

# TERMS AND CONDITIONS

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## I. Antitrust Affirmation

Applicant represents and warrants that, in accordance with Section 2155.005 of the Texas Government Code, neither Applicant nor the firm, corporation, partnership, or institution represented by Applicant, or anyone acting for such a firm, corporation or institution has (1) violated any provision of the Texas Free Enterprise and Antitrust Act of 1983, Chapter 15 of the Texas Business and Commerce Code, or the federal antitrust laws, or (2) communicated directly or indirectly the contents of this Response to any competitor or any other person engaged in the same line of business as Applicant.

## II. Assignment or Subcontracting

No rights, interest, or obligations in an Agreement resulting from this RFA shall be assigned, subcontracted, or delegated by Awarded Applicant without prior written permission of TVC Point of Contact. Any attempted assignment or delegation by Awarded Applicant shall be wholly void and totally ineffective for all purposes unless made in conformity with this paragraph. No assignment or subcontract shall relieve Awarded Applicant of any responsibility under this RFA.

## III. Applicable Law and Venue

The Agreement and any incorporated documents shall be governed by and construed in accordance with the laws of the State of Texas, without regard to the conflicts of law provisions. The exclusive venue of any suit brought concerning the Agreement and any incorporated documents is fixed in any court of competent jurisdiction in Travis County, Texas.

## IV. Applicant Responsibilities/Compliance with Laws

Applicant shall comply with all federal, state and local laws, statutes, ordinances, rules and regulations and the orders and decrees of any court or administrative bodies or tribunals in any matter affecting the performance of the Agreement, including, if applicable, workers compensation laws, compensation statutes and regulations, and licensing laws and regulations. When requested to do so by TVC, Applicant shall furnish TVC with satisfactory proof of its compliance.

## **V. Audit and Access to Records**

Pursuant to Section 2262.154 of the Texas Government Code, the state auditor may conduct an audit or investigation of any entity receiving funds from the state directly under any contract or indirectly through a subcontract under the contract. The acceptance of funds by the Applicant or any other entity or person directly under the contract or indirectly through a subcontract under the contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Applicant or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. Applicant shall ensure that this paragraph concerning the authority to audit funds received indirectly by subcontractors through the contract and the requirement to cooperate is included in any subcontract it awards.

## **VI. Records Retention**

Awarded Applicant shall maintain its records and accounts in a manner which shall assure a full accounting for all funds received and expended by Awarded Applicant in connection with the Project. These records and accounts (which includes all receipts of expenses incurred by Awarded Applicant) shall be retained by Awarded Applicant and made available for inspecting, monitoring, programmatic or financial auditing, or evaluation by TVC and by others authorized by law or regulation to do so for a period of not less than three (3) years from the date of completion of the Grant Project or the date of the receipt by TVC of Awarded Applicant's final claim for payment or final expenditure report or until a resolution of all billing questions in connection with the Agreement, whichever is later. If an audit has been announced, the records shall be retained until such audit has been completed. Awarded Applicant shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all documents and other information related to the Grant Project carried out under the Agreement. Awarded Applicant and any subcontractors shall provide any Audit Entities with any information the entity deems relevant to any monitoring, investigation, evaluation, or audit.

## **VII. Refund of Overpayments**

TVC reserves the right to require the reimbursement of any overpayments determined as a result of any audit or inspection of records kept by Awarded Applicant on work performed under the Agreement. Awarded Applicant shall reimburse TVC within thirty (30) calendar days of receipt of notice from TVC of overpayment. Awarded Applicant's failure to comply with this "Audit and Access to Records" section shall constitute a material breach of the Agreement.

## **VIII. Buy Texas**

In accordance with Texas Government Code, Section 2155.4441, the State of Texas requires that during the performance of a contract for services, Awarded Applicant shall purchase products and materials produced in the State of Texas when available at a price and time comparable to products and materials produced outside the state.

## **IX. Certification Concerning Hurricane/ Disaster Relief**

Under Section 2155.006(b) of the Texas Government Code, a state agency may not accept a bid or award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five year period preceding the date of the bid or award, has been:

- 1) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or
- 2) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005.

Under Section 2155.006 of the Texas Government Code, the bidder certifies that the individual or business entity named in this bid is not ineligible to receive the specified contract and acknowledges that any contract resulting from this RFA may be terminated and payment withheld if this certification is inaccurate.

