

PROFESSIONAL SERVICES AGREEMENT FOR GEOTECHNICAL ENGINEERING SERVICES TO BE PERFORMED BY TERRACON CONSULTANTS, INC.

This Agreement is made and entered into by and between the **WILLIS INDEPENDENT SCHOOL DISTRICT** ("District"), an Independent School District and political subdivision of the State of Texas and **TERRACON CONSULTANTS, INC.**, by and through its designated officer(s), pursuant to its by-laws, or via a resolution of its Board of Trustees ("**Consultant**"), both of which may be referred to herein collectively as the "Parties," to provide Geotechnical Engineering Services (the "**Project**") related to the following school facility (the "**Facility**"):

Willis Independent School District – Transportation Center
17980 TX – 75
Willis, Texas 77378

IN CONSIDERATION of the mutual covenants, terms, conditions, privileges, and obligations herein contained, District and Consultant do hereby agree as follows:

I. PERIOD OF SERVICE

1.1 This Agreement shall take effect upon execution by both Parties and continue in full force and effect for the period required for completion of the duties as set forth in the Scope of Services. Performance for the Project identified above shall commence upon issuance of a Notice to Proceed by the District's Representative and shall terminate upon substantial completion of Consultant's duties as set forth in the Scope of Services and upon written acceptance by the District of the work product or services rendered, unless extension or earlier termination shall occur pursuant to any of the provisions hereof.

1.2 Consultant shall not commence work or incur any billable expenses on the Project until establishment of the Scope of Services and the issuance of a Notice to Proceed for that Project.

1.3 If funding the Project is not appropriated at the time this Agreement is entered into, District retains the right to terminate this Agreement at the expiration of each of the District's budget periods, and any subsequent contract period is subject to and contingent upon such appropriation.

1.4 The Owner is the Board of Trustees of the Willis Independent School District and is referred to throughout this Agreement as if singular in number. The Owner may designate in writing one or more persons to represent the Owner; however, such representatives shall have the authority to bind the Owner only to the extent expressly authorized by the Owner and shall have no implied authority.

1.5 The District Representative(s) shall be as follows:

Dr. Kimberley James
Superintendent of Schools
612 N. Cambell St.
Willis, TX 77378
Phone: (936) 856-1200

II. SCOPE OF SERVICES

2.1 Consultant, in consideration for the compensation herein provided, shall render geotechnical engineering services in connection with the above-referenced Project related to the Facility. The Consultant's work will consist of the services, assumptions, and schedule as identified on the document attached as **Exhibit A** and incorporated herein by reference for all purposes. To the extent Exhibit A attached herein changes, modifies, or contradicts any term or condition included in this Agreement or the Construction Drawings, Project Manual or Specifications, such provisions shall be deemed to have no effect and will be void *ab initio*.

III. COORDINATION WITH THE DISTRICT

3.1 Consultant shall hold periodic conferences with District's representative, so that the Project, as developed, will have the full benefit of District's experience and knowledge of existing needs and facilities (including Facility) and be consistent with the District's current policies and standards. No more than two conferences shall be required, unless otherwise agreed to by Parties. The District shall make available, for Consultant's use, all existing plans, maps, field notes, statistics, computations, and other data in its possession relative to existing facilities, the Facility, and to this Project as may be requested by Consultant at no cost to Consultant, but does not warrant the accuracy of such documents.

3.2 The District's representative shall act on behalf of District with respect to the work performed under this Agreement and shall have complete authority to transmit instructions, receive information, and interpret and define District's policies and decisions with respect to materials, equipment elements and systems pertinent to Consultant's services.

3.3 The District shall provide written notice to the Consultant of any errors or omissions discovered in the Consultant's services, or performance, or of any development that affects the scope or timing of Consultant's services.

3.4 Consultant shall complete all applications and furnish all required data compiled by Consultant for District's use in obtaining any permits or approvals from governmental authorities having jurisdiction over the Project, as may be necessary for completion of the Project. Consultant shall not be obligated to develop additional data, prepare extensive reports, or appear at hearings in order to obtain said permits or approvals, unless compensated therefore as provided in Article IV, COMPENSATION.

IV. COMPENSATION

4.1 For and in consideration of the services to be rendered by Consultant, District shall pay Consultant a fee not to exceed that set forth in this Article IV, COMPENSATION. Nothing contained in this Agreement shall require District to pay for any work that is not in compliance with the terms of this Agreement. The District shall not be required to make any payments to Consultant at any time Consultant is in default under this Agreement.

4.2 The lump sum fee for Consultant's basic services as defined in the Scope of Services shall be the sum of **SEVENTEEN THOUSAND DOLLARS AND 00/100 DOLLARS (\$17,000.00)** ("Base Fee"). Consultant may submit invoices monthly for work performed and completed which has not been included on previous invoices. Payments shall be made to the Consultant in accordance with the progress of the Project and, pursuant to Section 2251.021(b) of the Texas Government Code, the District shall pay undisputed amounts set forth in an invoice on or before the later of (a) forty-five (45) days after the date on which Consultant performed the invoiced service; or (b) forty-five (45) days after the date on which the District receives the relevant invoice from Consultant

4.3 All additional services shall be paid based upon a written proposal for such services approved by the District Representative, or the Board of Trustees if required, and agreed to by Consultant, prior to the performance of such services. Consultant may be required to perform the additional services in connection with this Agreement including, but not limited to, the following:

4.3.1 Acting as an expert witness in any litigation with third parties, arising in connection with the Project as it relates to the Facility, including the preparation of engineering data and reports and providing testimony as necessary.

