



DRAFT

Texas Department of Transportation

P.O. DRAWER 15426 • AUSTIN, TEXAS 78761-5426 • (512) 832-7000

November 2, 2009

Travis County
RCSJ: 0700-03-117
CSJ: 0700-03-113
SH 71 W of Arroyo Canyon to W of Southwest Pkwy

Mark Meszaros
Director, Austin Water Utility
P.O. Box 1088
Austin, Texas 78767-1088

Attn: Kathi Flowers, PE

Dear Mr. Meszaros:

Enclosed are two original copies of an Advance Funding Agreement for the above referenced project. As requested by the City, the Agreement is for the construction of the relocations of the water and wastewater facilities within the above Project limits to be included in the State's construction contract.

Please sign, date and return both documents to this office for further execution. An executed Agreement will be returned to you for your records.

The standard date for the amount of the Latest Engineers Estimated cost for construction of the relocations to be due to the State is sixty days prior to the date to receive bids. The tentative date for the State to receive bids is January 5-6, 2010. Since the agreement is not anticipated to go before the City Council prior to the January date to receive bids, the required \$650,000 will be due with the return of the partially executed agreement.

If you have any questions, please contact me at (512) 832-7050. Your assistance is appreciated.

Sincerely,



Patricia L. Crews-Weight, P.E.
Director of Design - AUS

Attachments

cc: Don Nyland, PE
Christine Connor, PE
Chris Hatla
Mike Walker

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 **ORIGINAL**

THE STATE OF TEXAS §
 COUNTY OF TRAVIS §

**ADVANCE FUNDING AGREEMENT FOR VOLUNTARY UTILITY RELOCATION
 CONTRIBUTIONS ON STATE HIGHWAY IMPROVEMENT PROJECTS**

THIS AGREEMENT IS MADE BY AND BETWEEN the State of Texas, acting through the Texas Department of Transportation ("State") and the City of Austin ("Utility"),

WITNESSETH

WHEREAS, Transportation Code, Chapters 201, 221, 227 and 361, authorize the State to lay out, construct, maintain, and operate a system of streets, roads and highways that comprise the State Highway System; and,

WHEREAS, Transportation Code, Chapter 203, Subchapter E, Transportation Code §227.015, Transportation Code, §203.092 authorize the State to regulate the placement of public utility facilities along a state highway; and,

WHEREAS, Texas Transportation Commission Minute Order Number 110685 authorizes the State to undertake and complete a highway improvement generally described as: conversion to a 4-lane divided roadway ("Project"); and,

WHEREAS, Utility possesses facilities that are affected by the abovementioned highway improvement, and Utility and the State agree that it is more economical and/or efficient for such relocation to be effected by including said contract in the State's highway construction contract; and,

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements of the parties hereto, to be by them kept and performed as hereafter set forth, the State and Utility do agree as follows:

AGREEMENT

Article 1. Time Period Covered

This agreement becomes effective when signed by the last party whose signing makes the agreement fully executed, and the State and Utility will consider it to be in full force and effect until the Project described herein has been completed and accepted by all parties or unless terminated, as hereinafter provided.

Article 2. Project Funding and Work Responsibilities

- A. The State will authorize the performance of only those Project items of work which are eligible for relocation reimbursements or for which Utility has requested and has agreed

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to pay for as described in Attachment A - Payment Provision and Work Responsibilities, which is attached to and made a part of this contract.

In addition to identifying those items of work to be paid for by payments to the State, Attachment A - Payment Provision and Work Responsibilities, also specifies those Project items of work that are the responsibility of Utility and will be carried out and completed by Utility, at no cost to the State.

- B. If the Local Government will perform any work under this contract for which reimbursement will be provided by or through the State, the Local Government must complete training before a letter of authority is issued. Training is complete when at least one individual who is working actively and directly on the Project successfully completes and receives a certificate for the course entitled *Local Government Project Procedures Qualification for the Texas Department of Transportation*. The Local Government shall provide the certificate of qualification to the State. The individual who receives the training certificate may be an employee of the Local Government or an employee of a firm that has been contracted by the Local Government to perform oversight of the Project. The State in its discretion may deny reimbursement if the Local Government has not designated a qualified individual to oversee the Project.
- C. Whenever funds from the American Recovery and Reinvestment Act of 2009 (ARRA) are distributed to a Local Government, the Local Government must complete its Schedule of Expenditures of Federal Awards (SEFA) and the Data Collection Form (SF-SAC), as required by OMB Circular A-133, and separately identify any ARRA expenditures for Federal Awards.
- D. Payment under this contract beyond the end of the current fiscal biennium is subject to availability of appropriated funds. If funds are not appropriated, this contract shall be terminated immediately with no liability to either party.