## **X. Change in Law and Compliance with Laws**

Any alterations, additions, or deletions to the terms of the Agreement that are required by changes in federal or state law or regulations are automatically incorporated into the Agreement without written amendment hereto and shall become effective on the date designated by such law or by regulation. When requested to do so by TVC, Applicant shall furnish TVC with satisfactory proof of its compliance.

## **XI. Child Support Obligation**

Under Section 231.006 of the Texas Family Code, the Applicant certifies that the individual or business entity named in this application or Agreement 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. An application for a contract, grant, or loan paid from state funds must include the name and social security number (last 4 digits) of the individual or sole proprietor and each partner, shareholder, or owner with an ownership interest of at least 25 percent of the business entity submitting the application.

## **XII. Conflict of Interest**

Applicant represents and warrants that the performance under this Agreement will not constitute an actual or potential conflict of interest or reasonably create the appearance of impropriety. Applicants must disclose any existing or potential conflicts of interest relative to the performance of the requirements of this RFA. Failure to disclose a conflict of interest may be cause for disqualification of an Application or termination of an Agreement resulting from this RFA. If, following a review of this information, it is determined by TVC that a conflict of interest exists, Applicants may be disqualified from further consideration.

### **XIII. Dealings with Public Servants Affirmation**

Pursuant to Section 2155.003 of the Texas Government Code, Applicant represents and warrants that it has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted Response.

### **XIV. Debts and Delinquencies**

In accordance with Section 2252.903 of the Texas Government Code, Applicant agrees that any payments due under the Agreement shall be directly applied towards eliminating any debt or delinquency it has to the State of Texas including, but not limited to, delinquent taxes, delinquent student loan payments, and delinquent child support.

### **XV. Disaster Recovery Plan**

Upon request of TVC, Applicant shall provide the description of its business continuity and disaster recovery plans.

## **XVI. Dispute Resolution**

The dispute resolution process provided for in Texas Government Code, Chapter 2260 shall be used by TVC and Awarded Applicant (“Grantee” to resolve any dispute arising under the NOGA. The dispute resolution process provided for in Chapter 2260 shall be used, as further described herein, to attempt to resolve a claim for breach of contract asserted by the Grantee under the NOGA. If the Grantee’s claim for breach of contract cannot be resolved by the Parties in the ordinary course of business, it shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, the Grantee shall submit written notice, as required by Chapter 2260, to the Deputy Comptroller or his or her designee. The notice shall also be given to the individual identified in the NOGA for receipt of notices. Compliance by the Grantee with Chapter 2260 is a condition precedent to the filing of a contested case proceeding under Chapter 2260.

The contested case process provided in Chapter 2260 is the Grantee’s sole and exclusive process for seeking a remedy for an alleged breach of contract by TVC if the Parties are unable to resolve their disputes as described above.

Compliance with the contested case process provided in Chapter 2260 is a condition precedent to seeking consent to sue from the Legislature under Chapter 107, Civil Practices and Remedies Code. Neither the execution of the NOGA by TVC nor any other conduct of any representative of TVC relating to the NOGA shall be considered a waiver of sovereign immunity to suit.

For all other specific breach of contract claims or disputes under the NOGA, TVC and the Grantee shall first attempt to resolve them through direct discussions in a spirit of cooperation. If the Parties’ attempts to resolve their disagreements through negotiations fail, the dispute will be mediated by a mutually acceptable third party to be chosen by TVC and the Grantee within fifteen (15) days after written notice by one them demanding mediation under this Section. The Grantee shall pay all costs of the mediation unless TVC, in its sole good faith discretion, approves its payment of all or part of such costs. By mutual agreement, TVC and the Grantee may use a non-binding form of dispute resolution other than mediation. The purpose of this Section is to reasonably ensure that TVC and the Grantee shall, in good faith, utilize mediation or another non-binding dispute resolution process before pursuing litigation. TVC’s participation in, or the results of, any mediation or other non-binding dispute resolution process under this Section or the provisions of this Section shall not be construed as a waiver by TVC of (1) any rights, privileges, defenses, remedies or immunities available to TVC as an agency of the State of Texas or otherwise available to the TVC; (2) TVC’s termination rights; or (3) other termination provisions or expiration dates of the NOGA.