4.3.2 Services after the completion of the construction phase, such as inspections during any guarantee period and reporting observed discrepancies under guarantee called for in any contract for the Project or Facility.

4.3.3 Additional copies of reports, drawings, and specifications over the number specified in this Agreement.

4.4 Consultant may be required to perform the additional services in connection with the Requirements Work Order. Compensation for such additional services shall be subject to prior approval

of the District and approval of the Board of Trustees if additional funds, not provided for, in the initial budget are required to cover such services. Should Consultant be directed in writing by District's representative to perform these services, compensation shall be paid by District to Consultant as authorized in writing by District's representative. Amount of compensation shall be subject to negotiation.

V. OWNERSHIP AND RETENTION OF DOCUMENTS AND ACCESS TO LAB RESULTS

5.1 Upon completion or termination of the Project, or upon request by the District, subject to receipt by Consultant of payment due and owing for Consultant's services satisfactorily performed or furnished in the preparation of the documents and information, all documents and information, in whatever form, given to, prepared or assembled by the Consultant in connection with its performance of its duties under this Agreement shall become the sole property of the District and shall be delivered at no cost to the District. Documents and information covered by this paragraph shall include, but not be limited to, reports, test results, field notes and other data. The District shall have access to all such information at all times during the term of this Agreement with the right to make and retain copies documents, notes and data, whether or not the Project has been completed. Prior to surrender of the documents and information, Consultant may make copies of any and all documents for its files, at its sole cost and expense. Notwithstanding the forgoing, Consultant shall not be liable for any unauthorized changes, combination, or reuse of submittals, data, reports, and other documents by District, Submittal data, reports, and other documents produced by Consultant are not intended for use or extensions of Consultant's work, services, or other project. Any such modification without written verification or adaption by Consultant will be at District's sole risk

5.2 At any time during the Project, upon reasonable notice and during normal business hours, the District shall have the right to unrestrained direct access laboratories and testing facilities used by Consultant for work performed by Consultant under this Agreement; and the District shall have the unrestricted right to obtain original or duplicate copies of reports and testing results directly from the lab or testing facility used by Consultant.

5.3 The Consultant agrees to maintain all books, records and reports required under this contract for a period of not less than five (5) years after final payment is made and all pending matters are closed. In addition, the Consultant shall maintain an acceptable cost accounting system during the term of this Agreement. The Consultant agrees to provide the District, or any of their duly authorized representatives, access to any books, documents, papers and records of the Contractor which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcriptions.

5.4 Consultant shall notify District, promptly, in the even Consultant receives any requests for information from a third party, which pertain to the documentation and records referenced herein. Consultant understands and agrees that District will process and handle all such requests.

VI. TERMINATION OF AGREEMENT

6.1 Termination Without Cause.

6.1.1 This Agreement may be terminated by District without cause, prior to District's representative giving Consultant written Notice to Proceed, should District's representative, in its sole discretion, determine that it is not in District's best interest to proceed with this Agreement. Such notice shall be provided in accordance with the notice provisions contained in this Agreement and shall be effective immediately upon delivery to the Consultant.

6.1.2 This Agreement may be terminated by the District at any time after issuance of the District's representative's Notice to Proceed, either for the District's convenience or because of Consultant's failure to fulfill the contract obligations. Upon receipt of such notice, services shall be immediately discontinued (unless the notice directs otherwise) and all materials as may have been accumulated in performing this Agreement, to the extent Consultant has been compensated for such materials, whether completed or in progress, shall be delivered to the District.

6.1.3 If the termination is for the convenience of the District, and following inspection and acceptance of Consultant's services properly performed prior to the effective date of termination an

equitable adjustment in the contract price shall be made. Consultant shall not, however, be entitled to lost or anticipated profit on unperformed services, should District choose to exercise its option to terminate, nor shall Consultant be entitled to compensation for any unnecessary or unapproved work performed during time between the issuance of the District's notice of termination and the actual termination date.

6.1.4 If the termination is due to Consultant's failure to fulfill its obligations, the District may take over the work and prosecute the same to completion by contract or otherwise. In such case, the Consultant shall be liable to the District for any actual and direct cost occasioned to the District thereby.

6.1.5 If, after notice of termination for failure to fulfill contract obligations, it is determined that the Consultant had not so failed, the termination shall be deemed to have been effectuated for the convenience of the District. In such event, an equitable adjustment in the contract price shall be made as provided in paragraph 6.1.3 of this clause.

6.1.6 The rights and remedies of the District provided in this clause are in addition to any other rights and remedies provided by law or under this Agreement.

6.1.7 This Agreement may be terminated by the Consultant, at any time after issuance of the District's representative's Notice to Proceed, upon ninety (90) calendar days written notice provided in accordance with the Notice provisions contained in this Agreement.

6.2 Defaults with Opportunity for Cure. Should Consultant fail, as reasonably determined by the District's representative, to satisfactorily perform the duties set out in Article II, SCOPE OF SERVICES; or comply with any covenant herein required, such failure shall be considered an Event of Default. In such event, the District shall deliver written notice of said default(s), in accordance with the notice provisions contained in this Agreement, specifying the specific Event(s) of Default and the action necessary to cure such default(s). Consultant shall have ten (10) calendar days after receipt of the written notice to cure such default(s). If Consultant fails to cure the default(s) within such cure period, or take steps reasonably calculated to cure such default(s), District shall have the right, without further notice, to terminate this Agreement in whole or in part as District deems appropriate, and to contract with another Consultant to complete the work required by this Agreement. District shall also have the right to offset the actual and direct cost of said new agreement with a new consultant against Consultant's future or unpaid invoice(s), subject to any statutory or legal duty, if any, on the part of District to mitigate its losses.