Article 3. Termination

This agreement may be terminated in the following manner:

- ◆ by mutual written agreement and consent of both parties
- ◆ by either party upon the failure of the other party to fulfill the obligations set forth herein
- ◆ by the State if it determines that the performance of the Project or utility work is not in the best interest of the State.

If the agreement is terminated in accordance with the above provisions, Utility will be responsible for the payment of Project costs incurred by the State on behalf of Utility up to the time of termination.

Article 4. Right of Access

If Utility is the owner of any part of the Project site, Utility shall permit the State or its authorized representative access to the site to perform any activities required to execute the work.

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Article 5. Adjustments Outside the Project Site

Utility will provide for all necessary right-of-way and utility adjustments needed for performance of the work on sites not owned or to be acquired by the State.

Article 6. Responsibilities of the Parties and Indemnity

Utility acknowledges that it is not an agent, servant, employee of the State, nor is it engaged in a joint enterprise, and it is responsible for its own acts and deeds and for those of its agents or employees during the performance of the work on the Project.

To the extent permitted by law, Utility agrees to indemnify and hold harmless the State, its agents and employees, from all suits, actions or claims and from all liability and damages for any and all injuries or damages sustained by any person or property in consequence with the performance of design, construction, maintenance or operation of the utility facility. Such indemnity includes but is not limited to any claims or amounts arising or recovered under the "Worker's Compensation Law", the Texas Tort Claims Act, Chapter 101, Texas Civil Practice and Remedies Code; or any other applicable laws or regulations, all as time to time may be amended.

Article 7. Sole Agreement

In the event the terms of the agreement are in conflict with the provisions of any other existing agreements between Utility and the State, the latest agreement shall take precedence over the other agreements in matters related to the Project.

Article 8. Successors and Assigns

The State and Utility each binds itself, its successors, executors, assigns, and administrators to the other party to this agreement and to the successors, executors, assigns, and administrators of such other party in respect to all covenants of this agreement.

Article 9. Amendments

By mutual written consent of the parties, the scope of work and payment provisions of this agreement may be amended prior to its expiration.

Article 10. Inspection and Conduct of Work

Unless otherwise specifically stated in Attachment A - Payment Provision and Work Responsibilities, to this contract, the State will supervise and inspect all work performed hereunder and provide such engineering inspection and testing services as may be required to ensure that the Project is accomplished in accordance with the approved plans and specifications. All correspondence and instructions to the contractor performing the work will be the sole responsibility of the State. Unless otherwise specifically stated in Attachment A to this contract, all work will be performed in accordance with the *Utility Accommodation Rules* as set forth in 43 *Texas Administrative Code* §21.31 et. seq. adopted by the State and incorporated herein by reference, or special specifications approved by the State.

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Article 11. Maintenance

Upon completion of the Project, Utility will assume responsibility for the maintenance of the completed utility facility unless otherwise specified in Attachment A to this agreement.

Article 12. Notices

All notices to either party by the other required under this agreement shall be delivered personally or sent by certified or U.S. mail, postage prepaid or sent by electronic mail, (electronic notice being permitted to the extent permitted by law but only after a separate written consent of the parties), addressed to such party at the following addresses:

Utility:	State:
Director, Austin Water Utility City of Austin P.O. Box 1088 Austin, Texas 78767-1088	Austin District Engineer P.O. Drawer 15426 Austin, Texas 78761-5426

All notices shall be deemed given on the date so delivered or so deposited in the mail, unless otherwise provided herein. Either party may change the above address by sending written notice of the change to the other party. Either party may request in writing that such notices shall be delivered personally or by certified U.S. mail and such request shall be honored and carried out by the other party.

Article 13. State Auditor's Provision

The State Auditor may conduct an audit or investigation of any entity receiving funds from TxDOT directly under the contract or indirectly through a subcontract under the contract. Acceptance of funds directly under the contract or indirectly through a subcontract under this 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. An entity that is the subject of an audit or investigation must provide the State Auditor with access to any information the State Auditor considers relevant to the investigation or audit.