Notwithstanding any other provision of the NOGA to the contrary, unless otherwise requested or approved in writing by TVC, the Grantee shall continue performance and shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes; however, the Grantee may suspend performance during the pendency of such claim or dispute if the Grantee has complied with all provisions of Section 2251.051, Texas Government Code, and such suspension of performance is expressly applicable and authorized under that law.

## **XVII. E-Verify Program**

Applicant certifies that for contracts for services, Applicant shall utilize the U.S. Department of Homeland Security's E-Verify system during the term of the contract to determine the eligibility of: (1) all persons employed by Applicant to perform duties within Texas; and (2) all persons, including subcontractors, assigned by Applicant to perform work pursuant the contract within the United States of America.

## **XVIII. Entities that Boycott Israel**

Applicant represents and warrants that, pursuant to Section 2270.002 of the Texas Government Code, applicant does not boycott Israel and will not boycott Israel during the term of the Agreement.

## **XIX. Excluded Parties**

Applicant certifies that it is not listed in the prohibited vendors list authorized by Executive Order (EO) No. 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism", issued by President George W. Bush on September 23, 2001, and any subsequent changes made to it via cross- referencing the federal [Excluded Parties List System \(EPLS\)](#):

**LINK: Excluded Parties List System (EPLS)**

<https://www.sam.gov/portal/SAM/>

## **XX. Executive Head of State Agency Affirmation**

Under Section 669.003 of the Texas Government Code, relating to contracting with an executive head of a state agency, Applicant represents that no person who served as an executive of TVC, in the past four (4) years, was involved with or has any interest in the Agreement. If Applicant employs or has used the services of a former executive of the Agency, then Applicant shall provide the following information in its Response:

- Name of Former Executive:
- Name of State Agency:
- Date of Separation from State agency:
- Position with Applicant:
- Date of Employment with Applicant:

## **XXI. False Statements**

Applicant represents and warrants that all statements and information prepared and submitted in this document are current, complete, true, and accurate. Submitting a Response with a false statement or material misrepresentations made during the performance of a contract is a material breach of contract and may void the submitted Response and any resulting contract.

## **XXII. Force Majeure**

Neither Awarded Applicant nor Agency shall be liable to the other for any delay in, or failure of performance, of any requirement included in any NOGA resulting from this RFA caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. Force majeure is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three (3) business days of the existence of such force majeure, or otherwise waive this right as a defense.

## **XXIII. Foreign Terrorist Organizations**

Section 2252.152 of the Texas Government Code prohibits the Agency from awarding a contract to any person who does business with Iran, Sudan, or a foreign terrorist organization as defined in Section 2252.151 of the Texas Government Code. Applicant certifies that it not ineligible to receive the contract.



## XXIV. Indemnification

To the extent allowed by law, Awarded Applicant agrees to indemnify, defend and hold harmless the State of Texas, TVC, as well as officers, agents, and employees of TVC from any liability, for any and all claims, demands, fees, suits or actions of any nature whatsoever, including but not limited to personal injury or illness, bodily injury (including death) and property damage occurring in connection with or in any way incident to or arising out of the use, service, operation or performance of work under the terms of the Agreement, except claims, demands, fees, suits or actions arising from any negligence by TVC, its officers, agents, employees, contractor, subcontractors or any negligence of a third party, its (their) officers, agents, employees, contractors, subcontractors. TVC shall give Awarded Applicant written notice of each such claim or suit and full right and opportunity to conduct Awarded Applicant's own defense thereof, together with full information and all reasonable cooperation. Awarded Applicant shall coordinate its defense with the Texas Attorney General as requested by TVC.

Additionally, if Awarded Applicant requires or desires to use any design, trademark, device, material or process covered by letters of patent or copyright, Awarded Applicant shall indemnify, defend and hold harmless, to the extent allowed by law, the State of Texas, TVC, as well as officers, agents, and employees of TVC, from any liability, for any and all claims, demands, fees, suits or actions of any nature whatsoever, from any and all claims for infringement by reason of the use of any such patented design, device, trademark, copyright, material or process in connection with the work agreed to be performed and shall indemnify (to the extent allowed by law) the State of Texas, TVC, as well as officers, agents, and employees of TVC, from any cost, expense, royalty or damage which the State of Texas, TVC, as well as officers, agents, and employees of TVC may be obligated to pay by reason of any infringement at any time during the performance of or after completion of the work. Awarded Applicant represents and warrants that it has determined what licenses, patents, and permits are required under the Agreement and has lawfully acquired all such licenses, patents, and permits.