6.3 Termination for Cause. Upon the occurrence of one (1) or more of the following events, and following written notice to Consultant given in accordance with the notice provisions contained in this Agreement, District may immediately terminate this Contract, in whole or in part, "for cause":

6.3.1 Consultant makes, through its employees or representatives, any material misrepresentation or provides any materially misleading information to District in connection with this Agreement or its performance hereunder; or

6.3.2 Consultant violates or materially fails to perform any covenant, provision, obligation, term, or condition of a material nature contained in this Agreement, except those events of default for which an opportunity to cure is provided herein; or

6.3.3 Consultant fails to cure, or initiate steps reasonably calculated to cure, a default as required by this Agreement, within the time period required for cure; or

6.3.4 Consultant violates any rule, regulation, or law to which Consultant is bound or shall be bound under the terms of this Agreement; or

6.3.5 Consultant attempts the sale, transfer, pledge, conveyance, or assignment of this Agreement contrary to the terms of this Agreement.

6.3.6 Consultant ceases to do business as a going concern; makes an assignment for the benefit of creditors; admits in writing its inability to pay debts as they become due; files a petition in bankruptcy or has an involuntary bankruptcy petition filed against it (except in connection with a reorganization under which the business of such party is continued and performance of all its obligations

under this Contract shall continue) and such petition is not dismissed within forty-five (45) days of filing; or if a receiver, trustee or liquidator is appointed for it, or its joint venture entity, or any substantial part of Consultant's assets or properties.

6.4 Termination by Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.

6.5 Orderly Transfer Following Termination. Regardless of how this Agreement is terminated, Consultant shall effectuate an orderly transfer to District or to such person(s) or firm(s) as the District may designate, at no additional cost to District. Upon the effective date of expiration or termination of this Agreement, Consultant shall cease all operations of work being performed by Consultant, or any of its subcontractors, pursuant to this Agreement upon receipt of all undisputed payments. All completed or partially completed documents, papers, records, charts, reports, and any other materials or information produced, or provided to Consultant, in connection with the services rendered by Consultant under this Agreement, regardless of storage medium, shall be transferred to District. Such record transfer shall be completed within thirty (30) calendar days of the termination date and shall be completed at Consultant's sole cost and expense. Notwithstanding the foregoing, the Consultant may retain a copy of the documents, papers, records, charts, reports, and any other materials or information provided to Consultant to comply with its data or compliance policies, and such documents, papers, records, charts, reports, and any other materials or information provided to consultant shall remain subject to the terms of this Agreement. Notwithstanding anything contained herein to the contrary, Consultant shall not be required to take any action to delete or erase documents, papers, records, charts, reports, and any other materials or information provided to Consultant from any disaster recovery tapes or back-up media of any record retention or computer storage system so long as Consultant take actions that are reasonably likely to prevent access on a permanent basis to such materials.

6.6 Claims for Outstanding Fees. Within one hundred eighty (180) calendar days of the effective date of completion, or termination, or expiration of this Agreement, Consultant shall submit to District its claims, in detail, for the monies owed by District for services performed under this Agreement through the effective date of completion, termination, or expiration. **Failure by Consultant to submit its claims within one hundred eighty (180) calendar days shall negate any liability on the part of District and constitute a waiver by Consultant of any and all right or claims to collect moneys that Consultant may rightfully be otherwise entitled to for services performed pursuant to this Agreement.**

6.7 Termination Not Sole Remedy. In no event shall District's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of District's remedies, nor shall such termination limit, in any way, at law or at equity, District's right to seek damages from or otherwise pursue Consultant for any default hereunder or other action.

VII. SUSPENSION OF WORK UNDER AGREEMENT

7.1 Right of District to Suspend. District may suspend this Agreement for any reason, with or without cause, upon the issuance of written Notice of Suspension in accordance with the Notice provisions contained in this Agreement. Such suspension shall take effect upon the date specified in such notice; provided, however, such date shall not be earlier than the tenth (10th) day following receipt by Consultant of said notice. The Notice of Suspension will set out the reason(s) for the suspension and the anticipated duration of the suspension but will in no way guarantee the total number of days of suspension.

7.2 Consultant's Right to Terminate in Event of Suspension of Agreement. In the event such suspension exceeds one hundred and twenty (120) calendar days, Consultant shall have the right to terminate this Agreement. Consultant may exercise this right to terminate by issuing a written Notice of Termination to the District, delivered in accordance with the Notice provisions contained in this Agreement after the expiration of one hundred and twenty (120) calendar days from the effective date of the suspension. Termination pursuant to this paragraph shall become effective immediately upon receipt of said written notice by District and such termination shall be subject to all the requirements set out in Paragraphs 6.5 and 6.6 above, related to the Orderly Transfer and Fee Payment.

7.3 Procedures Upon Receipt of Notice of Suspension.

7.3.1 Upon receipt of a notice of suspension and prior to the effective date of the suspension, Consultant shall, unless otherwise directed, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement.

7.3.2 Consultant shall prepare a statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

7.3.3 Copies of all completed or partially completed studies, plans, and other documents prepared under this Agreement, prior to the effective date of suspension, shall be prepared for possible delivery to the District but shall be retained by Consultant until such time as Consultant may exercise the right to terminate.