Whenever ARRA, funds are used and the Local Government is performing any work, either directly or through a contractor, it must comply with the following provisions. If a Local Government is receiving ARRA funds, but is not performing any work, the following provisions apply, if appropriate, and to the extent necessary to comply with ARRA regulations.

In accordance with Section 902 of the ARRA, should this agreement involve the expenditure of ARRA funds, then the U.S. Comptroller General and its representatives shall have the authority to:

- a. examine any records of the contractor or any of its subcontractors, or any State or local agency administering such contract, that directly pertain to, and involve transactions relating to the contract or subcontract; and

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- b. interview any officer or employee of the contractor or any of its subcontractors, or any State or local agency administering the contract regarding such contracts.

Nothing in the section previously mentioned shall be interpreted to limit or restrict in any way the existing authority of the Comptroller General.

In accordance with Section 1515(a) of the ARRA, with respect to each contract or grant awarded using covered funds, any representative of an appropriate inspector general appointed under Section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), is authorized:

- a. to examine any records of the contractor or grantee, any of its subcontractors or subgrantees, or any State or local agency administering such contract that pertain to and involve transactions relating to the contract, subcontract, grant, or subgrant; and
- b. to interview any officer or employee of the contractor, grantee or subgrantee, or agency regarding such transactions.

Section 1515(b) further provides that nothing in the section previously mentioned shall be interpreted to limit or restrict in any way the existing authority of an inspector general.

The ARRA requires that the Contractor report monthly employment information for its firm as well as that of all of its subcontractors. The Contractor, similarly, shall include this reporting requirement in all of its subcontracts. Failing to include the requirement in agreements with subcontractors can serve as grounds for contract termination.

Form FHWA-1589, Monthly Employment Report, promulgated by the Federal Highway Administration (FHWA), captures the necessary monthly employment information and shall be submitted by the Contractor on a regular basis to the LG (Local Government). It is the responsibility of the LG to obtain this form from the prime Contractor and any subcontractors and, the LG shall verify the accuracy, completeness, and reasonableness of the data contained in the form. The LG shall ensure that this form is submitted by the LG to the State according to the policies and at the direction of the State.

In order to meet any other FHWA and ARRA reporting requirements, the LG shall provide to the State all information requested by the State, including data or information in possession of contractors and subcontractors for completing other necessary reporting forms, and the information shall be submitted in the manner required and according to all due dates as set by the State.

Furthermore, the ARRA mandates that the U.S. Comptroller General's Office shall have authority to examine the records of the contractor, subcontractor, or local agency relating to the project at any time.

Article 14. Debarment Certifications

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The parties are prohibited from making any award at any tier to any party that is debarred or suspended or otherwise excluded from or ineligible for participation in Federal Assistance Programs under Executive Order 12549, "Debarment and Suspension." By executing this agreement, the [Contractor, Local Government, Engineer, or whatever] certifies that it is not currently debarred, suspended, or otherwise excluded from or ineligible for participation in Federal Assistance Programs under Executive Order 12549. The parties to this contract shall require any party to a subcontract or purchase order awarded under this contract to certify its eligibility to receive Federal funds and, when requested by the State, to furnish a copy of the certification.

Article 15. Signatory Warranty

The signatories to this agreement warrant that each has the authority to enter into this agreement on behalf of the party they represent.

IN WITNESS WHEREOF, THE STATE AND THE UTILITY have executed duplicate counterparts to effectuate this agreement.

THE STATE OF TEXAS

Executed for the Executive Director and approved for the Texas Transportation Commission for the purpose and effect of activating and/or carrying out the orders, established policies or work programs heretofore approved and authorized by the Texas Transportation Commission.

By _____ Date _____
 District Engineer

FOR UTILITY

Name _____

By _____ Date _____

Typed or Printed Name and Title _____

Attest:

By _____ Date _____

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**ATTACHMENT A
Payment Provision
and Work Responsibilities**

Description of the Work Items

The parties agree that the existing water and wastewater facilities shall be relocated and adjustments shall be made along SH 71 from west of Arroyo Canyon Drive to west of Southwest Parkway. The water and wastewater facilities shall be owned, operated, and maintained by Utility from and after completion and final acceptance by the State and Utility. The estimated total construction cost for the relocated and adjusted facilities is \$650,000. The parties agree that it is their intent to complete the relocation improvements within this estimate of cost.