Notwithstanding any indemnification clause, TVC shall have full authority to conduct its own defense, negotiations, and settlements, but Awarded Applicant's indemnification (to the extent allowed by law) nevertheless remains in full force and effect. Any settlement shall only be reimbursable by Awarded Applicant if Awarded Applicant approves such settlement in advance, and any liability upon unsuccessful defense shall only be reimbursable by Awarded Applicant if Awarded Applicant has full opportunity to participate equally in the defense of the action.

## **XXV. Legal and Regulatory Actions**

Applicant represents and warrants that it is not aware of and has received no notice of any court or governmental agency actions, proceedings or investigations, etc., pending or threatened against Applicant or any of the individuals or entities included in the Response within the five (5) calendar years immediately preceding the submission of the Response that would or could impair Applicant's performance under the Agreement, relate to the solicited or similar goods or services, or otherwise be relevant to Agency's consideration of the Response. If Applicant is unable to make the preceding representation and warranty, then Applicant instead represents and warrants that it has included as a detailed attachment in its Response a complete disclosure of any such court or governmental agency actions, proceedings or investigations, etc. that would or could impair Applicant's performance under the Agreement, relate to the solicited or similar goods or services, or otherwise be relevant to Agency's consideration of the Response.

In addition, Applicant represents and warrants that it shall notify TVC in writing within five (5) business days of any changes to the representations or warranties in this clause and understands that failure to so timely update Agency shall constitute breach of contract and may result in immediate termination of the Agreement.

## **XXVI. Limitation on Authority**

Applicant shall have no authority to act for or on behalf of TVC or the State of Texas except as expressly provided for in the Agreement; no other authority, power or use is granted or implied. Applicant may not incur any debt, obligation, expenses, or liability of any kind on behalf of TVC or the State of Texas.

## **XXVII. Lobbying Prohibition**

Applicant represents and warrants that TVC's payments to Applicant and Applicant's receipt of appropriated or other funds under the Agreement are not prohibited by Sections 556.005 or 556.0055 of the Texas Government Code.

## **XXVIII. No Implied Waiver**

Failure of a Party to require performance by another Party under the Agreement will not affect the right of such Party to require performance in the future. No delay, failure, or waiver of either Party's exercise or partial exercise of any right or remedy under the Agreement shall operate to limit, impair, preclude, cancel, waive or otherwise affect such right or remedy. A waiver by a Party of any breach of any term of the Agreement will not be construed as a waiver of any continuing or successive breach.

## **XXIX. Non–Appropriation of Funds**

The NOGA may be terminated if funds allocated to TVC should become reduced, depleted, or unavailable during the grant period, and to the extent that TVC is unable to obtain additional funds for such purposes. TVC shall negotiate efforts as first consideration and if such efforts fail, then TVC shall immediately provide written notification to the Awarded Applicant of such fact and the NOGA shall be deemed terminated upon receipt of the notification, and neither party shall have any further rights or obligations hereunder. Awarded Applicant shall not incur new obligations after the effective date of termination and shall cancel as many outstanding obligations as reasonably practicable. TVC shall be liable for allowable costs incurred up to the time of such termination.

Under no circumstances shall this RFA or any provisions herein be construed to extend the duties, responsibilities, obligations, or liabilities of the State of Texas or TVC beyond the then existing biennium.

## **XXX. Permits, Certifications and Licenses**

Applicant represents and warrants that it has determined what licenses, certifications and permits are required under the Agreement and has acquired all applicable licenses, certifications, and permits.

## **XXXI. Prompt Payment**

Payment shall be made in accordance with Chapter 2251 of the Texas Government Code, commonly known as the Texas Prompt Payment Act. Chapter 2251 of the Texas Government Code shall govern remittance of payment and remedies for late payment and non-payment.