7.3.4 During the period of Suspension, Consultant shall have the option to at any time submit the above-referenced statement to the District for payment of any unpaid portion of the prescribed fee for services which have actually been performed to the benefit of the District under this Agreement, adjusted for any previous payments of the fee in question.

7.3.5 In the event Consultant exercises its right to terminate this Agreement at any time after the effective Suspension date, Consultant shall provide District with Consultant's notice of termination. Additionally, Consultant shall submit, within one hundred eighty (180) calendar days from providing its notice of termination, a statement showing in detail the services performed under this Agreement prior to the effective date of suspension. Failure by Consultant to submit its statement of claims within one hundred eighty (180) calendar days shall negate any liability on the part of District and constitute a waiver by Consultant of any and all right or claims to collect moneys that Consultant may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

7.3.6 Upon the above conditions being met, the District's review of the submissions and finding the claimed compensation to be appropriate to the terms of this Agreement, the District shall pay Consultant that portion of the agreed prescribed fee for those as yet uncompensated services actually performed under this Agreement to the benefit of the District, adjusted for any previous payments of the fee in question.

VIII. INSURANCE REQUIREMENTS

8.1 Prior to the commencement of any work under this Agreement, Consultant shall furnish an original completed Certificate of Insurance to District's representative, which shall be clearly labeled with the Project name and which shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon, containing all required information referenced or indicated thereon. District shall have no duty to pay or perform under this Agreement until such certificate shall have been delivered to District's representative, and no officer or employee shall have authority to waive this requirement.

8.2 The District reserves the right to review the insurance requirements of this Article during the effective period of this Contract and to modify insurance coverage and limits when deemed necessary and prudent by the District based upon changes in statutory law, court decisions, or circumstances surrounding this Contract, but in no instance will the District allow modification whereupon the District may incur increased risk. To the extent a modification is required, Consultant agrees to cooperate with the District to effectuate such modification. Additionally, to the extent such modification results in an increase of cost, the District will bear such increase.

8.3 Consultant's financial integrity is of interest to District, therefore, subject to Consultant's right to maintain reasonable deductibles in such amounts as are approved by District, Consultant shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Consultant's sole expense, insurance coverage written on an occurrence basis, except for professional liability, by companies licensed, authorized, approved, or admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to District, in the following types and amounts:

Workers' Compensation:
(Including Waiver of Subrogation Endorsement)

All liability arising out of Consultant's employment of workers and anyone for whom Consultant shall be liable for Worker's Compensation claims. Worker's Compensation is required and no "alternative" form of insurance shall be permitted.

Employer's Liability:

\$1,000,000.00

Commercial General Liability:

Occurrence

\$1,000,000.00

Aggregate

\$2,000,000.00

Personal Injury

\$1,000,000.00 each person

Automobile Liability:

\$1,000,000 combined single limit

Professional Liability:

\$1,000,000 per claim to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any negligent act, malpractice, error or omission in professional services. If written on a claims made basis, Consultant shall provide coverage for an additional 25 months after the completion date of the contract.

8.4 The General Liability and Automobile issued in the name of Consultant shall also name the District as an additional insured. The coverage afforded to the additional insured under the policy or policies shall be primary insurance. It is the intent of the parties to this Agreement that the General Liability coverage required herein shall be primary to and shall seek no contribution from all insurance available to District, with District's insurance being excess, secondary, and non-contributing. The Commercial General Liability coverage provided by Consultant shall be endorsed to provide such primary and non-contributing liability. If the additional insured has other insurance which is applicable to the loss, such other insurance shall be on an excess or contingent basis.

8.5 Workers' compensation and employers' liability policy will provide a waiver of subrogation in favor of District.

8.6 The District shall be entitled, upon request and without expense, to receive all endorsements thereto as they apply to the limits required by the District. Other than the provisions/requirements, related to insurance, which are set forth herein, the District and may not require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Consultant shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to District at the address provided in this Agreement for Notice within ten (10) days of the requested change. Unless required to comply with the initial provisions/requirements related to insurance as they are set forth herein, Consultant shall not be required to pay any costs incurred as a result of said changes.

8.7 When there is a cancellation, non-renewal, or material change in coverage which is not made pursuant to a request by District, Consultant shall notify District of such and shall give such notices not less than thirty (30) days prior to the change, if Consultant knows of said change in advance, or ten (10) days notice after the change, if the Consultant did not know of the change in advance. In the event of cancellation or non-renewal, such notice must be accompanied by a replacement Certificate of Insurance. All notices under this Article shall be given to District at the address provided in the Notice section of this Contract.

8.8 If Consultant fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, after Consultant's reasonable opportunity to cure, District may obtain

such insurance, and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement; however, procuring of said insurance by District is an alternative to other remedies District may have, and is not the exclusive remedy for failure of Consultant to maintain said insurance or secure such endorsement. In addition to any other remedies District may have upon Consultant's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, District shall have the right to order Consultant to stop work hereunder, and/or withhold any payment(s) which become due to Consultant hereunder until Consultant demonstrates compliance with the requirements hereof. A stop work order given to Consultant by District in accordance with this Article shall not constitute a Suspension of Work under this Agreement.

8.9 It is agreed that Consultant's insurance shall be deemed primary with respect to any insurance or self insurance carried by District for liability arising out of operations under this Agreement.

8.10 Nothing herein contained shall be construed as limiting in any way the extent to which Consultant may be held responsible for payments of damages to persons or property resulting from Consultant's or its subcontractors' performance of the work covered under this Agreement.

IX. INDEMNIFICATION

9.1 Consultant (for purposes of this Section referred to as Licensed Engineer) whose work product is the subject of this contract for engineering services and other related professional services, agrees to **INDEMNIFY AND HOLD DISTRICT, ITS OFFICERS AND EMPLOYEES, HARMLESS** against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought to the extent caused by the **LICENSED ENGINEER'S NEGLIGENT ACT, ERROR, OR OMISSION OF LICENSED ENGINEER, ANY AGENT, OFFICER, REPRESENTATIVE, EMPLOYEE, CONSULTANT, OR SUBCONSULTANT OF LICENSED ENGINEER** while in the exercise of performance of the rights or duties under this Agreement.

9.2 The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of District, its trustees, officers, or employees, in instances where such negligence causes personal injury, death, or property damage. **IN THE EVENT LICENSED ENGINEER AND DISTRICT ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE DISTRICT UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

9.3 Consultant shall promptly advise the District, in writing, of any claim or demand against the District or Licensed Engineer known to Licensed Engineer related to or arising out of Licensed Engineer activities under this Agreement.

9.4 The provisions of this section are solely for the benefit of the Agreement Parties and not intended to create or grant any rights, contractual or other wise, to any other person or entity.

X. LIABILITY AND STANDARD OF CARE

10.1 Services provided by Consultant under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. Acceptance of reports or other documents by District shall not constitute nor be deemed a release of the responsibility and liability of Consultant, its employees, associates, agents or subcontractors for the accuracy and competency of their testing, reports, assessments or other documents and work; nor shall such acceptance be deemed an assumption of responsibility or liability by District for any defect or error in testing, reports, or assessments and work performed by Consultant, its employees, subcontractors, and agents.

XI. CONSULTANT'S WARRANTY UNDER THE PROFESSIONAL SERVICES PROCUREMENT ACT

11.1 Consultant warrants that it has not employed or retained any company or person other than a bona fide employee working solely for Consultant to solicit or secure this Agreement, and that it has not, for the purpose of soliciting or securing this Agreement, paid, compensated, or agreed to pay or compensate, any company or person, other than a bona fide employee working solely for Consultant, any fee, commission, percentage, brokerage fee, gift, for any other consideration contingent upon or resulting from the award or making of this Agreement. For breach of the foregoing warranty, the District shall have the right to terminate the Agreement under the provisions of this Agreement. However, breach of the warranty required in this provision constitutes fraud by operation of law; therefore, any Consultant found in breach of such warranty, by a final judgment of a Court of Competent Jurisdiction, shall take no compensation under this Agreement for any services rendered and such forfeiture shall not bar the District from pursuit and collection of any and all other damages, at law and in equity, to which it may be justly entitled. This Agreement is entered into under competency requirements of the Texas Professional Services Procurement Act governing District employment of engineering and other professionals. Accordingly, Consultant further pledges and warrants it shall perform all services with the same degree of skill and care as other professionals in the same field under similar circumstances to secure to the District the benefits of the agreement.

XII. ASSIGNMENT OF RIGHTS OR DUTIES

12.1 By entering into this Agreement, District has approved the use of subcontractors, if any, identified in Consultant's Proposal. No further approval shall be needed for Consultant to use such subcontractors to the extent they are identified in Consultant's Proposal.

12.2 Except as otherwise required herein, Consultant may not sell, assign, pledge, transfer, or convey any interest in this Agreement nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the prior written consent of District which shall not be unreasonably withheld. Engineering services required by law to be performed by a licensed engineer, or services which, by law, require the supervision and approval of a licensed engineer, may only be subcontracted upon the prior written approval of the District. Any other services to be performed under this Agreement may be subcontracted upon the written approval of District's representative. As a condition of consent, if same is given, Consultant shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor consultant, assignee, transferee, or subcontractor. Any references in this Agreement to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by District in accordance with this Article.

12.3 Any attempt to assign, transfer, pledge, convey, or otherwise dispose of any part of, or all of its right, title, interest or duties to or under this Agreement, without said written approval, shall be void, and shall confer no rights upon any third person. Should Consultant assign, transfer, convey, or otherwise dispose of any part of, or all of its right, title, or interest or duties to or under this Agreement, District may, at its option, terminate this Agreement as provided herein, and all rights, titles and interest of Consultant shall thereupon cease and terminate, notwithstanding any other remedy available to District under this Agreement. The violation of this provision by Consultant shall in no event release Consultant from any obligation under the terms of this Agreement, nor shall it relieve or release Consultant from the payment of any damages to District, which District sustains as a result of such violation.

12.4 Consultant agrees to notify District's representative of any changes in ownership interest greater than thirty percent (30%) or control of its business entity not less than sixty (60) days in advance of the effective date of such change. Notwithstanding any other remedies that are available to District under this Agreement, any such change of ownership interest or control of its business entity may be grounds for termination of this Agreement in accordance with Article VI, TERMINATION.

XIII. INDEPENDENT CONTRACTOR

13.1 Consultant covenants and agrees that it is an independent contractor and not an officer, agent, servant, or employee of District; that Consultant shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be

responsible for the acts and omissions of its officers, agents, employees, contractors, and subcontractors; that the doctrine of *respondeat superior* shall not apply as between District and Consultant, its officers, agents, employees, contractors, and subcontractors, and nothing herein shall be construed as creating a partnership or joint enterprise between District and Consultant.

XIV. NOTICES

14.1 Unless otherwise expressly provided elsewhere in this Agreement, any election, notice, or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or on receipt after mailing the same by certified mail, return receipt request with proper postage prepaid, or three (3) days after mailing the same by first class U.S. mail, postage prepaid (in accordance with the "Mailbox Rule"), or when sent by a national commercial courier service such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier.

If intended for District, to:

Willis Independent School District
Attn: Dr. Kimberley James,
Superintendent of Schools
612 N. Campbell St.
Willis, TX 77378

If intended for Consultant, to:

Terracon Consultants, Inc.
Attn: Rebecca C. Rice, P.E.
Geotechnical Services Manager
11133 I-45 South, Building T
Conroe, TX 77302
Rebecca.rice@terracon.com

XV. WORK ON SCHOOL DISTRICT PREMISES

15.1 To the extent that the Work may be performed in connection with an educational facility which is currently occupied and in use, it is imperative that Consultant's operations and the performance of the Work not interfere with, interrupt, disturb, or disrupt District's normal operations or facilities. Consultant agrees to and shall comply with all rules, regulations, and requirements of the District and the school campus on which the Work is to be performed. The Consultant shall take all steps necessary to protect and guard the safety of the employees, students, and invitees of District. Consultant shall exercise professional skill and judgment to ensure that testing activities will not interfere with the use, occupancy, and quiet enjoyment of facilities in use on the site. Consultant recognizes that the ongoing District activities in proximity with its activities shall result in the need for prompt and effective coordination of its services with those involved in the ongoing utilization of the premises. Such coordination and adequate site access shall be the responsibility of Consultant. Consultant understands and accepts the difficulties, the cost associated with working in an existing facility, and the potential delays and disruptions in its work related to the Project. Consultant has considered such constraints in the negotiation of this Agreement.

15.2 Consultant shall be responsible for the actions of Consultant's agents, employees, and all sub-consultants working under it. The Consultant agrees that if the site of a Project is a public-school campus, it shall prohibit the possession or use of alcohol, controlled substances, tobacco, and any prohibited weapons on the site and shall require adequate dress of the Consultant's forces consistent with the nature of the work being performed. Sexual harassment of employees of the Consultant or employees or students of the District by employees of the Consultant is strictly forbidden. Any employee of the Consultant who is found to have engaged in such conduct shall be subject to appropriate disciplinary action by the Consultant, including removal from the job site.

15.3 **Criminal History Records Checks**

15.3.1 For purposes of this Section 15.3 (and all subsections), the following definitions shall be applicable:

.1 "Continuing Duties" shall mean work duties that are performed pursuant to a contract on a regular, repeated basis rather than infrequently or one-time only.

.2 "Covered Employees", shall mean, all employees of Consultant, as well as employees of Consultant's subcontractors, consultants, or independent contractors (of every tier), who will have

Continuing Duties related to the services contracted for herein and the Opportunity For Direct Contact With Students in connection with the subject employee's Continuing Duties.

.3 "Disqualifying Criminal History" means: a conviction within the last 30 years, related to one or more of the following offenses, if at the time of the offense, the victim was under 18 years of age or enrolled in a public school: (1) a felony offense under Texas Penal Code Title 5 Offenses Against Persons (homicide; kidnapping, unlawful restraint, smuggling of persons, trafficking of persons, sexual offenses; and assault offenses); (2) an offense for which a defendant is required to register as a sex offender under Texas Code of Criminal Procedure Chapter 62; or (3) an equivalent offense under federal law or the laws of another state. Consultant shall assume all expenses associated with obtaining criminal history record information, providing the certification, and performing Consultant's responsibilities as set out herein.

.4 "Opportunity for Direct Contact with Students" is contact that results from activities that provide a substantial opportunity for verbal or physical interaction with students, and that is not supervised by a certified educator or other professional school district employee. An employee is not considered to have an Opportunity For Direct Contact With Students if: (1) the employee's work does not involve the construction alteration or repair of an Instructional Facility; (2) the employee's work involves construction of a new Instructional Facility and the person's duties related to the contacted services will be completed not later than the seventh day before the first date the facility will be used for instructional purposes; or (3) if the employee's work involves an existing Instructional Facility; and:

a. the Project site area (to include that of the Facility) contains sanitary facilities and is separated from all areas used by students, by a secure barrier fence that is not less than six feet in height; and

b. the Consultant has adopted a written policy applicable to its employees, as well as employees of its subcontractors (of any tier) and its independent contractors and consultants, which prohibits these parties from interacting with students or entering areas used by students, informs these parties of the policy, and enforces the policy on the Project site (to include the site of the Facility) and at any other areas where the Work of this Agreement will be conducted.

c. the Consultant has sought and received written approval by the District of the adopted policy (including its enforcement provisions) and Consultant's means of informing the relevant parties of the existence of the policy.

d. Consultant certifies that, if it has taken the above precautions or imposed conditions to ensure that the Consultant's employees and employees of any of its subcontractors, independent contractors, or consultants, will not become Covered Employees, then Consultant will make reasonable efforts to ensure that these precautions or conditions continue throughout the time the contracted services are provided.

.5 "Instructional Facility" is defined as real property or improvements to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required under Texas Education Code § 28.002; Texas Education Code § 22.08341(a)(2); and Texas Education Code § 46.01.

15.3.2 Unless otherwise exempt from providing such information by any provision in Texas Education Code, Section 22.08341 (the "Statute"), the Consultant agrees, that prior to commencement of work under this Agreement, using the form promulgated by the District or such other form approved by the District, Consultant will arrange with the District to obtain any national criminal history record information ("CHRI") required pursuant to Texas Education Code, Section 22.08341 (the "Statute") on all of Consultant's employees, independent contractors, agents, or Subcontractors, Consultant's Subcontractors of every tier ("Subcontractors"), Subcontractors' employees, independent contractors, agents, or sub-subcontractors, if any of these persons is a "Covered Employee" as defined by the Statute (i.e., the person has or will have continuing duties related to the contracted for services, and said person has or will have the opportunity for direct contact with students in connection with those continuing duties and shall reimburse the District for the costs and expenses associated with obtaining the criminal history information). For purposes of this Section 15.3, a person does not have the opportunity for direct contact with students if:

.1 the public work does not involve the construction, alteration, or repair of an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required by the Texas Education Code ("Instructional Facility);

.2 for a public work that involves construction of a new Instructional Facility, the person's duties related to the contracted services will be completed not later than the seventh (7th) day before the first date the facility will be used for instructional purposes; or

.3 for a public work that involves an existing Instructional Facility:

a. the public work area contains sanitary facilities and is separated from all areas used by students by a secure barrier fence that is not less than six feet in height; and

b. the Consultant adopts a policy prohibiting employees, including subcontractor entity employees, from interacting with students or entering areas used by students, informs employees of the policy, and enforces the policy at the public work area.

15.3.3 Any Covered Employee that has during the preceding thirty (30) years, been convicted of one of the following offenses, if at the time of the offense the victim was under eighteen (18) or enrolled in a public school: (a) a felony offense under Title 5, Texas Penal Code; (b) an offense for which a defendant is required to register as a sex offender under Chapter 62, Texas Code of Criminal Procedure; or (c) an equivalent offense to (a) or (b) under federal law or the laws of another state ("Disqualifying Criminal History") shall be disqualified and prohibited from performing any contract duties or services and neither the Consultant nor its Subcontractor may permit such person to provide services at an instructional facility. If a Covered Employee is determined by the District's review of the CHRI to have a Disqualifying Criminal History, Contractor will exclude that person from assignment to the Project. Consultant understands that it will not have access to the results of such criminal history records check, based on statewide regulations beyond the control of the District, and agrees to rely solely on the judgment of the District as to whether the Covered Employee must be excluded from the Project.

15.3.4 Prior to commencement of its work on the Project, the Consultant will provide written certification to the District that either: (1) Consultant and its Subcontractors of every tier, do not have any Covered Employees, as defined; (2) are otherwise exempt from compliance with the Statute; or (3) has complied with the statutory and contractual requirements stated in this Section of the Agreement as of that date, and that it:

.1 has requested a Criminal History Records Check through the District on all Covered Employees, if any, of every tier, has provided the required information to the District to do so and reimbursed the District for same;

.2 has obtained written certification from its independent contractors, and Subconsultants (of any tier) that they have provided the required information to the Consultant, necessary to secure the information from the District and reimbursed the Consultant for same; and

.3 have excluded any Covered Employee reported by the District to have a Disqualifying Criminal History from assignment to the Project.

Further, Consultant agrees that if it receives information that a Covered Employee is arrested or convicted for any of the Disqualifying Criminal History offenses, during the performance of the Work, Consultant will immediately remove the Covered Employee from District's property or other location where students are regularly present and notify the District of said removal within three (3) days of doing so. Consultant understands that any failure to comply with the requirements of this section may be grounds for termination of this Agreement, in accordance with Article VI, Termination.

XVI. CONTRACT CONSTRUCTION

16.1 All Parties have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this Agreement.

XVII. FAMILIARITY WITH LAW AND CONTRACT TERMS

17.1 Consultant represents that, prior to signing this Agreement; Consultant has become thoroughly acquainted with all matters relating to the performance of this Agreement, all applicable laws, and all of the terms and conditions of this Agreement.

XVIII. APPLICABLE LAW AND VENUE

18.1 This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas.

18.2 The obligations of the parties to this Agreement shall be performable in Montgomery County, Texas, and if legal action, such as civil litigation, is necessary in connection therewith, exclusive venue shall lie in the County where the District's administrative offices are located.

XIX. SEVERABILITY

19.1 In the event any one or more paragraphs or portions of this Agreement are held invalid or unenforceable, such shall not affect, impair, or invalidate the remaining portions of this Agreement, but such shall be confined to the specific section, sentences, clauses, or other portions of this Agreement held invalid or unenforceable.

XX. FORCE MAJEURE

20.1 In the event that performance by either party of any of its' obligations or undertakings hereunder shall be interrupted or delayed by any occurrence and not occasioned by the conduct of either party hereto, whether such occurrence be an act of God or the common enemy or the result of war, riot, civil commotion, sovereign conduct, or the act or conduct of any person or persons not party or privy hereto, then such party shall be excused from performance for a period of time as is reasonably necessary after such occurrence to remedy the effects thereof, and each party shall bear the cost of any expense it may incur due to the occurrence.

XXI. SUCCESSORS

21.1 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and, except as otherwise provided in this Agreement, their assigns.

XXII. NON-WAIVER OF PERFORMANCE

22.1 A waiver by either Party of a breach of any of the terms, conditions, covenants, or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant, or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification, or discharge by either Party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

22.2 No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

XXIII. PARAGRAPH HEADINGS

23.1 The headings of this Agreement are for the convenience of reference only and shall not affect in any manner any of the terms and conditions hereof.

XXIV. LEGAL AUTHORITY

24.1 The signer of this Agreement for District and Consultant each represents, warrants, assures, and guarantees that she or he has full legal authority to execute this Agreement on behalf of District and Consultant respectively and to bind District and Consultant to all of the terms, conditions, provisions, and obligations herein contained.

XXV. CERTIFICATIONS

25.1 Pursuant to Texas Government Code Chapter 2270, the Consultant represents and warrants that it is not a foreign terrorist organization as identified on the list prepared and maintained by the Texas Comptroller of Public Accounts. If Consultant has misrepresented its inclusion on the Comptroller's list such omission or misrepresentation will void this Agreement.

25.2 By signing this Agreement, the undersigned certifies as follows: Under Section 231.006 of the Texas Family Code, to the extent applicable to this Agreement, the Consultant certifies that the individual or business entity named in this Agreement is not ineligible to receive the specified payments and acknowledges that this Agreement may be terminated and payment withheld in this certification is inaccurate.

XXVI. ENTIRE AGREEMENT

26.1 This Agreement, together with its Attachments embodies the complete Agreement of the Parties hereto, superseding all oral or written previous and contemporary agreements between the Parties relating to matters herein, and, except as otherwise provided herein, cannot be modified without written consent of the parties.

26.2 It is understood and agreed by the Parties that changes in local, state or federal rules, regulations, or laws applicable hereto may occur during the term of this Agreement, and that any such changes shall be automatically incorporated into this Agreement without written amendment hereto and shall become a part hereof as of the effective date of the rule, regulation or law.

XXVII. SUPPLEMENTAL TERMS AND CONDITIONS

27.1 **Testing and Observations.** District understands that testing and observation are discrete sampling procedures, and that such procedures indicate conditions only at the depths, locations, and times the procedures were performed. Consultant will provide test results and opinions based on tests and field observations only for the work tested. District understands that testing and observation are not continuous or exhaustive and are conducted to reduce—not eliminate—Project risk. District shall cause all tests and inspections of the site, materials, and services performed by Consultant to be timely and properly scheduled in order for the Services to be performed in accordance with plans, specifications, contract documents, and Consultant's recommendations. No claims for loss or damage or injury shall be brought against Consultant by District or any third party unless all tests and inspections have been so performed and Consultant's recommendations have been followed. Consultant shall not be responsible for the quality and completeness of District's contractor's work or their adherence to the Project documents, and Consultant's performance of testing and observation services shall not relieve District's contractor in any way from its responsibility for defects discovered in its work or create a warranty or guarantee. Consultant will not supervise or direct the work performed by District's contractor or its subcontractors and is not responsible for their means and methods. The extension of unit prices with quantities to establish a total estimated cost does not guarantee a maximum cost to complete the Services. The quantities, when given, are estimates based on contract documents and schedules made available at the time of the Proposal. Since schedule, performance, production, and charges are directed and/or controlled by others, any quantity extensions must be considered as estimated and not a guarantee of maximum cost.

27.2 **Warranty.** **EXCEPT FOR THE STANDARD OF CARE PREVIOUSLY STATED, CONSULTANT MAKES NO WARRANTIES OR GUARANTEES, EXPRESS OR IMPLIED, RELATING TO**

CONSULTANT'S SERVICES AND CONSULTANT DISCLAIMS ANY IMPLIED WARRANTIES OR WARRANTIES IMPOSED BY LAW, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.


27.3 **Site Access and Safety.** District shall secure all necessary site related approvals, permits, licenses, and consents necessary to commence and complete the Services and will execute any necessary site access agreement. Consultant will be responsible for supervision and site safety measures for its own employees but shall not be responsible for the supervision or health and safety precautions for any third parties, including District's contractors, subcontractors, or other parties present at the site.

27.4 **Subsurface Explorations.** Subsurface conditions throughout the site may vary from those depicted on logs of discrete borings, test pits, or other exploratory services. District understands Consultant's layout of boring and test locations is approximate and that Consultant may deviate a reasonable distance from those locations. Consultant will take reasonable precautions to reduce damage to the site when performing services; however, District accepts that invasive services such as drilling or sampling may damage or alter the site. Site restoration is not provided unless specifically included in the Services.

27.5 **Utilities.** District shall provide the location and/or arrange for the marking of private utilities and subterranean structures. Consultant shall take reasonable precautions to avoid damage or injury to subterranean structures or utilities. Consultant shall not be responsible for damage to subterranean structures or utilities that are not called to Consultant's attention, are not correctly marked, including by a utility locate service, or are incorrectly shown on the plans furnished to Consultant.

[Signature Page to Follow]

WILLIS INDEPENDENT SCHOOL DISTRICT

By: 
Dr. Kimberley James, Superintendent of Schools

Date: 4.17.25

TERRACON CONSULTING, INC.

By: 
Rebecca C. Rice, P.E.
Geotechnical Services Manager

Date: 4/16/2025

Texas Firm Registration No. F-3272

WILLIS INDEPENDENT SCHOOL DISTRICT

By: _____
Dr. Kimberley James, Superintendent of Schools

Date: _____

TERRACON CONSULTING, INC.

By: _____
Rebecca C. Rice, P.E.
Geotechnical Services Manager

Date: _____

Texas Firm Registration No. F-3272