Actual Cost Agreement

Utility will be responsible for paying all costs associated with the planning, specification, and estimate (PS&E) development, and construction of the proposed utility work to the extent such is not reimbursed pursuant to state law. All the costs associated with construction of the water and wastewater items for the Project shall be provided as defined under the Standard Utility Agreement, Utility Joint Use Agreement, and/or the Agreement to Contribute Funds executed between the State and Utility, which are attached to and made a part of this contract.

Schedule of Payments

At least forty five (45) days prior to the date set for receipt of the construction bids, the Utility shall remit its remaining financial share for the State's estimated construction oversight and construction costs. Utility must advance to the State one hundred percent (100%) of its share of the estimated Project utility construction costs. The amount to be advanced for the utility improvements is estimated to be \$ 650,000. (See Attachment B – Estimated Utility Costs)

In the event the State determines that additional funding is required by the Utility at any time during the Project, the State will notify the Utility in writing. The Utility is responsible for 100% of the authorized project cost and any overruns. The Utility will make payment to the State within thirty (30) days from receipt of the State's written notification.

Whenever funds are paid by the Utility to the State under this agreement, the Utility will remit a warrant made payable to the "Texas Department of Transportation Trust Fund." The warrant will be deposited by the State in an escrow account to be managed by the State. Until the final project accounting, funds in the escrow account may only be applied by the State to the Project.

Upon completion of the Project, the State will perform an audit of the Project costs. Any funds due by the Utility, the State, or the Federal Government will be promptly paid by the owing party.

Work Responsibilities

The **Utility** shall provide the following services under this contract:

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- Responsible for engaging the services of a Texas Registered Professional Engineer to prepare drawings and technical specifications for waterline relocations and adjustments along SH 71 west of Arroyo Canyon Drive to west of Southwest Parkway.

Utility will provide the plans and specifications to the State to include in the current planning specifications and estimate package being prepared by representatives of TxDOT's Central Design Office.

- Secure all necessary permitting as may be required for the installation of the water and wastewater line.
- Arrange and coordinate with the contractor, through the State, materials and equipment testing, rejection of all work not conforming to minimum requirements of the construction contract documents, maintenance of the proposed relocation of water and wastewater during construction, and the relocation of water and wastewater and connection of services to customers.
- Advise the State of work that Utility determines should be corrected or rejected.
- Arrange, observe, and inspect all acceptance testing and notify the State of the results of these activities.
- Provide inspection services for the construction, notify the State of defects and deficiencies in the work, and observe actions of the contractor to correct such defects and deficiencies.
- Assume all responsibility for the maintenance of the existing water and wastewater during and upon completion of the construction contract.
- Ensure all Texas Commission on Environmental Quality (TCEQ) and all other regulatory rules, regulations and laws are strictly adhered to.
- Prepare and submit both a certificate of substantial completion and a list of observed items requiring completion or correction for the relocations and adjustments to the Project Engineer for his concurrence.
- Utility agrees that all construction activities performed by Utility's staff for the relocations and adjustments will be coordinated through the Project Engineer.

The **State** shall provide the following services under this contract:

- Combine the Utility's water and wastewater relocation and adjustment plans with the plans being prepared for the Project.
- Review and approve the final construction plans prior to any construction-related activities. In order to ensure federal and/or state funding eligibility, projects must be authorized by the State prior to advertising for construction.
- Advertise for construction bids, issue bid proposals, receive and tabulate the bids and award and administer the contract for construction of the Project.
- Negotiate and administer all field changes and change orders required for the Project. All change orders increasing construction costs for Utility's Project shall be submitted to Utility for review and approval together with an evaluation. Utility agrees to review and either approve or disapprove all change orders within five (5) business days after receipt of such order unless

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Utility Board's approval is necessary in which case Utility shall bring the item to Utility Board as soon as reasonably possible.

- Provide overall project management to supervise the day-to-day activities of the construction and monitor the activities of the contractor to promote the timely and efficient completion of the Project in accordance with the approved Plans and Specifications and construction schedule.
- Conduct field observations and coordinate with Utility's inspectors and the contractor to cure defects and deficiencies in the construction prior to final acceptance.
- Make timely payment to the contractor for work performed in connection with the Project.
- Ensure access and permit Utility's inspectors and other authorized representatives to inspect the waterline construction at all times.
- Conduct and coordinate final inspection of the Project in the presence of Utility's Engineer and Inspector, transmit final list of items to be completed or repaired and observe contractor correction of same.
- Maintain job file.