## **XXXII. Release of Application Information by TVC**

Public Information Act. Awarded Applicant understands and acknowledges that as a Texas state agency, TVC is subject to the provisions of the Texas Public Information Act (“PIA”), Government Code, Chapter 552 as interpreted by judicial opinions and the opinion of the Attorney General of the state of Texas. Awarded Applicant will cooperate with TVC in the production of documents responsive to any such requests under the Public Information Act. TVC will decide whether to submit a Public Information Act request to the Attorney General.

All submitted Applications become the property of TVC after the RFA submission deadline date. Upon acceptance of the Notice of Grant Award, all information submitted with Applicant’s Application becomes public record and all information submitted with Awarded Applicant’s Application becomes part of the Notice of Award. Therefore, such information is subject to disclosure under the Texas Public Information Act, unless an exception under the Texas Public Information Act is applicable.

Any proprietary information included in Applicant’s Application shall be subject to disclosure unless such proprietary information was clearly identified by Applicant, and such identification was submitted concurrently with the original submission of the proprietary information. Additionally, Applicant shall state the specific reason(s) an exception from the Texas Public Information Act is being claimed concurrently with the original submission of the proprietary information. If Awarded Applicant fails to clearly identify proprietary information with the original submission of the proprietary information, then those Sections will be deemed non-proprietary and made available upon receipt of public information request after the Agreement is awarded. The production of any material under the Agreement shall not have the effect of violating or causing TVC to violate any law, including the Texas Public Information Act.

## **XXXIII. Restricted Employment for Certain State Personnel**

Pursuant to Section 572.069 of the Texas Government Code, Applicant certifies that it has not employed and will not employ a former state officer or employee who participated in a procurement or contract negotiations for the Agency involving Applicant within two (2) years after the date that the Agreement is signed, or the procurement is terminated or withdrawn. This certification only applies to former state officers or employees whose state service or employment ceased on or after September 1, 2015.

## **XXXIV. Severability**

If any provision of the Agreement is construed to be illegal or invalid, such construction will not affect the legality or validity of any of its other provisions. The illegal or invalid provision will be deemed severable and stricken from the Agreement as if it had never been incorporated herein, but all other provisions will continue in full force and effect.

## **XXXV. Sovereign Immunity**

The Parties expressly agree that no provision of the Agreement is in any way intended to constitute a waiver by the Agency or the State of Texas of any immunities from suit or from liability that the Agency or the State of Texas may have by operation of law.

## **XXXVI. Architectural and Engineering Contractors**

Pursuant to Section 2254.0031 of the Texas Government Code, which incorporates by reference Section 271.904(d) of the Texas Local Government Code, Respondent shall perform services (1) with professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license, and (2) as expeditiously as is prudent considering the ordinary professional skill and care of a competent engineer or architect.

## **XXXVII. Survival**

Expiration or termination of the Agreement for any reason does not release Applicant from any liability or obligation set forth in the Agreement that is expressly stated to survive any such expiration or termination, that by its nature would be intended to be applicable following any such expiration or termination, or that is necessary to fulfill the essential purpose of the Agreement, including without limitation the provisions regarding warranty, indemnification, confidentiality, and rights and remedies upon termination.

## **XXXVIII. Suspension and Debarment**

Applicant certifies that it and its principals are not suspended or debarred from doing business with the state or federal government as listed on the State of Texas Debarred Vendor List maintained by the Texas Comptroller of Public Accounts and the System for Award Management (SAM) maintained by the General Services Administration.

## **XXXIX. Termination and Enforcement**

Awards may be terminated in whole or in part only if one of the following applies:

By the Agency if a recipient materially fails to comply with the terms and conditions of the award;

By the awarding agency with the consent of the recipient in which case the two parties shall agree on the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated; or

By the recipient upon sending to the awarding agency written notification setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. If the awarding agency determines in the case of partial termination that the reduced or modified grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety.

## **XL. Unfair Business Practices**

Applicant represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Chapter 17 of the Texas Business and Commerce Code, or allegations of any unfair business practice in any administrative hearing or court suit and that Applicant has not been found to be liable for such practices in such proceedings. Applicant certifies that it has no officers who have served as officers of other entities who have been the subject of allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

## **XLI. Waiver of Consequential Damages**

Notwithstanding any other provision to the contrary herein, neither party shall be liable to the other for any indirect, incidental, special or consequential damages or loss of profits, anticipated or otherwise, or loss of revenues in connection with or arising out of, or in connection with, the subject matter of this Agreement.