by Texas Government Code Section 2270.001. CONTRACTOR’s obligations under this Section, if any exist, will automatically cease or be reduced to the extent that the requirements of Texas Government Code 2270 are subsequently repealed, reduced, or declared unenforceable or invalid in whole or in part by any court or tribunal of competent jurisdiction or by the Texas Attorney General, without any further impact on the validity or continuity of this contract.

IN WITNESS WHEREOF, OWNER and CONTRACTOR have signed this Agreement in duplicate. One counterpart each has been delivered to OWNER and CONTRACTOR. All portions of the Contract Documents have been signed or identified by OWNER and CONTRACTOR or on their behalf.

This Agreement will be effective on \_\_\_\_\_ (which is the Effective Date of the Agreement).

#### **OWNER:**

By:

Title:

[CORPORATE SEAL]

Attest:

Title:

Address for giving notices:

(If OWNER is a corporation, attach evidence of authority to sign. If OWNER is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of OWNER-CONTRACTOR Agreement.)

**CONTRACTOR:**

By:

Title:

[CORPORATE SEAL]

Attest:

Title:

Address for giving notices:

License No.:

(Where applicable)

Agent for service or process:

(If CONTRACTOR is a corporation or a partnership, attach evidence of authority to sign.)

**SURETY:**

By:

Title:

[CORPORATE SEAL]

Attest:

Title:

Address for giving notices: