FIBER NETWORK COORDINATION AGREEMENT

by and between

CITY OF BROWNSVILLE, TEXAS

and

BROWNSVILLE PUBLIC UTILITIES BOARD

and

LIT TEXAS, LLC

and its affiliate

BTX FIBER, LLC

Dated as of July 20, 2022
This FIBER NETWORK COORDINATION AGREEMENT ("Agreement") is entered into as July 20, 2022 ("Effective Date") by and between the City of Brownsville, Texas (individually, the City or the "Public Owner"), the Brownsville Public Utility Board (individually, "BPUB"), and which joins this Agreement for the limited purpose of acknowledging Section 3 herein, and Lit Texas, LLC, a Delaware limited liability company (individually, "Lit"), including its affiliate BTX Fiber, LLC, a Delaware limited liability company ("BTX") (collectively "Lit/BTX"), each a "party" or collectively the "parties".

WHEREAS, The Coronavirus State and Local Fiscal Recovery Funds ("SLFRF") may be used to make necessary investments in broadband infrastructure, which has been shown to be critical for work, education, healthcare, and civic participation during the public health emergency; and

WHEREAS, the United States Treasury Department in its Final Rule for use of the SLFRF encouraged entities such as the City to prioritize broadband investments in projects that are designed to serve locations without access to reliable wireline 100/20 Mbps broadband service (meaning service that reliably provides 100 Mbps download speed and 20 Mbps upload speed through a wireline connection), but also made clear that the City and others are permitted to invest in projects designed to provide service to locations with an identified need for additional broadband investment; and

WHEREAS, the City currently lacks sufficient connectivity, with nearly sixty-seven (67%) percent of Brownsville, Texas, the City’s households lacking access to cable, DSL, or fiber broadband, and being consistently ranked as one of the least connected cities in the State of Texas; and

WHEREAS, the Parties in deploying broadband as outlined in this Agreement will ensure that SLFRF funds are not used for costs that would otherwise be reimbursed by other federal or state funding streams and will ensure that the network will be designed to deliver no less than reliable service of at least 100/20 Mbps to address the identified need for additional broadband investment documented by the research outlined above; and

WHEREAS, all Parties agree that any service provided to a household over the fiber network that is built pursuant to this Agreement will participate in the FCC’s Affordable Connectivity Program ("ACP") or provide access to a broad-based affordability program to low-income consumers that provides benefits commensurate to ACP Recipients; and

WHEREAS, BPUB is a municipally owned electric utility; and

WHEREAS, the City is a home-rule municipality; and
WHEREAS, neither the City nor BPUB will provide telecommunications services, pursuant to the Texas Utilities Code; and

WHEREAS, in accordance with Texas Utilities Code, Section 54.202, BPUB is not offering, nor shall it offer, for sale to the public, pursuant to this or any other agreement, either directly or indirectly through a telecommunications provider: (1) a service for which a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority is required; or (2) a nonswitched telecommunications service used to connect a customer's premises with: (A) another customer's premises within the exchange; or (B) a long distance provider that serves the exchange; and

WHEREAS, any conflict between a provision of this or any related agreement and the prior two recitals shall yield to, and be harmonized to the greatest extent possible with, such prior two recitals; and

WHEREAS, in accordance with Texas Utilities Code, Section 54.2025, a municipality is not prevented from leasing any of the excess capacity of its fiber optic cable facilities (dark fiber), so long as the rental of the fiber facilities is done on a nondiscriminatory, non-preferential basis; an

WHEREAS, the City, desiring to bridge the digital divide, issued a Request for Qualifications and Information (“RFQ/I”) seeking interest from public and private entities to participate with the City to create a fiber infrastructure network to serve residential, businesses, community anchor institutions, and backhaul wireless or other smart city services; and

WHEREAS, Lit/BTX was selected as a result of the competitive RFQ/I process; and

WHEREAS, BPUB, an agency of the City, currently manages and controls the city’s water, wastewater, and electricity infrastructure networks, and in cooperation with the City will issue to the City one or more use and access agreements as distinguished from a private easement to facilitate a city-owned middle mile fiber network; and

WHEREAS, City and Lit have agreed to work together to ensure the construction of a quality, open access, Fiber Middle Mile Network (“FMMN”) throughout the entire city and its underserved areas utilizing the City’s property acquired through its Public Use Easement and Right of Way Agreement, including but not limited to installing fiber connections and end-customer equipment installed along various community anchor institutions and points of interconnection throughout the network footprint; and

WHEREAS, upon approval and acceptance by the City, Lit will transfer title/ownership of the physical FMMN to City upon completion of the construction and installation, including all fiber optic cabling, coaxial cabling, supplies, tools, inventory and other assets related to the construction of the FMMN; and

WHEREAS, Lit/BTX, in coordination with the City, shall create a project plan and design the last mile fiber network, including but not limited to providing technical specifications of expected base station(s) and customer premise equipment. (The last mile fiber network refers to the portion of
the network that transmits services to the end users (or Fiber to the Premise “FTTP” Network)); and

WHEREAS, the City requires certain up-front and annual maintenance fees for access to the City’s right of way, which access is necessary for construction and operation of the FTTP Network, in the form of a right-of-way use agreement (“Right of Way Agreement”) and access to the in the form of an indefeasible right-of-use agreement (“IRU”); and

WHEREAS, in lieu of certain Right of Way Agreement and IRU fees, Lit/BTX (direct or through a subcontractor) shall provide: (i) operations and maintenance services to the FMMN, (ii) a project plan and design for the FTTP Network that includes capacity for at least three (3) Service providers, (iii) in-kind services to certain City buildings that will be specified and mutually agreed by the City and Lit/BTX, (iv) affordable services to FTTP customers as defined in ARPA, and (v) FTTP connection to priority locations identified in the Middle Mile Network Priority List; and

WHEREAS, the project plan and design for the FTTP Network shall allow for a minimum of three (3) service providers, one of which shall be Lit/BTX; and

WHEREAS, the parties agree that the remaining two (2) FTTP partners that will be connected to the FMMN shall be determined by lottery under the terms set forth herein; and

WHEREAS, nothing in this Agreement shall prevent other internet service providers or wireless providers from accessing City or BPUB right of way under Texas Local Government Code Chapters 283, 284 or similar regulatory framework; and

WHEREAS, this Agreement reflects the terms and conditions agreed upon by the Public Owner and Lit/BTX with respect to the construction of the FMMN through a “Build and Transfer” model and the design and implementation of the FTTP Network, collectively referred to as the broadband network.

NOW THEREFORE, in consideration of the promises and the mutual representations, warranties, covenants and undertakings contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the City, BPUB, Lit and BTX agree as follows:

Section 1. Incorporation of Recitals: The recitals listed above are incorporated into this Agreement as findings of fact as if expressly set forth herein.

Section 2. This Agreement consists of this written agreement and the following items which are attached hereto and incorporated herein by reference:

(a) Right of Way and Encroachment Agreement (Appendix A);

(b) Engineer, Procurement and Construction Contract Between Lit and the City of Brownsville (Appendix B);

(c) List of Middle Mile Network Priority List, Mapping Images, and July 2022 Price Sheet (Appendix C);
These documents make up the Agreement Documents and what is called for by one shall be as binding as if called by all. In the event of an inconsistency or conflict in any of the provisions of the Agreement documents, the inconsistency or conflict shall be resolved by giving precedence first to this written agreement, then to the Agreement documents in the order in which they are listed above. These documents shall be referred to collectively as “Agreement Documents.”

Section 3. Public Use Easement and Right of Way: To the extent allowed by law, BPUB agrees to cooperate with City in providing access and use of BPUB-owned real property for the purpose of constructing the City’s Fiber Middle Mile Network as described in Appendix A. Such use and access agreements may include temporary access agreements such as rights of entry, temporary access agreements, and temporary construction easements. In addition, BPUB agrees to cooperate in the issuance of Pole Attachment Agreements, Encroachment Agreements, and/or License Agreements providing for long term use and access of BPUB-owned property for operation and maintenance of the City’s FMMN.

Section 4. Engineer, Procurement, and Construction Agreement for Fiber Middle Mile Network (FMMN):

A. Lit shall engineer, procure, and construct all necessary fiber, equipment, and inventory for the FMMN as further described and agreed upon by the City and Lit in the Engineer, Procurement and Construction Agreement, Appendix B.

B. The City of Brownsville has been appropriated federal funds through the American Rescue Plan Act (ARPA) for the purposes of building the FMMN and FTTP Networks in Brownsville, Texas.

C. Notwithstanding any other provisions in this Agreement, the total financial obligation of the City for the FMMN project shall not exceed Nineteen Million Five Hundred Thousand Dollars ($19.5 Million) (the “Guaranteed Maximum Price” or “GMP”) which shall also include the cost of funding the City’s Project Manager. The City shall have no further financial obligation for the FMMN (Middle Mile) project. All other costs related to the FMMN (Middle Mile) project will be the responsibility of Lit and not the City. Lit will assume any and all financial risks specifically related to the FMMN (Middle Mile) in excess of the GMP and as otherwise allowed in the Engineer, Procurement and Construction Agreement, Appendix B, attached hereto; provided, however, that any assets acquired, developed or otherwise constructed with funds in excess of the GMP shall be owned by Lit for all purposes and shall not be owned by the City. Should Lit own and possess assets acquired, developed, or otherwise constructed with its own funds in excess of the GMP (the “Additional Assets”), then the City shall maintain a Right of First Offer (the “Additional ROFO”) and purchase option to purchase such assets as provided further in Appendix B, Engineer, Procurement and Construction Agreement, specifically Section 5.2.

D. Lit shall use the City’s funds and construct the FMMN project in accordance with the provisions of this Agreement, compliance regulations imposed by ARPA (including but not limited
to compliance with 2 CFR Sec. 200 and prevailing wage laws), and the Engineer, Procurement and Construction Agreement, Appendix B.

E. All costs incurred by Lit before the Effective Date and before the approval of the City of the release of City funds are incurred voluntarily, at Lit’s risk and upon its own credit and expense.

F. Upon completion and satisfaction of conditions set forth in the Engineer, Procurement and Construction Agreement, Lit shall convey, transfer, assign and deliver to the City title and ownership to the FMMN, including but not limited to all fiber optic cabling, coaxial cabling, supplies, tools, and inventory related to the construction of the FMMN.

Section 5. Disbursement of City Funds for Construction of FMMN:

A. After the Effective Date, the City will disburse City funds, subject to receipt of ARPA funds by the City, to Lit on a reimbursement basis as the project progresses. Lit shall submit a detailed request for payment. Request for payment should be made allowing at minimum thirty (30) calendar days to receive funds. The request for payment shall not exceed the eligible costs incurred and approved by the City.

B. If, upon completion of the FMMN project, there are cost savings and or undistributed funds, Lit shall return any remaining City funds to the City and relinquish any claims to undistributed funds.

C. The City has the right to withhold disbursement of funds if at any time the City determines, in its sole discretion, that Lit is not performing or completing the project in a manner satisfactory to the City. The City shall have the right at any time to request that Lit provide additional supporting documentation with any request for payment.

D. Unless otherwise specified by the City, if Lit does not complete the FMMN by the dates referenced in the Engineer, Procurement and Construction Agreement, then the City may withhold further payments. Lit may request a meeting with the City to discuss any unforeseeable events that led to the inability to complete the FMMN within the prescribed deadlines.

Section 6. Project Plan and Design for the FTTP Network:

A. Lit/BTX, shall construct with design-build mindset, and in concert with public and private partners, to include, without limitation, the other Parties hereto, in middle mile efforts, to facilitate to the maximum practical and economic extent possible concurrent middle mile with last mile, FTTP activities, including but not limited to providing technical specifications of expected base station(s) and customer premise equipment.

B. Lit/BTX will further support project agility and grant applications toward additional funding opportunities within the design and construction of middle and last mile of the network, including but not limited to providing updates and reports to a City designated centralized project manager and attend and provide requested status and related updates to recurring project meetings.
C. Lit/BTX shall construct and design the FTTP Network in accordance with the priorities and described in Appendix C, attached hereto, *List of Middle Mile Network Priority List, Mapping Images, and July 2022 Price Sheet.*

D. The City shall undertake a design review and validation of Lit/BTX’s initial design of the FTTP Network in the form of a permit application to the city submitted by Lit/BTX or Lit/BTX’s contractor prior to the commencement of construction and at any time when the design is substantially modified. The City’s review will be expeditious and is intended to enable the City to verify for state and city stakeholders that the proposed network meets the terms herein, in addition to compliance with any other City code requirements. The City will not unreasonably delay approval of the network design; provided, however, the Parties agree that the review periods of such permit application, for approval, approval with conditions or denial, shall be completed within a reasonable time as allowed by law or city ordinance; provided, however, the City will use commercially reasonable efforts to expedite review to the extent possible. The City retains the right to utilize an independent consultant to assess the design review and validation. City’s independent review does not relieve Lit/BTX of any responsibility for accuracy of dimensions and details, or from compliance with all City code requirements. Nor shall such review act as a waiver of defects subsequently discovered in those documents or in work performed by Lit/BTX, or Lit/BTX’s contractor, in reliance on those documents.

**Section 7. Dark Fiber Exclusivity:** The City shall reserve two (2) fiber strands on the FMMN for the use of BTX Fiber, LLC. The City may allow additional fiber use or increased bandwidth use as long as the remaining capacity is sufficient for the City’s needs as determined by the City at the City’s sole discretion, including sufficient capacity to provide nondiscriminatory use of the FMMN to other providers; provided, however, any increase of bandwidth or increase fiber usage above four (4) fibers will require review of, and potential increase to, Port Connection Fee payments due to the City from BTX Fiber, LLC. The City agrees and acknowledges that BTX Fiber, LLC shall not be required to pay a Port Connection Fee higher than any other similar provider accessing the FMMN.

A. In exchange for (i) entering an operations and maintenance services agreement for the FMMN during the course of construction of the Middle Mile Network only, (ii) creating a project plan and construction of the FTTP Network, (iii) free access and Services to certain City buildings, (iv) affordable services to FTTP customers as defined in ARPA, and (v) FTTP connection to priority locations identified in the FTTP Network Priority List; BTX shall serve as one of the three (3) authorized FTTP partners connected to the FMMN under the terms and conditions of this Agreement.

Upon completion and satisfaction of conditions set forth in the Engineer, Procurement and Construction Agreement, Lit shall convey, transfer, assign and deliver to the City title and ownership to the FMMN, including but not limited to all fiber optic cabling, coaxial cabling, supplies, tools, and inventory related to the construction of the FMMN.

B. **Selection of FTTP providers:** Twelve (12) months following the conveyance and transfer of the FMMN to the City as required under Section 4 (F), the City shall engage a third-party auditor
to conduct a FTTP Provider Lottery in order to select the remaining two (2) FTTP partners authorized to connect to the City’s FMMN. In preparation for the Lottery, the Auditor, as directed by the City, will post technical requirements for the proposed lottery applicants, receive proposals, and vet each proposal for compliance with all posted requirements. Those proposals identified by the Auditor as having fully complied with the posted technical requirements will be entered to participate in the FTTP Provider Lottery conducted by the Auditor. Only two proposals will be selected to serve as FTTP providers authorized to connect to the City’s FMMN.

C. Selected FTTP providers shall enter into a franchise agreement or other right-of-way occupancy agreement. The terms of any future franchise agreement are consistent with the terms of this Agreement and permit the selected FTTP providers to engage in all construction activities contemplated in providing last mile fiber service subject to permitting and other regulatory costs and requirements. Notwithstanding anything in such franchise agreements to the contrary, the selected FTTP providers shall have access at all times to the City’s FMMN for the purposes of installing, maintaining, and troubleshooting the providers’ services and equipment and for splicing purposes, and, to the extent necessary, the City will allow providers’ personnel and agents reasonable direct ingress and egress to City property at such times as may be required to install, test, and repair the FMMN and/or the providers’ own network assets as part of the Right of Way Agreement as applicable.

Section 8. Middle Mile Connection Agreement and Grant of Indefeasible Rights of Use:

A. In exchange for the City granting Lit/BTX access to and use of the City’s FMMN under the terms memorialized in this Agreement and the “Middle Mile Connection Agreement and Grant of Indefeasible Rights of Use,” further described in Appendix D, Lit/BTX shall operate and maintain the City’s FMMN under terms to later be memorialized in a separate “Operation and Maintenance and Middle Mile Connection Agreement”.

B. The City shall undertake a design review and validation of Lit’s initial design in the form of a permit application to the city submitted by Lit or Lit’s contractor prior to the commencement of construction and at any time when the design is substantially modified. The City’s review will be expeditious and is intended to enable the City to verify for state and city stakeholders that the proposed network meets the terms herein, in addition to compliance with any other City code requirements. The City will not unreasonably delay approval of the network design; provided, however, the Parties agree that the maximum time allowed by law for such review of a permit application shall be deemed a reasonable time for approval, approval with conditions or denial; provided, however, the City will use commercially reasonable efforts to expedite review to the extent possible. The City retains the right to utilize an independent consultant to assess the design review and validation.

C. The City reserves the right to require proof of compliance with any and all ARPA requirements, including but not limited to:

1) documentation showing average, minimum and maximum upload and download speeds on the FTTP network;
2) documentation that rates charged for Services on the FTTP Network comply with ARPA and this Agreement; and

3) the City may request an audit by a third-party of any ARPA compliance requirement at the City’s expense following seven (7) days advance written notice to BTX Fiber, LLC.

Section 9. Notices:

A. Notices to City. All notices given to City in writing pursuant to this Agreement shall be delivered to the City at the address below, which may be changed by notice given as provided in this Agreement:

   CITY OF BROWNSVILLE
   Attention: Noel Bernal, City Manager
   1001 East Elizabeth Street (2nd Floor)
   Brownsville, Texas 78522
   Email: noel.bernal@brownsvilletx.gov
       Copy to:
       Victor A. Flores, City Attorney
       1001 East Elizabeth Street (2nd Floor)
       Brownsville, Texas 78522
       Email: victor.flores@brownsvilletx.gov

Non-electronic notices and communications to the City shall be considered effective when received by City via certified mail, or by any national commercial courier service that provides evidence of receipt, as indicated by the applicable record of receipt. Electronic communications to the City shall be considered effective when received into the City’s email system.

B. Notices to BPUB. All notices given to BPUB in writing pursuant to this Agreement shall be delivered to BPUB at the address below, which may be changed by notice given as provided in this Agreement:

   BROWNSVILLE PUBLIC UTILITY BOARD
   Attention: John Bruciak, P.E., CEO/ General Manager
   1425 Robinhood Drive
   Brownsville, Texas 78521
   Email: jbruciak@brownsville-pub.com
       Copy to:
       Davidson Troilo Ream & Garza PC
       Attention: John W. Davidson
       601 NW Loop 410, Suite 100
       San Antonio, Texas 78216
       Email: jdavidson@dtrglaw.com

Non-electronic notices and communications to BPUB shall be considered effective when received by BPUB via certified mail, or by any national commercial courier service that provides evidence
of receipt, as indicted by the applicable record of receipt. Electronic communications to BPUB shall be considered effective when received into BPUB’s email system.

C. Notices to Lit. All notices given to Lit in writing pursuant to this Agreement shall be delivered to Lit at the address below, which may be changed by notice given as provided in this Agreement:

**LIT TEXAS, LLC**
3500 Blue Lake Drive, Suite 225
Birmingham, Alabama 35243
brian@litcommunities.net

Copy to:
Maynard, Cooper & Gale, PC
Attention: David R. Kinman, Esq.
1901 Sixth Avenue North, Suite 1700
Birmingham, Alabama 35203
Email: dkinman@maynardcooper.com

Non-electronic notices and communications to Lit shall be considered effective when received by Lit via certified mail, or by any national commercial courier service that provides evidence of receipt, as indicted by the applicable record of receipt. Electronic communications to Lit shall be considered effective when received into Lit’s email system.

D. Notices to BTX. All notices given to BTX in writing pursuant to this Agreement shall be delivered to BTX at the address below, which may be changed by notice given as provided in this Agreement:

**BTX FIBER, LLC**
Brian Snider, CEO
c/o Lit Communities Broadband, Inc.
3500 Blue Lake Drive, Suite 225
Birmingham, Alabama 35243

Copy to:
Maynard, Cooper & Gale, PC
Attention: David R. Kinman, Esq.
1901 Sixth Avenue North, Suite 1700
Birmingham, Alabama 35203
Email: dkinman@maynardcooper.com

Non-electronic notices and communications to BTX shall be considered effective when received by BTX via certified mail, or by any national commercial courier service that provides evidence of receipt, as indicted by the applicable record of receipt. Electronic communications to BTX shall be considered effective when received into BTX’s email system.
Section 10. Confidentiality

A. "Confidential Information" means information concerning a Party’s (or its Affiliates’) products, plans, methods, processes, business opportunities, vendors, customers, finances, personnel and other information related to the business of such Party that is marked Confidential pursuant to Section 10.C hereof; provided, however, that information marked as Confidential which is provided under the TPIA (as defined in Section 10.D., below) to be public information required to be released shall not be Confidential Information under the terms of this Agreement. “Confidential Information” does not include any information which: (a) the receiving Party rightfully knew before the disclosing Party disclosed it to the receiving Party; (b) has become publicly known through no wrongful act of the receiving Party; or (c) the receiving Party developed independently and without the use of any Confidential Information, as evidenced by appropriate documentation.

B. Nondisclosure. All Confidential Information remains the property of the disclosing Party, and no license or other right in any Confidential Information is granted hereby. The receiving Party shall not disclose any Confidential Information to any third party or otherwise unless such third party is contractually bound or is otherwise bound to keep such Confidential Information confidential, and shall take all reasonable precautions to prevent its unauthorized dissemination, during the pendency of this Agreement. The receiving Party shall limit its internal distribution of Confidential Information to its employees, representatives, and agents who have a need to know, and shall take steps to ensure that dissemination is so limited. The receiving Party shall not use any Confidential Information for its own benefit or for the benefit of anyone other than the disclosing Party. Upon disclosing Party’s written request, the receiving Party shall return to the disclosing Party all Confidential Information in the receiving Party’s custody or control, to the extent allowed by law. All information disclosing Party provides is provided “AS IS” and without any warranty, express, implied or otherwise, regarding its accuracy or performance.

C. Confidential or Proprietary Records Must be Marked. If any party provides records that it considers confidential or proprietary, then it is that party’s responsibility to mark all applicable pages of said record(s) as “Confidential” or “Proprietary.” If the party fails to so mark record(s), then that respective party expressly waives its right to allege any kind of civil action or claim pertaining to the release of said record(s).

D. Public Disclosure. This Agreement and documents provided to the parties hereunder are deemed public records subject to disclosure under the Texas Government Code, Chapter 552 (“Texas Public Information Act” or “TPIA”). Thus, the City may be required, upon request, to disclose this Agreement and documents related to it unless an exemption under the TPIA or other laws applies.

Section 11. Assignment, Severability, Survivability, Successors and Assigns, Counterparts:

A. Assignment. No Party may assign any rights or obligations under this Agreement without the other Parties’ prior written consent not to be unreasonably withheld. The engagement of any subcontractor that is in accordance with Section 17 below shall not constitute an assignment.
B. **Severability.** If any provision of this Agreement is illegal or unenforceable, the Agreement's all other provisions will remain in effect.

C. **Survivability.** The terms and conditions of this Agreement regarding confidential information, indemnification, warranties, payment and all others that are stated to survive the expiration or termination of this Agreement will survive such expiration and termination and continue in effect.

D. **Successors and Assigns.** This Agreement shall inure to the benefit of and be binding on the Parties and their respective successors and any permitted assigns.

**Section 12. Conflicts:** If documents referred to in this Agreement conflict with one another (such as conflicting contract expiration dates), they will prevail in the following order: any terms specified in an Appendix, attached hereto, shall be given effect over the terms of the Agreement as of the effective date of an Appendix.

**Section 13. Delay Does Not Constitute Waiver:** No failure or delay of the City to exercise any right, power or remedy consequent upon default by Lit, and/or BTX shall constitute a waiver of any such term, condition, covenant, certification or agreement of any such default or preclude the City from exercising any right, power or remedy at any later time or times.

**Section 14. Technical Assistance:** If the project(s) is not being completed or performed in a manner satisfactory to the City, Lit, and/or BTX has violated a provision of this Agreement, prior to the City declaring a default, the City may (but is not required) to request that Lit, and/or BTX accept technical assistance the City feels is necessary for the project(s) to proceed in a manner that is acceptable to the City. Furthermore, in the event the City is of the opinion that Lit/BTX has not fulfilled any of their respective obligations, shall be given written notice thereof and given a reasonable period to cure such deficiencies before such events shall give the City any rights or remedies with respect to Lit/BTX.

**Section 15. Relationship of the Parties:** The relationship between the Parties will not be that of partners, agents, or joint venture parties for one another, and nothing contained in this Agreement will be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to, tax purposes. No employment relationship is created by this Agreement. Neither Party will make any commitment, by contract or otherwise, binding upon the other or represent that it has any authority to do so. In performing any of their obligations hereunder, each Party will be an independent contractor or independent Party and shall use its discretion in discharging its contractual obligations at its own risk.

**Section 16. Time of Essence:** TIME IS OF THE ESSENCE IN THIS AGREEMENT, EACH PROVISION HEREOF, AND THE OTHER AGREEMENT DOCUMENTS, IN WHICH TIME OF PERFORMANCE IS ESTABLISHED.

**Section 17. Subcontracting:** Any delegation or subcontracting by any of the Parties will not operate to relieve the respective party of its responsibilities and obligations under this Agreement.
Section 18. Addenda: This Agreement includes such addenda as the Parties shall from time to time agree to include within its terms ("Addenda"). Addenda may be incorporated into this Agreement, provided that to be effective each such Addendum shall make specific reference to this Agreement and be executed by authorized representatives of all the Parties.

Section 19. Entire Agreement: This Agreement, constitutes the entire agreement between the Parties and supersedes all prior or contemporaneous negotiations or agreements, whether oral or written, relating to the subject matter hereof.

Section 20. Governing Law: This Agreement, including any Addenda referenced herein, will be governed by and construed in accordance with applicable U.S. federal law and the laws of the State of Texas, without regard to conflict of law principles. Each party consents to the exclusive jurisdiction and venue of the Texas state courts located in and serving Cameron County and the applicable United States federal court for the federal district encompassing Cameron County, in connection with any dispute or controversy arising out of or in connection with this Agreement and/or its subject matter.

Section 21. Change of Law: In the event there is a change in federal or state statute or regulation applicable to this Agreement, the parties may modify each other of its desire to amend this Agreement in order to comply with that change in statute or regulation. The parties may amend this Agreement to comply with such change in statute or regulation provided that such amendment is approved in writing by all parties.

Section 22. Counterparts: This Agreement may be executed in counterparts, all of which together shall constitute the original of the Agreement, and each signed counterpart may be sent by email in portable document format ("PDF") and shall be considered the original of that counterpart. One assemblage of all signed counterparts shall be sufficient to prove this Agreement.
IN WITNESS WHEREOF, the parties have executed or caused this Agreement to be executed as of the Effective Date.

CITY OF BROWNSVILLE, TEXAS

By: _______________________  
Trey Mendez  
Mayor

LIT TEXAS, LLC

By: _______________________  
Brian Snider  
CEO

ATTEST:

BTX FIBER, LLC

By: _______________________  
Brian Snider  
CEO

APPROVED AS TO FORM:

By: _______________________  
Victor A. Flores  
City Attorney

BROWNSVILLE PUBLIC UTILITY BOARD

Joining for the limited purposes of Section 3 only

By: _______________________  
John Bruciak, P.E.,  
CEO/ General Manager City Manager

APPROVED AS TO FORM:

By: _______________________  
Name: _____________________  
Title: _____________________
COORDINATION AGREEMENT - APPENDIX A

RIGHT OF WAY AND ENCROACHMENT AGREEMENT

[to be added]
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

by and between

CITY OF BROWNSVILLE, TEXAS

and

LIT TEXAS, LLC
ENGINEER, PROCUREMENT, AND CONSTRUCTION CONTRACT

This ENGINEER, PROCUREMENT, AND CONSTRUCTION CONTRACT (as may be amended and supplemented from time to time as set forth herein, and including all exhibits and appendices attached hereto, collectively, this “Agreement”), effective as of July 20, 2022 (the “Effective Date”), by and between CITY OF BROWNSVILLE, TEXAS (the “City” or “Owner”), and LIT TEXAS, LLC (“LIT”), each individually referred to as a “Party”, and collectively referred to as the “Parties”.

RECITALS

WHEREAS, the Parties have concurrently entered into a Public-Private Partnership Fiber Network Agreement (the “P3 Agreement”) whereby the Parties have agreed to work together for the construction of a quality, open access, Fiber Middle Mile Network (“FMMN”) throughout the entire city and its underserved areas utilizing the City’s property interests, much of which is acquired through a Public Use Easement and Right of Way Agreement executed concurrently between the City and the Brownsville Public Utility Board (“BPUB”), including but not limited to installing fiber connections and end-customer equipment installed along various community anchor institutions and points of interconnection throughout the network footprint (as further defined below, collectively, the “Middle Mile Network”); and

WHEREAS, City desires and Lit agrees to perform for City the construction and installation of the Middle Mile Network, as set forth in this Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

Section 1. Definitions. As used in this Agreement, the following capitalized terms have the meanings given below:

1.1 “Addendum or Addenda” means any and all addenda, exhibits, or attachments related to and incorporated into this Agreement or regardless of whether attached to this Agreement in its original form or executed by the Parties pursuant to Section 20 and made a part of this Agreement by reference.

1.2 “Affiliate” shall mean any Person that directly or indirectly controls or is controlled by or is under common control with, or is managed by, the specified Person. For purposes of this definition only, “control” means (i) in the case of corporate entities, direct or indirect ownership of at least fifty percent (50%) of the stock or participating shares entitled to vote for the election of directors, and (ii) in the case of non-corporate entities, direct or indirect ownership of at least fifty percent (50%) of the equity interest with the power to participate in the management and policies of such non-corporate entity.

1.3 “Cable” means the bundles of optical fiber strands within sheathing of the Middle Mile Network.

1.4 “Carrier” means a provider of services via the internet, or that use the internet as a platform, internet services over the FTTP Network pursuant to a written contract with
Subscriber (if applicable) to provide such services to a residential or business location. Subscriber may also serve as the Carrier.

1.5 **“Claims”** shall mean causes of action, losses, claims, liabilities, costs (including reasonable attorneys’ fees and related necessary legal costs), damages for injury to or death of Persons, impairment to the environment, and loss of or damage to property.

1.6 **“Effective Date”** is defined in the introductory paragraph.

1.7 **“Imposition”** shall mean all taxes, fees, levies, imposts, duties, charges or withholdings of any nature including, without limitation, gross receipts taxes and franchises, license, and/or permit fees) together with any penalties, fines, assessments or interest thereon, arising out of the transactions contemplated by this Agreement and/or imposed upon the Licensed Fiber(s) by any federal, state, or local government or other public taxing authority of competent jurisdiction.

1.8 **“Middle Mile Network”** includes (i) all Cable equipment, optronics and electronics installed within the Middle Mile Network or (if not in fact within the Middle Mile Network) associated with the use of the optical fiber Cable and unless specifically provided otherwise in an Addendum to this Agreement (ii) all connection points controlled and operated by or on behalf of the City prior to a Demarcation Point.

1.9 **“Person”** shall mean any individual, partnership, corporation, limited liability company, joint venture, trust, business trust, cooperative or association, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so admits.

1.10 **“Rights of Way”** shall mean the land and other rights granted to Provider by a third party through or by way of the Underlying Rights.

### Section 2. Construction Documents. Lit shall complete the Work described in the Construction Documents for the project. This Agreement consists of this written agreement and the following items which are attached hereto and incorporated herein by reference:

- a. List of Middle Mile Network Priority List, Mapping Images, and July 2022 Price Sheet (Exhibit A);
- b. Transferred Equipment (Exhibit B-1);
- c. Transferred Inventory (Exhibit B-2);
- d. Excluded Assets (Exhibit B-3);
- e. American Rescue Plan Act (ARPA) Terms & Conditions Addendum (Exhibit C);
- f. Standard General Conditions of the Construction Contract (Exhibit D);
- g. Payment Bond (Exhibit E);
- h. Performance Bond (Exhibit F);
- i. Maintenance Bond (Exhibit G);
- j. Notice of Award (Exhibit H);
- k. **Reserved** (Exhibit I);
- l. Affidavit of Bills Paid (Exhibit J); and
m. Testing standards (Exhibit K); and
n. Other plans, drawings, and specifications as may be agreed upon the Parties in writing, which are attached hereto and incorporated herein, and made a part of this Agreement for all purposes. The Construction Documents represent the entire and integrated agreement between the Owner and LIT and supersede all prior negotiations, representations, or agreements, either oral or written. This Agreement may be amended only by written instrument signed by both the Owner and the LIT. In the event of any conflict between the terms and conditions of the Construction Documents and the terms and conditions set forth in the body of this Agreement, the terms and conditions of this Agreement shall control.

2.1 The City shall undertake a design review and validation of LIT’s initial design of the FMMN prior to the commencement of construction and at any time when the design is substantially modified. This review is in addition to any permitting requirement of the City. The City’s review will be expeditious and is intended to enable City to verify that the proposed FMMN design meets the terms herein. The City will not unreasonably delay approval of the FMMN design.

2.2 The Construction Documents shall show the phases of FMMN completion and shall require approval of the City’s Project Manager.

Section 3. Work.

3.1 LIT shall perform all required Work and shall provide and furnish all labor, materials, necessary tools, expendable equipment and utility, transportation and all else required for the design, engineering, construction, and installation of a quality, open access, Fiber Middle Mile Network (“FMMN”) throughout the entire city and its underserved areas utilizing the City’s property interests, much of which is acquired through a Public Use Easement and Right of Way Agreement executed concurrently between the City and the Brownsville Public Utility Board (“BPUB”), including but not limited to installing fiber connections and end-customer equipment installed along various community anchor institutions and points of interconnection throughout the network footprint within the City, generally known as the [Brownsville Fiber Network], as may be amended, increased, expanded, modified or supplemented from time to time (as further defined below, collectively, the “Middle Mile Network”), in strict accordance with the Drawings and Specifications, including any and all Addenda, and in strict compliance with the Construction Documents, the terms of which are incorporated herein by reference.

3.2 Unless as otherwise agreed upon in writing by LIT and the City, LIT shall procure and furnish a minimum of 100 miles of middle mile fiber as described in the List of Middle Mile Network Priority List, Mapping Images, and July 2022 Price Sheet, attached hereto, and incorporated herein, as Exhibit A.

3.2.1 Upon written request from LIT, the City may authorize the substitution of materials from the LIT proposal response subject to the compliance with federal procurement regulations triggered by the usage of ARPA funds and any other federal funds, and subject to the approval of the City or its designated Project Manager. In the case of a written request from LIT for substitution of materials, the
City shall not unreasonably withhold authorization and approval of such a request. In addition, the City shall support LIT’s submission of a waiver under the Buy American Act as it has a shorter lead time and comparable performance in the City’s sole discretion, and only if such substitution complies with the “excess fiber capacity” in Chapter 43 of the Texas Public Utility Regulatory Act.

3.3 LIT shall commence construction of the Work, as described under Section 3 of this Agreement, within six (6) months after the Effective Date stated herein. If there is a significant delay in the supply of critical materials, then LIT shall promptly notify City prior to the six (6) month commencement period prescribed herein of the delay in the supply of critical materials. Thereafter, the City may, within its sole discretion, grant LIT an extension of the required commencement date. However, the City shall not unreasonably withhold such extension and shall act in good faith.

3.4 In all circumstances, LIT shall complete construction of the Work, as described in Section 3 of this Agreement, within twenty-four (24) months after the Effective Date stated herein.

3.5 It is understood and agreed that said labor, materials, tools, equipment, and service shall be furnished and said Work performed and completed under the direction and supervision of LIT, in compliance with federal procurement regulations triggered by the usage of ARPA funds and any other federal funds, and subject to the approval of the Owner or its authorized representative.

3.6 Further, LIT shall secure through tax exempt procurement the requisite materials based on List of Middle Mile Network Priority List, Mapping Images, and July 2022 Price Sheet (Exhibit A), leveraging potential savings whenever possible in the final design. Final material unit cost will be tied to market pricing at the time of the Effective Date. Parties agree that leveraged savings incurred through the City’s tax-exempt status shall be allocated to funding the Owner’s Representative, as further allowed under Section 4 of this Agreement. LIT shall provide copies of material quotes for its July 2022 Price Sheet, and related purchase orders and invoices to the City, as requested.

3.7 LIT shall construct the Brownsville Fiber Network with a design-build mindset, and in concert with public and private partners in last mile efforts, to facilitate to the maximum practical and economic extent possible concurrent last mile fiber-to-the-premise (FTTP) activities.

3.8 LIT shall provide best efforts in focusing on local workforce development and ensuring that employment and other economic opportunities generated by this Project, to the greatest extent feasible, be directed to local residents of Brownsville, Texas.

3.9 In partnership with the City, LIT shall accommodate and coordinate with any external institutional and private partners as it may relate to any regional broadband initiative(s).
3.10 City and LIT have mutually divided the Designated Locations into five distinct areas, known as “Phases”. The Phases are illustrated and described in Appendices B and E. LIT shall complete each of the Phases in a timely fashion as follows: 1) Phase 1 by 6 months from the Effective Date, 2) Phase 2 by 12 months from the Effective Date; 3) Phase 3 by 16 months from the Effective Date; 4) Phase 4 by 20 months from the Effective Date; and 5) Phase 5 by 24 months from the Effective Date. A Phase shall be deemed “complete” when end-to-end attenuation, end-to-end signature and splice testing for the Phase’s outside plant fiber is completed, and test results that utilize the template format in Appendix K have been submitted to City and reviewed and accepted by City.

3.11 During the Construction Period, LIT will provide sufficiently detailed written progress reports to City Project Manager on a quarterly basis (January 1, April 1, July 1 and October 1 of each year or as applicable following the Effective Date) to enable City to understand the status of deployment. The progress reports should indicate whether or not the construction has met the progress milestones set forth herein.

3.12 LIT shall present City with lien waivers from its contractor(s) and subcontractor(s) to demonstrate that LIT is meeting its obligations and that all materials and labor purchased for the Project are not subject to contractor liens. LIT shall not cause or permit any part of the Middle Mile Network to become subject to any mechanic’s, materialmen’s, or vendor’s lien, or any similar lien.

Section 4. Project.

4.1 The Project is the total construction for which the Work, as further prescribed in Section 3, and otherwise performed under the Construction Documents may be the whole or a part and which may include construction by the Owner and by separate contractors, and is generally defined as the Middle Mile Network.

4.2 The Owner will assign an individual to oversee this project. That person will act as the Owner’s Representative, and assume all duties and responsibilities, and have the rights and authority assigned to the Owner in the Agreement Documents in connection with completion of the Work in accordance with the Agreement Documents. LIT shall provide timely updates and reports to the Owner’s Representative and attend and provide requested status and related updates to recurring project meetings.

4.3 The City shall approve in a timely fashion and route plan recommendations, unless otherwise modified by the City, and provide any prioritization in implementation of construction plans related to the Project.

4.4 The City shall assist with securing necessary permits and required public use easements and rights of way, facilitate temporary street closures when appropriate and only to the extent allowed by law and within the City’s standard practice and procedures, and provide in-kind contributions during the construction of the Middle Mile Network, strictly within the City’s sole discretion that the requests are reasonable and do not impact the City’s general course of business, at currently existing staffing levels, and at no additional
out of pocket costs (except as otherwise agreed to by the Parties in writing).

4.5 LIT agrees to provide a Network that is capable of delivering the following technical performance requirements:

1) Passive Optical Network ("PON") or active Ethernet technology to provide 1 Gbps downstream to all subscribers and 1 Gbps symmetric service to 10 percent of subscribers.

2) A technology roadmap to increase speed to 10 Gbps downstream to all users and 10 Gbps symmetrical service to 10 percent of subscribers without replacement or upgrade of outside plant.

3) The Middle Mile Network will be able to manage Quality of Service to individual users.

4) The Middle Mile Network will include the capability to split users into multiple tiers of service, each.

5) Backup power of at least 72 hours in case of an electric outage for all electronics except at the customer premises.

4.6 LIT will determine the optimal network design and configuration to achieve the standards in Section 4.5 hereof.

4.7 The Middle Mile Network shall comply with all current applicable codes, including the National Electrical Safety Code, the National Electric Code and any other applicable federal laws and regulations and the laws, ordinances and construction standards of the State of Texas and the City.

Section 5. Contract Price; Payment Terms

5.1 Owner agrees to pay LIT for performance of the Work in accordance with the Construction Documents, the General Conditions and terms and conditions hereof, specifically the List of Middle Mile Network Priority List, Mapping Images, and July 2022 Price Sheet, Exhibit A, in an amount not to exceed Nineteen Million Five Hundred Thousand Dollars ($19.5 Million) (the “Guaranteed Maximum Price” or “GMP”) which shall also include the cost of funding the City’s Project Manager. The City shall have no further financial obligation for FMMN (Middle Mile) project. All other costs related to the FMMN project will be the responsibility of LIT and not the City. All other costs related to the FMMN (Middle Mile) project will be the responsibility of LIT and not the City. LIT will assume any and all financial risks specifically related to the FMMN (Middle Mile).

Further, unless otherwise specified by City in writing, if LIT does not complete a Phase by the applicable deadline provided in Section 3.10 hereof, the City may withhold further payments until completion of the deadline. LIT may request a meeting with City to discuss any unforeseeable events that led to the inability to complete the Phase by the deadline. Prior to final payment from the City, LIT will obtain all certifications, licenses, permits,
and approvals, and shall otherwise satisfy all requirements necessary for operation of the FMMN.

5.2 Any assets acquired, developed or otherwise constructed with LIT’s separate funding in excess of the GMP (the “Additional Assets”) shall be owned by LIT for all purposes and shall not be owned by the City; provided, however, that the City shall preserve and maintain a Right of First Offer and Purchase Option to purchase the Assets as provided herein below:

5.2.1 Right of First Offer. At any time following the Effective Date and continuing through the tenth anniversary of the Effective Date (the “ROFO Period”), LIT decides to sell the Additional Assets to a third party, City shall have the right of first offer to purchase the Additional Assets (the “ROFO”), as provided herein below:

1) Lit shall notify the City in a written notice in compliance with Section 16.9 of this Agreement (the “ROFO Notice”);
2) City shall have 45 days (the “Offer Period”) to decide whether to purchase the Additional Assets;
3) The ROFO Notice shall be irrevocable until the end of the Offer Period;
4) If the City determines to exercise its ROFO, it shall notify LIT prior to the end of the Offer Period of its exercise of the ROFO in writing in the form of a binding letter of intent to purchase (the “ROFO Exercise Notice”) and committing to close the sale on a proposed date and time which shall not be less than 90 days from the date of the ROFO Exercise Notice. Parties will act in good faith to negotiate a purchase agreement between LIT and the City within 30 days of the date of delivery of the ROFO Exercise Notice to LIT.
5) If the City fails to deliver the ROFO Exercise Notice to LIT by the end of the Offer Period, the City shall be deemed to have declined the ROFO and LIT may offer the Additional Assets for sale to any third party.

5.2.2 Purchase Option. At any time following the Effective Date and continuing through the tenth anniversary of the Effective Date (the Purchase Option Period), City may elect to purchase the Additional Assets (the “Purchase Option”), as provided herein below:

1) City shall give written notice (the “Purchase Option Exercise Notice”) to LIT of its intent to do so, with such Purchase Option Exercise Notice stating the City’s intent to purchase the Additional Assets for the Purchase Price;
2) Upon delivery of the Purchase Option Notice, LIT shall have the obligation to sell the Assets to City at the Purchase Price, subject to the conditions set forth in Section 16.9 below; and

3) City shall be prepared to close the purchase of the Additional Assets not more than 90 days following the delivery of the Purchase Option Exercise Notice to LIT.

5.2.3 Exemption. Notwithstanding the foregoing, the ROFO and the Purchase Option shall not be triggered by any sale of equity interests in Lit (directly or indirectly), stock sale, sale of substantially all of the assets of Lit, corporate reorganization or other corporate reorganization by Lit or any affiliate of Lit, so long as, in any applicable case, the successor owner of the Additional Assets agrees to be bound or is otherwise bound to honor the ROFO and Purchase Option as set forth in this Section 5.

5.2.4. Closing. The closing of transactions contemplated by the ROFO and Purchase Option shall occur at the times stipulated above and parties shall obtain all necessary consents and the satisfaction of any other closing conditions, as the case may be. Upon sale of the Additional Assets to the City and the satisfaction of the Purchase Price, all carrier contracts and other assets and contracts that are part of or related to the operation of the Additional Assets shall be assigned to the City.

5.2.4. Purchase Price. The Purchase Price in connection with the ROFO and Purchase Option shall be equal to a price calculated from the performance of LIT’s Assets and the City’s FMMN baselined against proforma information provided by LIT and the City. The proforma information is compared against actual performance, on an annual basis, adjusting the Purchase Price based on the delta between actual and baseline, but not less than a 11% decrease from the proforma value and not more than a 7% increase from the proforma value. The delta between the accumulated performance variance from the proforma, for each network, is calculated, on an annual basis, to establish the Purchase Price within the percentage variance described above.

5.3 After the Effective Date, City will disburse City funds to LIT on a reimbursement basis as the Project progresses. LIT shall submit a request for payment. No more than 50 percent of City funds will be paid by City in the first year of the Construction Period, and no more than 40 percent of City funds will be paid by City in the second year of the Construction Period. The remaining 10 percent of City fund will be paid once 90 percent of total fiber miles have been installed by LIT and tested and approved by City.

5.4 This Agreement is subject to the Texas Prompt Payment Act and Section 5.2 hereof, and all Invoices shall be paid by Owner in compliance with applicable law, less 10% retainage, also in accordance with applicable law. Invoices shall be in standard form, Application and Certificate for Payment, and shall be accompanied by signed Conditional Release of Liens forms from each applicable subcontractor and supplier.
5.5 City has a right to withhold disbursement of funds if at any time City determines, in its sole discretion, that LIT is not performing or completing the Project in a manner satisfactory to City. City shall have the right at any time to request that LIT provide additional supporting documentation with any request for payment.

5.6 Payment will not be made for fiber placement until the Required Testing is completed. Test results shall (i) meet or exceed the standards required pursuant to Appendix D, (ii) be submitted with the request for payment, and (iii) be based on the test data template in Appendix D attached hereto. City may, prior to disbursement of funds, undertake such tests itself and LIT will facilitate such testing by City.

5.7 Conditions Precedent to Disbursement of City funds. City shall not disburse City funds until LIT has complied with the following conditions:

1) LIT has submitted, and City has approved, all the Project plans and specifications.

2) LIT has (a) completed end-to-end attenuation, end-to-end signature and splice testing in accordance with Section 4.5 (collectively, the “Required Testing”) to the satisfaction of City in its sole discretion and (b) submitted test results to City based on the test data template in Exhibit K attached hereto.

5.8 The Contract Sum shall include all materials, supplies, tools, equipment, permits, perimeter fencing, portable restrooms, construction debris container(s), supervision and labor necessary for the proper prosecution and completion of the Work.

5.9 Retainage shall be paid within thirty (30) days of receipt of an acceptable Final Invoice, subject to and in accordance with the General Conditions. The final Application for Payment shall be accompanied by signed Final Release and Waiver of Liens forms from all subcontractors and suppliers.

Section 6. Contract Time. Unless otherwise permitted under Section 3 of this Agreement, LIT shall commence construction of the Work within six (6) months after the Effective Date. In all circumstances, LIT shall complete construction of the Work, as described in Section 3 of this Agreement, within twenty-four (24) months after the Effective Date stated herein.

Section 7. City’s Right to Stop or to Suspend Work.

7.1 If the LIT fails to carry out the Work or supply labor and materials in accordance with the Agreement Documents, the City by written order may order the LIT to stop the Work, or any portion thereof, without monetary compensation to the LIT until the cause for such order has been eliminated.

7.2 The City may order the LIT in writing to suspend, delay, or interrupt all or any part of the Work for such period of time as he may determine to be appropriate for the convenience of the City.
Section 8. Liquidated Damages. LIT recognizes that time is of the essence for completion of the Work, and to achieve Final Acceptance of the Work, and City will suffer financial loss if the Work is not completed within the time(s) specified herein. LIT also recognizes the delays, expense and difficulties involved in proving in a legal proceeding, the actual loss suffered by the City if the Work is not completed on time. Accordingly, instead of requiring any such proof, LIT agrees that as liquidated damages for delay (but not as a penalty), LIT shall pay City **One Thousand Dollars ($1000.00)** for each day that expires after the time specified in Paragraph 6 above, for Final Acceptance until the City issues the Final Letter of Acceptance.

Section 9. Transfer of Ownership of Middle Mile Network to City and Related Assets

9.1 The City’s inspection and acceptance of contractual compliance will be accomplished by an engineering inspector of the City, or a City’s independent consultant. The City reserves the right to reject unsatisfactory work. Upon written notice of rejected work, LIT has 48 hours to correct unacceptable work. (To be corrected during regular working days, holidays or weekends.)

9.2 The Transfer of Ownership of Middle Mile Network to the City shall take place not later than the last business day of the calendar month in which the LIT's construction of the Middle Mile Network has been completed to the City's unilateral acceptance and satisfaction (“Transfer Date”).

9.3 On the Transfer Date, LIT will convey, transfer, assign and deliver to the City, and City shall accept from LIT, the Middle Mile Network, including all related assets, free and clear of all encumbrances. The "Related Assets" are comprised of:

9.3.1 all spare Middle Mile Network equipment, and other tangible personal property and assets of LIT relating to the Middle Mile Network, as set forth in Exhibit B-1 (collectively "Equipment");

9.3.2 all fiber optic cabling, coaxial cabling, supplies, tools and inventories of LIT related to the Middle Mile Network, as set forth in Exhibit B-2 (collectively "Inventory");

9.3.3 all documentation, including but not limited to: as-built drawings, plans, and specifications; names of all manufacturers whose optical fiber cable, associated splices and other equipment are used in installing and providing fiber optic network services; technical specifications of the optical fiber cable, associated splices and other equipment used in installing and providing fiberoptic network services; and summary of rights and easement providers and recurring fee schedules, if any;

9.3.4 all rights of LIT under contracts related to the Middle Mile Network (collectively "Transferred Contracts");

9.3.5 all government authorizations related to the Middle Mile Network (collectively “Transferred Authorizations”); and
9.3.6 all defenses, claims, deposits, prepayments, refunds, causes of action, credits, warranties (including manufacturer's warranties), rights of recovery, rights of set off and recoupment relating to any right, property or asset included in the Related Assets, or against any party under the Transferred Contracts.

9.4 Excluded Assets: Notwithstanding anything herein to the contrary, from and after the Transfer Date, LIT shall retain, and there shall be excluded from the conveyance, assignment, or transfer to the City hereunder, all assets of LIT that are not Related Assets (the "Excluded Assets"), as further identified and set forth in Exhibit B-3.

9.5 Deliveries by LIT: At the Transfer Date, LIT shall deliver to the City:

9.5.1 a duly executed counterpart of one or more Bills of Sale;

9.5.2 a duly executed counterpart of one or more Assignment and Assumption Agreements;

9.5.3 the Records that are Related Assets; and

9.5.4 duly executed counterparts of such other customary instruments of transfer, assumptions, filings or documents, in form and substance reasonably satisfactory to the City and LIT, as may be reasonably required to give effect to this Agreement.

Section 10. INDEMNIFICATION

10.1 LIT COVENANTS AND AGREES TO FULLY INDEMNIFY, DEFEND AND HOLD HARMLESS, THE CITY AND THE ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS, VOLUNTEERS AND REPRESENTATIVES OF THE CITY, INDIVIDUALLY AND COLLECTIVELY, FROM AND AGAINST ANY AND ALL COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, PROCEEDINGS, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY AND SUITS OF ANY KIND AND NATURE, INCLUDING BUT NOT LIMITED TO, PERSONAL OR BODILY INJURY, DEATH AND PROPERTY DAMAGE, MADE UPON THE CITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO LIT'S ACTIVITIES UNDER THIS AGREEMENT, INCLUDING ANY ACTS OR OMISSIONS OF LIT, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONSULTANT OR SUBCONTRACTOR OF LIT, AND THEIR RESPECTIVE OFFICERS, AGENTS EMPLOYEES, DIRECTORS AND REPRESENTATIVES WHILE IN THE EXERCISE OF THE RIGHTS OR PERFORMANCE OF THE DUTIES UNDER THIS AGREEMENT; PROVIDED THAT LIT SHALL HAVE NO OBLIGATION TO INDEMNIFY FOR ANY CLAIMS, COSTS, LOSSES OR DAMAGES ARISING OUT OF OR RELATED TO THE GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR VIOLATION OF LAW BY THE CITY, ITS AGENTS, EMPLOYEES OR REPRESENTATIVES. THIS INDEMNIFICATION PROVISION IS
SPECIFICALLY INTENDED TO OPERATE AND BE EFFECTIVE EVEN IF IT IS ALLEGED OR PROVEN THAT ALL OR SOME OF THE DAMAGES BEING SOUGHT WERE CAUSED, IN WHOLE OR IN PART, BY ANY ACT, OMISSION OR NEGLIGENCE OF THE CITY. THIS INDEMNITY PROVISION IS INTENDED TO INCLUDE, WITHOUT LIMITATION, INDEMNITY FOR COSTS, EXPENSES AND LEGAL FEES INCURRED BY THE CITY IN DEFENDING AGAINST SUCH CLAIMS AND CAUSES OF ACTIONS. IN THE EVENT LIT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

10.2 THE PROVISIONS OF THIS INDEMNITY ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON OR ENTITY. LIT SHALL ADVISE THE CITY IN WRITING WITHIN 24 HOURS OF ANY CLAIM OR DEMAND AGAINST THE CITY OR LIT KNOWN TO LIT RELATED TO OR ARISING OUT OF LIT'S ACTIVITIES UNDER THIS AGREEMENT, AND SHALL SEE TO THE INVESTIGATION AND DEFENSE OF SUCH CLAIM OR DEMAND AT LIT'S COST. THE CITY SHALL HAVE THE RIGHT, AT ITS OPTION AND AT ITS OWN EXPENSE, TO PARTICIPATE IN SUCH DEFENSE WITHOUT RELIEVING LIT OF ANY OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.

10.3 This Indemnification provision shall survive termination or expiration of the Agreement.

Section 11. Independent Contractor; Personnel

11.1 LIT enters into this Agreement as, and shall continue to be, an independent contractor. All Services shall be performed only by LIT and LIT's employees and subcontractors. Subject to and in accordance with the conditions and provisions of this Agreement, LIT shall have the exclusive right to control the details of its operations and activities and be solely responsible for the acts and omissions of its officers, agents, servants, employees, consultants and subcontractors. Under no circumstances shall LIT, or any of LIT's employees, look to City as his/her employer, or as a partner, agent or principal. Neither LIT, nor any of LIT's employees, shall be entitled to any benefits accorded to City's employees, including without limitation worker's compensation, disability insurance, vacation, or sick pay. LIT shall be responsible for providing, at LIT's expense, and in LIT's name, unemployment, disability, worker's compensation, and other insurance, as well as any and all licenses and permits usual or necessary for conducting the Services. LIT shall be responsible for paying all applicable local, state, and federal taxes.
11.2 LIT represents and warrants to City that its employees performing Work hereunder will have sufficient expertise, training, licensure (if applicable) and experience to accomplish the Work for the Project.

11.3 LIT shall not subcontract any portion of the work required by this Agreement, except as provided in the Construction Documents. City may terminate this Agreement, effective immediately, if there is any assignment, or attempted assignment, transfer, or encumbrance, by LIT of this Agreement or any right or interest herein without City's written consent. In the event LIT engages any subcontractor in the performance of this Agreement, LIT shall ensure that all of LIT's subcontractors perform in accordance with the terms and conditions of this Agreement. LIT shall be fully responsible for all of LIT's subcontractors' performance, and liable for any of LIT's subcontractors' non-performance and all of LIT's subcontractors' acts and omissions.

Section 12. Insurance

12.1 The LIT shall furnish proof of insurance requirements as indicated below. The coverage is to remain in force at all times during the contract period. The following minimum insurance coverage is required. The commercial general liability insurance policy shall name the City of Brownsville, Texas, as an "additional insured". This MUST be written in the description section of the insurance certificate, even if there is a check-off box on the insurance certificate. Any costs for adding the City as "additional insured" shall be at the LIT's expense.

12.2 The City shall be given notice ten (10) days prior to cancellation or modification of any required insurance. The insurance provided shall be endorsed or amended to comply with this notice requirement. In the event that the insurer is unable to accommodate, it shall be the responsibility of the LIT to provide the proper notice. Such notification will be in writing by registered mail, return receipt requested and addressed to the Purchasing & Contract Services Department located at City Hall, 1001 E. Elizabeth St. 1st Floor Suite 101, Brownsville, Texas.

12.3 The LIT's insurance must be provided by an A.M. Best "A-" rated or better insurance company authorized to issue insurance policies in the State of Texas, subject to approval by the City. Any exclusions or provisions in the insurance maintained by the LIT that excludes coverage for work contemplated in this solicitation shall be deemed unacceptable, and shall be considered breach of contract.

12.3.1 Workers' Compensation and Employers' Liability Insurance. LIT shall purchase and maintain such insurance coverage with limits consistent with statutory benefits outlined in the Texas Workers' Compensation Act (Texas Labor Code, Ch. 406, as amended), and minimum limits for Employers' Liability as is appropriate for the Work being performed and as will provide protection from claims set forth below which may arise out of or result from LIT's performance of the Work and LIT's other obligations under the Construction Documents, whether it is to be performed by LIT, any Subcontractor or Supplier, or by anyone directly or indirectly employed by any of them to perform any of the Work, or by anyone for whose acts any of them may be liable:
12.3.1.1 claims under workers' compensation, disability benefits, and other similar employee benefit acts;
12.3.1.2 claims for damages because of bodily injury, occupational sickness or disease, or death of I LIT's employees. Any firm performing work for or on behalf of the City of Brownsville must provide Workers' Compensation insurance.

12.3.2 General Liability Insurance. Covering premises-operations, products-completed operations, independent contractors and contractual liability.

Limits: Combined single limit bodily injury/property damage $2,000,000.

This coverage must include, but not limited to:
12.3.2.1 Coverage for the liability assumed by LIT under the indemnity provision of the contract.
12.3.2.2 Coverage for Premises/Operations
12.3.2.3 Products/Completed Operations
12.3.2.4 Broad Form Contractual Liability
12.3.2.5 Independent Contractors

12.3.3 Commercial Automobile Liability Insurance. Covering all owned, hired and non-owned automobile equipment.

Limits: Bodily injury $250,000 each person, $500,000 each occurrence
Property damage $100,000 each occurrence

12.4 This insurance shall be kept in force until the work under this Agreement has been completed and accepted by the City. The City shall be listed as Additional Insured under the policy.

Section 13. Termination.

13.1 Termination for Cause. Within seven (7) business days after written notice from the aggrieved party identifying the breach, the responding party must provide a written plan of action to resolve the breach within the time prescribed herein. The aggrieved party may terminate this Agreement for cause if the party in breach has not corrected the breach within thirty (30) days after written notice from the aggrieved party identifying the breach. The City Manager may also terminate this Agreement upon such notice as the City Manager deems appropriate under the circumstances in the event the City Manager determines that termination is necessary to protect the public health or safety. The parties agree that if the City erroneously, improperly or unjustifiably terminates for cause, such termination shall be deemed a termination for convenience, which shall be effective thirty (30) days after such notice of termination for cause is provided.
13.1.1 This Agreement may be terminated for cause for reasons including, but not limited to, LIT's repeated (whether negligent or intentional) submission for payment of false or incorrect bills or invoices, failure to perform the Work to the City's satisfaction; or failure to continuously perform the work in a manner calculated to meet or accomplish the objectives as set forth in this Agreement.

13.2 Termination for Subcontractor Act or Omission. The City reserves the right, in its best interest as determined by the City, to cancel this Agreement for convenience by giving written notice to the LIT, due to any act or omission or any subcontractor of Lit that causes any material harm to the City and if such act or omission remains unremedied by Lit or Lit does not terminate such subcontractor within thirty (30) days of such notice from the City. In the event this Agreement is terminated pursuant to this section, LIT shall be paid for any services performed to the City's satisfaction pursuant to the Agreement through the termination date specified in the written notice of termination. LIT acknowledges and agrees that it has received good, valuable and sufficient consideration from City, the receipt and adequacy of which are hereby acknowledged by LIT, for City's right to terminate this Agreement for convenience.

13.3 Cancellation for Non-appropriated Funds. The City reserves the right, in its best interest as determined by the City, to cancel this Agreement for non-appropriated funds or unavailability of funds by giving written notice to the LIT at least thirty (30) days prior to the effective date of such cancellation. The obligation of the City for payment to a LIT is limited to the availability of funds appropriated in a current fiscal period, and continuation of the contract into a subsequent fiscal period is subject to appropriation of funds, unless otherwise provided by law.

13.4 Force Majeure. The City and LIT will be excused from the performance of their respective obligations under this Agreement when and to the extent that their performance is delayed or prevented by any circumstances beyond their control including, fire, flood, explosion, strikes or other labor disputes, act of God or public emergency, war, riot, civil commotion, malicious damage, act or omission of any governmental authority, delay or failure or shortage of any type of transportation, equipment, or service from a public utility needed for their performance, provided that:

13.4.1 The nonperforming party gives the other party prompt written notice describing the particulars of the Force Majeure including, but not limited to, the nature of the occurrence and its expected duration, and continues to furnish timely reports with respect thereto during the period of the Force Majeure;

13.4.2 The excuse of performance is of no greater scope and of no longer duration than is reasonably necessary when considered in light of the Force Majeure;

13.4.3 No obligations of either party that arose before the Force Majeure causing the excuse of performance are excused as a result of the Force Majeure; and

13.4.4 The non-performing party uses its best efforts to remedy its inability to perform.

13.4.5 Notwithstanding the above, performance shall not be excused under this Section for a period in excess of sixty (60) days, provided that in extenuating circumstances, the City may excuse performance for a longer term. Economic
hardship of the LIT will not constitute Force Majeure. The term of the agreement shall be extended by a period equal to that during which either party's performance is suspended under this Section.

Section 14. Warranties. LIT warrants that the completed Project shall be adequate for the purposes intended. LIT further warrants to the Owner that materials and equipment furnished under the Agreement will be of good quality and new unless the Construction Documents require or permit otherwise. The LIT further warrants that the Work will conform to the requirements of the Construction Documents and will be free from defects, except for those inherent in the quality of the Work the Construction Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The LIT's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the LIT, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Engineer, the LIT shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

Section 15. Eminent Domain. Should any portion of the Middle Mile Network or any other interest belonging to the City with respect to this Agreement be acquired by condemnation, eminent domain, nationalization, or expropriation (each of which, a “Taking”) by any government authority or other person possessing such power, then each Party will be excused from performance of its obligations to the extent of the taking, as provided in this Section. In the proceeding for any Taking or an involuntary discontinuance of the use of the Middle Mile Network in anticipation of an imminent Taking, the interests of City in the affected portion will be severed. The City may claim and receive the portion of the total award attributable to its interest in the Middle Mile Network, and the City may claim damages payable on account of the Taking and the relocation or re-routing expenses relating to the Middle Mile Network.


16.1 ARPA Contracting Provisions. This Project is funded wholly or in part with federal assistance in the form of a grant issued pursuant to the AMERICAN RESCUE PLAN ACT (ARPA), as such, LIT acknowledges and agrees to be bound by the additional federal terms and conditions, including but not limited to those contained within Exhibit C.

16.2 Successors and Assigns. All of the provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto, and their partners, assigns, successors, subcontractors, executors, heirs, officers, agents, employees, representatives, and administrators.

16.3 Choice of Law. The laws of the state of Texas shall govern the validity of this Agreement, the construction of its terms and the interpretation of the rights and duties of the parties hereto.

16.4 No Waiver of Governmental Immunity. NOTHING IN THIS AGREEMENT SHALL BE CONSTRUED TO WAIVE CITY'S GOVERNMENTAL IMMUNITY FROM LAWSUIT, WHICH IMMUNITY IS EXPRESSLY RETAINED TO THE EXTENT IT IS NOT CLEARLY AND UNAMBIGUOUSLY WAIVED BY STATE LAW.
16.5 **Assignment.** LIT shall not assign any of LIT’s rights under this Agreement, or delegate the performance of any of LIT’s duties hereunder, without the prior written consent of the City.

16.6 **Modification or Amendment.** No amendment, change or modification of this Agreement shall be valid unless in writing signed by the parties hereto.

16.7 **Venue.** This Agreement and any and all matters arising directly or indirectly herefrom shall be governed by and construed and enforced in accordance with the Laws of the State of Texas, with the Federal and State Courts of Cameron County, Texas having jurisdiction. If at any time there is a dispute between or among the Parties with respect to any matter arising directly or indirectly from this Agreement (an "Agreement Matter"), the Parties agree that, prior to seeking judicial remedy, they will engage in face-to-face negotiations in an attempt to resolve such dispute and shall, upon failing to negotiate a mutually-satisfactory resolution, choose a mutually agreeable neutral third party to mediate such dispute. Mediation shall be non-binding and shall be confidential.

16.8 **Execution and Consideration.** This Agreement is executed by the parties hereto without coercion or duress for any substantial consideration, the sufficiency of which is forever confessed.

16.9 **Notices.** Any and all notices, demands, or other communications required or desired to be given hereunder by any party shall be in writing and shall be validly given or made to another party if personally served, emailed, or if deposited in the United States mail, certified or registered, postage prepaid, return receipt requested. If such notice or demand is served personally, notice shall be deemed constructively made at the time of such personal service. Electronic communications shall be considered effective when received into the receiving Party's email system. If such notice, demand, or other communication is given by mail, such notice shall be conclusively deemed given five days after deposit thereof in the United States mail addressed to the party to whom such notice, demand or other communication is to be given as follows:

**CITY OF BROWNSVILLE**

Attention: Noel Bernal, City Manager
1001 East Elizabeth Street (2nd Floor)
Brownsville, Texas 78522
Email: noel.bernal@brownsvilletx.gov

Copy to:
Victor A. Flores, City Attorney
1001 East Elizabeth Street (2nd Floor)
Brownsville, Texas 78522
Email: victor.flores@brownsvilletx.gov
Any party hereto may change its address for purposes of this paragraph by written notice given in the manner provided above.

16.10 **Cumulative Remedies.** All rights and remedies of the Parties under this Agreement shall be cumulative, and none shall exclude any other right or remedy provided by law, or by any other provisions of the Agreement. All such rights and remedies may be exercised and enforced concurrently and whenever, and as often, as occasion for their exercise arises.

16.11 **Waiver of Breach.** A waiver by either Party of a breach of the Agreement by the other Party does not constitute a continuing waiver or a waiver of any subsequent breach of the Agreement.

16.12 **No Third-Party Beneficiaries.** Nothing in this Agreement shall be construed to create any right in any third party not a signatory to this Agreement, and the Parties do not intend to create any third-party beneficiaries by entering into this Agreement.

16.13 **Entire Understanding.** This document and any exhibit attached hereto, constitute the entire understanding and agreement of the parties, and any and all prior agreements, understandings, and representations are hereby terminated and canceled in their entirety and are of no further force and effect.

16.14 **Counterparts.** This Agreement may be executed in a number of identical counterparts, each of which shall be deemed an original for all purposes. A facsimile signature will also be deemed to constitute an original if properly executed.

16.15 **Miscellaneous Drafting Provisions.** This Agreement shall be deemed drafted equally by the Parties hereto. The language of all parts of this Agreement shall be construed as a whole according to its fair meaning, and any presumption or principle that the language herein is to be construed against any Party shall not apply. Headings in this Agreement are for the convenience of the Parties and are not intended to be used in construing this document.

16.16 **Authority to Execute.** The individuals executing this Agreement on behalf of the respective Parties below represent to each other and to others that all appropriate and
necessary action has been taken to authorize the individual who is executing this Agreement to do so and on behalf of the Party for which his or her signature appears, that there are no other parties or entities required to execute this Agreement in order for the same to be an authorized and binding agreement on the Party for whom the individual is signing this Agreement and that each individual affixing his or her signature hereto is authorized to do so, and such authorization is valid and effective on the date hereof.

16.17 Savings/Severability. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

16.18 Prohibition On Contracts With Companies Boycotting Israel. LIT acknowledges that in accordance with Chapter 2270 of the Texas Government Code, the City is prohibited from entering into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract.

16.18.1 The terms "boycott Israel" and" company" shall have the meanings ascribed to those terms in Section 808.001 of the Texas Government Code. By signing this Agreement, LIT certifies that LIT's signature provides written verification to the City that LIT: (1) does not boycott Israel, and (2) will not boycott Israel during the term of the Agreement.

16.19 Prohibition on Boycotting Energy Companies. LIT acknowledges that in accordance with Chapter 2274 of the Texas Government Code (as added by Acts 2021, 87th Leg., R.S., S.B. 13, § 2), the City is prohibited from entering into a contract for goods or services that has a value of $100,000 or more, which will be paid wholly or partly from public funds of the City, with a company (with 10 or more full-time employees) unless the contract contains a written verification from the company that it: (1) does not boycott energy companies; and (2) will not boycott energy companies during the term of the contract. The terms “boycott energy company” and “company” have the meaning ascribed to those terms by Chapter 2274 of the Texas Government Code (as added by Acts 2021, 87th Leg., R.S., S.B. 13, § 2). To the extent that Chapter 2274 of the Government Code is applicable to this Agreement, by signing this Agreement, LIT certifies that LIT’s signature provides written verification to the City that LIT: (1) does not boycott energy companies; and (2) will not boycott energy companies during the term of this Agreement.

16.20 Prohibition on Discrimination Against Firearm and Ammunition Industries. LIT acknowledges that except as otherwise provided by Chapter 2274 of the Texas Government Code (as added by Acts 2021, 87th Leg., R.S., S.B. 19, § 1), the City is prohibited from entering into a contract for goods or services that has a value of $100,000 or more which will be paid wholly or partly from public funds of the City, with a company (with 10 or more full-time employees) unless the contract contains a written verification from the company that it: (1) does not have a practice, policy, guidance, or directive that
discriminates against a firearm entity or firearm trade association; and (2) will not discriminate during the term of the contract against a firearm entity or firearm trade association. The terms “discriminate,” “firearm entity” and “firearm trade association” have the meaning ascribed to those terms by Chapter 2274 of the Texas Government Code (as added by Acts 2021, 87th Leg., R.S., S.B. 19, § 1). To the extent that Chapter 2274 of the Government Code is applicable to this Agreement, by signing this Agreement, LIT certifies that LIT’s signature provides written verification to the City that LIT: (1) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; and (2) will not discriminate against a firearm entity or firearm trade association during the term of this Agreement.

16.21 Immigration Nationality Act. LIT shall verify the identity and employment eligibility of its employees who perform work under this Agreement, including completing the Employment Eligibility Verification Form (I-9). Upon request by City, LIT shall provide City with copies of all I-9 forms and supporting eligibility documentation for each employee who performs work under this Agreement. LIT shall adhere to all Federal and State laws as well as establish appropriate procedures and controls so that no services will be performed by any LIT employee who is not legally eligible to perform such services. **LIT SHALL INDEMNIFY CITY AND HOLD CITY HARMLESS FROM ANY PENALTIES, LIABILITIES, OR LOSSES DUE TO VIOLATIONS OF THIS PARAGRAPH BY LIT, LIT’S EMPLOYEES, SUBCONTRACTORS, AGENTS, OR LICENSEES.** City, upon written notice to LIT, shall have the right to immediately terminate this Agreement for violations of this provision by LIT.

16.22 No Cause of Action Against Engineer. LIT, its subcontractors and equipment and materials suppliers on the PROJECT or their sureties, shall maintain no direct action against the Engineer, its officers, employees, and subcontractors, for any claim arising out of, in connection with, or resulting from the engineering services performed. Only the City will be the beneficiary of any undertaking by the Engineer. The presence or duties of the Engineer's personnel at a construction site, whether as on-site representatives or otherwise, do not make the Engineer or its personnel in any way responsible for those duties that belong to the City and/or the City's construction LITs or other entities, and do not relieve the construction LITs or any other entity of their obligations, duties, and responsibilities, including, but not limited to, all construction methods, means, techniques, sequences, and procedures necessary for coordinating and completing all portions of the construction work in accordance with the Construction Documents and any health or safety precautions required by such construction work. The Engineer and its personnel have no authority to exercise any control over any construction LIT or other entity or their employees in connection with their work or any health or safety precautions.

16.23 Representations. Each signatory represents this Agreement has been read by the Party for which this Agreement is executed and that such Party has had an opportunity to confer with its legal counsel.
IN WITNESS WHEREOF the undersigned have executed this Agreement as of the day and year first written above.

NO OFFICIAL, EMPLOYEE, AGENT, OR REPRESENTATIVE OF THE OWNER HAS ANY AUTHORITY, EITHER EXPRESSED OR IMPLIED, TO AMEND THIS AGREEMENT, EXCEPT SUCH EXPRESS AUTHORITY AS MAY BE GRANTED BY THE CITY COMMISSION OF THE CITY OF BROWNSVILLE.

EXECUTED THIS 20th DAY OF July, 2022.

CITY OF BROWNsville, TEXAS

By: __________________________
Noel Bernal
City Manager
Date: __________________________

LIT TEXAS, LLC

By: __________________________
Brian Snider
CEO
Date: 7/15/2022

Approved as to Form:

Victor A. Flores
City Attorney
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit A
List of Middle Mile Network Priority List, Mapping Images, and July 2022 Price Sheet
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit B-1
TRANSFERRED EQUIPMENT

[to be added]
Exhibit B-2
TRANSFERRED INVENTORY
[to be added]
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit B-3
EXCLUDED ASSETS

[to be added]
1. LIT will at all times be in compliance with any current and future requirements outlined by the American Rescue Plan Act or regulatory requirements that arise from ARPA and provide its best and timely efforts to assist the City in meeting any such ARPA requirements; including, but not necessarily limited to those listed in this Exhibit C.

2. LIT shall maintain records and financial documents sufficient to evidence compliance with section 603(c) of the Act, Treasury’s regulations implementing that section, and guidance issued by Treasury regarding the foregoing.

The Treasury Office of Inspector General and the Government Accountability Office, or their authorized representatives, shall have the right of access to records (electronic and otherwise) of LIT in order to conduct audits or other investigations.

Records shall be maintained by LIT for a period of five (5) years after all funds have been expended or returned to USD, whichever is later.

In accordance with 2 CFR 200.337, during the Agreement’s time of performance the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives will have access to any books, documents, papers, and records maintained by LIT which are directly pertinent to the Contract for the purpose of making audit, examination, excerpts, and transcriptions.

3. LIT will include in all contracts and subcontracts in excess of $250,000 provisions or conditions which will allow for administrative, contractual or legal remedies in instances where contractors violate or breach contract terms and provide for such sanctions and penalties as may be appropriate.

4. LIT will include in all contracts and subcontracts in excess of $150,000 a provision which requires compliance with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C 7401-7671q) and the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251-1387). The provisions shall require reporting of violations to the US Department of Treasury, TECQ, and the Regional Office of the Environmental Protection Agency (EPA).

5. LIT will include in all contracts and subcontracts in excess of $10,000 provisions addressing termination for cause and for convenience by the City/County including the manner by which it will be affected and the basis for settlement.

6. LIT will include in all contracts and subcontracts provisions requiring compliance with the following, if applicable:

   a. Prime construction contracts in excess of $10,000,000, as stated in the Coronavirus State and Local Fiscal Recovery Funds Compliance and Reporting Guidance Section B Project and Expenditure Report, number (8)(j)(1) on page 21 must be in
compliance with the Davis-Bacon Act, as amended (40 U.S.C.3141-3144, 3146-3148) as supplemented by Department of Labor regulations (29 CFR part 5);

b. Prime construction contracts in excess of $2,000, compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR part 3);

c. Contracts greater than $10,000, the inclusion of the Equal Opportunity clause provided under 41 CFR 60-1.4(b) (Executive Order 11246);

d. Contracts exceeding $100,000, compliance with the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352);

e. For contracts in excess of $10,000,000 that involve the employment of mechanics or laborers, compliance with the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708), including work week requirements and safety conditions for workers, as supplemented by Department of Labor regulations (29 CFR Part 5); and

f. For procurement of recovered materials where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000, compliance with 2 CFR 200.322 and section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, which requires procuring only items designated in guidelines of the EPA at 40 CFR part 247 that contain the highest percentage of recovered materials practicable.

g. Recipients and contractors will comply with CFR 200.216 which prohibits obligating or expending loan or grant funds to procure, obtain, extend or contract with services or systems that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Public Law 115-232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

h. Recipients and contractors will comply with CFR 200.322 which requires as appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

7. LIT will include in all negotiated contracts and subcontracts a provision which indicates that funds will not be awarded under this contract to any party listed on the government wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.
8. LIT will include in all negotiated contracts and subcontracts a provision to the effect that the City/County, the Texas Comptroller of Public Accounts, the Comptroller General of the United States, the U.S. Department of Treasury, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions.

9. LIT will include in all contracts and subcontracts a requirement that the contractor maintain all relevant project records for five (5) years after the City/County has made final payment to the contractor and all other pending matters are closed.

10. ARPA terms and conditions. LIT will comply with the following ARPA terms and conditions (Sections 10 through 36 hereof) and ensure the inclusion of the ARPA terms and conditions in any and all contracts, including without limitation terms that apply to the “Recipient” of the City.

11. USE OF FUNDS
   
a. LIT understands and agrees that the funds disbursed under this award may only be used in compliance with section 603(c) of the Social Security Act (the “Act”), Treasury’s regulations implementing that section, and guidance issued by Treasury regarding the foregoing.
   b. Recipient will determine prior to engaging in any project using this assistance that it has the institutional, managerial, and financial capability to ensure proper planning, management, and completion of such project.

12. PERIOD OF PERFORMANCE. The period of performance for this award begins on the date hereof and ends on December 31, 2026. As set forth in Treasury’s implementing regulations, Recipients may use award funds to cover eligible costs incurred during the period that begins on March 3, 2021 and ends on December 31, 2024.

13. REPORTING. LIT agrees to provide timely information aiding the City/County with any reporting obligations established by the Treasury as they relate to this award.

14. PRE-AWARD COSTS. Pre-award costs, as defined in 2 C.F.R. § 200.458, may not be paid with funding from this award.

15. ADMINISTRATIVE COSTS. Recipients may use funds provided under this award to cover both direct and indirect costs.

16. COST SHARING. Cost sharing or matching funds are not required to be provided by the Recipient.

17. CONFLICTS OF INTEREST. LIT understands and agrees it must maintain a conflict-of-interest policy consistent with 2 C.F.R. § 200.318(c) and that such conflict-of-interest policy is applicable to each activity funded under this award. Recipients and subrecipients must disclose in
writing to the Treasury or the pass-through entity, as appropriate, any potential conflict of interest affecting the awarded funds in accordance with 2 C.F.R. § 200.112.

18. COMPLIANCE WITH APPLICABLE RULES AND REGULATIONS.

a. Recipient agrees to comply with the requirements of section 603 of the Act, regulations adopted by Treasury pursuant to section 603(f) of the Act, and guidance issued by Treasury regarding the foregoing. Recipient also agrees to comply with all other applicable federal statutes, regulations, and executive orders, and Recipient shall provide for such compliance by other parties in any agreements it enters into with other parties relating to this award.

b. Federal regulations applicable to this award include, without limitation, the following: i. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200, other than such provisions as Treasury may determine, are inapplicable to this Award and subject to such exceptions as may be otherwise provided by Treasury. Subpart F – Audit Requirements of the Uniform Guidance, implementing the Single Audit Act, shall apply to this award. ii. Universal Identifier and System for Award Management (SAM), 2 C.F.R. Part 25, pursuant to which the award term set forth in Appendix A to 2 C.F.R. Part 25 is hereby incorporated by reference. iii. Reporting Subaward and Executive Compensation Information, 2 C.F.R. Part 170, pursuant to which the award term set forth in Appendix A to 2 C.F.R. Part 170 is hereby incorporated by reference. iv. OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement), 2 C.F.R. Part 180, including the requirement to include a term or condition in all lower tier covered transactions (contracts and subcontracts described in 2 C.F.R. Part 180, subpart B) that the award is subject to 2 C.F.R. Part 180 and Treasury’s implementing regulation at 31 C.F.R. Part 19. v. Recipient Integrity and Performance Matters, pursuant to which the award term set forth in 2 C.F.R. Part 200, Appendix XII to Part 200 is hereby incorporated by reference. vi. Governmentwide Requirements for Drug-Free Workplace, 31 C.F.R. Part 20. vii. New Restrictions on Lobbying, 31 C.F.R. Part 21. viii. Uniform Relocation Assistance and Real Property Acquisitions Act of 1970 (42 U.S.C. §§ 4601-4655) and implementing regulations. ix. Generally applicable federal environmental laws and regulations.

c. Statutes and regulations prohibiting discrimination applicable to this award include, without limitation, the following: i. Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.) and Treasury’s implementing regulations at 31 C.F.R. Part 22, which prohibit discrimination on the basis of race, color, or national origin under programs or activities receiving federal financial assistance; ii. The Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 et seq.), which prohibits discrimination in housing on the basis of race, color, religion, national origin, sex, familial status, or disability; iii. Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of disability under any program or activity receiving federal financial assistance; iv. The Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101 et seq.), and Treasury’s implementing regulations at 31 C.F.R.
Part 23, which prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance; and v. Title II of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. §§ 12101 et seq.), which prohibits discrimination on the basis of disability under programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto.

19. REMEDIAL ACTIONS. In the event of Recipient’s noncompliance with section 603 of the Act, other applicable laws, Treasury’s implementing regulations, guidance, or any reporting or other program requirements, Treasury may impose additional conditions on the receipt of a subsequent tranche of future award funds, if any, or take other available remedies as set forth in 2 C.F.R. § 200.339. In the case of a violation of section 603(c) of the Act regarding the use of funds, previous payments shall be subject to recoupment as provided in section 603(e) of the Act.

20. HATCH ACT. Recipient agrees to comply, as applicable, with requirements of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328), which limit certain political activities of State or local government employees whose principal employment is in connection with an activity financed in whole or in part by this federal assistance.

21. FALSE STATEMENTS. Recipient understands that making false statements or claims in connection with this award is a violation of federal law and may result in criminal, civil, or administrative sanctions, including fines, imprisonment, civil damages and penalties, debarment from participating in federal awards or contracts, and/or any other remedy available by law.

22. PUBLICATIONS. Any publications produced with funds from this award must display the following language: “This project [is being] [was] supported, in whole or in part, by federal award number [enter project FAIN] awarded to the City of Brownsville by the U.S. Department of the Treasury.”

23. DEBTS OWED THE FEDERAL GOVERNMENT

a. Any funds paid to Recipient (1) in excess of the amount to which Recipient is finally determined to be authorized to retain under the terms of this award; (2) that are determined by the Treasury Office of Inspector General to have been misused; or (3) that are determined by Treasury to be subject to a repayment obligation pursuant to section 603(e) of the Act and have not been repaid by Recipient shall constitute a debt to the federal government.

b. Any debts determined to be owed to the federal government must be paid promptly by Recipient. A debt is delinquent if it has not been paid by the date specified in Treasury’s initial written demand for payment, unless other satisfactory arrangements have been made or if the Recipient knowingly or Agreement for ARPA Administration Services. The Treasury will take any actions available to it to collect such a debt.
24. DISCLAIMER
   a. The United States expressly disclaims any and all responsibility or liability to Recipient or third persons for the actions of Recipient or third persons resulting in death, bodily injury, property damages, or any other losses resulting in any way from the performance of this award or any other losses resulting in any way from the performance of this award or any contract, or subcontract under this award.
   b. The acceptance of this award by Recipient does not in any way establish an agency relationship between the United States and Recipient.

25. PROTECTIONS FOR WHISTLEBLOWERS
   a. In accordance with 41 U.S.C. § 4712, Recipient may not discharge, demote, or otherwise discriminate against an employee in reprisal for disclosing to any of the list of persons or entities provided below, information that the employee reasonably believes is evidence of gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract) or grant.
   b. The list of persons and entities referenced in the paragraph above includes the following:
      i. A member of Congress or a representative of a committee of Congress;
      ii. An Inspector General;
      iii. The Government Accountability Office;
      iv. A Treasury employee responsible for contract or grant oversight or management;
      v. An authorized official of the Department of Justice or other law enforcement agency;
      vi. A court or grand jury; or
      vii. A management official or other employee of Recipient, contractor, or subcontractor who has the responsibility to investigate, discover, or address misconduct.
   c. Recipient shall inform its employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

26. INCREASING SEAT BELT USE IN THE UNITED STATES. Pursuant to Executive Order 13043, 62 FR19217 (Apr. 18, 1997), Recipient should encourage its contractors to adopt and enforce on-the-job seat belt policies and programs for their employees when operating company-owned, rented or personally owned vehicles.

27. FEDERAL COMPLIANCE. During the term of this Agreement, the parties shall comply with all Federal laws, regulations, and rules including the following:
   a. CIVIL RIGHTS ACT OF 1964. Under Title VI of the Civil Rights Act of 1964, no person shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
b. Section 504 Rehabilitation Act of 1973, as amended. LIT agrees that no otherwise qualified individual with disabilities shall, solely by reason of his/her disability, be denied the benefits of, or be subjected to discrimination, including discrimination in employment, under any program or activity receiving federal financial assistance.

c. AGE DISCRIMINATION ACT OF 1975. LIT shall comply with the Age Discrimination Act of 1975 which provides that no person in the United States shall on the basis of age be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

d. SECTIONS 106(b), 102(a)(4) and A109 OF THE HOUSING & COMMUNITY DEVELOPMENT ACT OF 1974. i. Under Title VI of the Civil Rights Act of 1964, no person shall on the ground of race, color, religion, national origin or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this Title.

e. EQUAL OPPORTUNITY CLAUSE. During the performance of this Agreement, LIT agrees as follows:
   i. LIT will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. LIT will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. LIT agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
   ii. LIT will, in all solicitations or advertisements for employees placed by or on behalf of LIT, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.
   iii. LIT will not discourage or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee’s essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding,
hearing, or action, including an investigation conducted by the employer, or is consistent with LIT’s legal duty to furnish information.

iv. LIT will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of LIT’s commitments under this section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.


vi. LIT will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

vii. In the event of LIT’s noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and LIT may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

viii. LIT will include the portion of the sentence immediately preceding paragraph (i) and the provisions of paragraphs (i) through (vii) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. LIT will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event a firm becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, LIT may request the United States to enter into such litigation to protect the interests of the United States.
28. CONTRACTING WITH SMALL AND MINORITY BUSINESS, WOMEN'S BUSINESS ENTERPRISES, AND LABOR SURPLUS AREA FIRMS.
   a. LIT must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.
   b. Affirmative steps must include:
      i. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
      ii. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
      iii. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
      iv. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
      v. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
      vi. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (i) through (v) of this section.

29. PATENT RIGHTS AND INVENTIONS. LIT shall comply with the requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract. (2 CFR 200 Appendix II (f) and Rights to Inventions in 37 CFR Part 401).

30. RIGHTS TO INVENTIONS MADE UNDER A CONTRACT OR AGREEMENT. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency. (2 CFR 200 Appendix II (B))

31. ENERGY EFFICIENCY. LIT shall comply with the mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94A 163, 89 Stat. 871). (2 CFR 200 APPENDIX II (H) and 42 U.S.C. 6201).

32. VERIFICATION NO BOYCOTT ISRAEL. As required by Chapter 2271.002, Texas Government Code, LIT hereby verifies that it does not boycott Israel and will not boycott Israel through the term of this Agreement. For purposes of this verification, “boycott Israel”, as defined
by §808.001(1) of the Texas Government Code, means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli controlled territory, but does not include an action made for ordinary business purposes.

33. NO FOREIGN TERRORIST ORGANIZATIONS. Pursuant to Chapter 2252.152, Texas Government Code, LIT represents and certifies that, at the time of execution of this Agreement neither LIT, nor any wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of the same

   i. engages in business with Iran, Sudan, or any foreign terrorist organization as described in Chapters 806 or 807 of the Texas Government Code, or Subchapter F of Chapter 2252 of the Texas Government Code, or
   
   ii. is a company listed by the Texas Comptroller of Public Accounts under Sections 806.051, 807.051, or 2252.153 of the Texas Government Code. The term "foreign terrorist organization" in this paragraph has the meaning assigned to such term in Section 2252.151 of the Texas Government Code

34. COMBATING TRAFFICKING IN PERSONS. Pursuant to Chapter 52.222-50 of the F.A.R. LIT agrees to comply with all provisions of the Combating Trafficking in Persons Act.

35. REDUCING TEXT MESSAGING WHILE DRIVING. Pursuant to Executive Order 13513, 74 FR 51225 (Oct. 6, 2009), Recipient should encourage its employees, subrecipients, and contractors to adopt and enforce policies that ban text messaging while driving.

36. DEBARMENT AND SUSPENSION (EXECUTIVE ORDERS 12549 AND 12689, 2 CFR part 180). LIT certifies, by entering into this Agreement, that neither it nor its principals are presently debarred, suspended, or otherwise excluded from or ineligible for participation in federally assisted programs under Executive Orders 12549 (1986) and 12689 (1989). The term “principal” for purposes of this Agreement is defined as an officer, director, owner, partner, key employee, or other person with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of LIT. LIT understands that it must not make any award or permit any award (or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, “Debarment and Suspension.”

37. Texas Ethics Commission (10 TAC 2252). A governmental entity or state agency may not enter into a contract described by Subsection (b) with a business entity unless the business entity, in accordance with this section and rules adopted under this section, submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency. The disclosure of interested parties must be submitted on a form prescribed by the Texas Ethics Commission that includes:

   (1) a list of each interested party for the contract of which the contracting business entity is aware; and
(2) the signature of the authorized agent of the contracting business entity, acknowledging that the disclosure is made under oath and under penalty of perjury.
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit D
STANDARD GENERAL CONDITIONS
OF THE CONSTRUCTION CONTRACT
STANDARD GENERAL CONDITIONS OF THE CONSTRUCTION CONTRACT

ARTICLE 1 – DEFINITIONS AND TERMINOLOGY

1.01 Defined Terms

A. Wherever used in these General Conditions or in other Construction Documents, the terms listed below have the meanings indicated which are applicable to both the singular and plural thereof, and words denoting gender shall include the masculine, feminine and neuter. Said terms are generally capitalized or written in italics, but not always. When used in a context consistent with the definition of a listed-defined term, the term shall have a meaning as defined below whether capitalized or italicized or otherwise. In addition to terms specifically defined, terms with initial capital letters in the Construction Documents include references to identified articles and paragraphs, and the titles of other documents or forms.

1. Addenda—Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the proposed Construction Documents.

2. Agreement—The written instrument which is evidence of the agreement between City and LIT covering the Work.

3. Application for Payment—The form acceptable to City which is to be used by LIT during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Construction Documents.

4. Asbestos—Any material that contains more than one percent asbestos and is friable or is releasing asbestos fibers into the air above current action levels established by the United States Occupational Safety and Health Administration.

5. Award – Authorization by the City Commission for the City to enter into an Agreement.

6. Bid—The offer or proposal of a Bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

7. Bidder—The individual or entity who submits a Bid directly to City.

8. Bidding Documents—The Bidding Requirements and the proposed Construction Documents (including all Addenda).

9. Bidding Requirements—The advertisement or Invitation to Bid, Instructions to Bidders, Bid security of acceptable form, if any, and the Bid Form with any supplements.
10. **Business Day** – A business day is defined as a day that the City conducts normal business, generally Monday through Friday, except for federal or state holidays observed by the City.

11. **Calendar Day** – A day consisting of 24 hours measured from midnight to the next midnight.

12. **Change Order**—A document, which is prepared and approved by the City, which is signed by LIT and City and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract Time, issued on or after the Effective Date of the Agreement.

13. **City**—The City of Brownsville, Texas, a home-rule municipal corporation, authorized and chartered under the Texas State Statutes, acting by its governing body through its City Manager, his designee, or agents authorized under his behalf, each of which is required by Charter to perform specific duties with responsibility for final enforcement of the contracts involving the City of Brownsville is by Charter vested in the City Manager and is the entity with whom LIT has entered into the Agreement and for whom the Work is to be performed.

14. **City Attorney** – The officially appointed City Attorney of the City of Brownsville, Texas, or his duly authorized representative.

15. **City Commission** - The duly elected and qualified governing body of the City of Brownsville, Texas.

16. **City Manager** – The officially appointed and authorized City Manager of the City of Brownsville, Texas, or his duly authorized representative.

17. **Contract Claim**—A demand or assertion by City or LIT seeking an adjustment of Contract Price or Contract Time, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Contract Claim.

18. **Contract**—The entire and integrated written document between the City and LIT concerning the Work. The Contract contains the Agreement and all Construction Documents and supersedes prior negotiations, representations, or agreements, whether written or oral.

19. **Construction Documents**—Those items so designated in the Agreement. All items listed in the Agreement are Construction Documents. Approved Submittals, other LIT submittals, and the reports and drawings of subsurface and physical conditions are not Construction Documents.

20. **Contract Price**—The moneys payable by City to LIT for completion of the Work in accordance with the Construction Documents as stated in the Agreement (subject to the provisions of Paragraph 11.03 in the case of Unit Price Work).
21. **Contract Time**—The number of days or the dates stated in the Agreement to: (i) achieve Milestones, if any and (ii) complete the Work so that it is ready for Final Acceptance.

22. **Cost of the Work**—See Paragraph 11.01 of these General Conditions for definition.

23. **Damage Claims** – A demand for money or services arising from the Project or Site from a third party, City or LIT exclusive of a Contract Claim.

24. **Day or day** – A day, unless otherwise defined, shall mean a Calendar Day.

25. **Director of Aviation** – The officially appointed Director of the Brownsville South Padre Island International Airport of the City of Brownsville, Texas, or his duly appointed representative, assistant, or agents.

26. **Director of Engineering & Public Works** – The officially appointed Director of the Engineering & Public Works Department of the City of Brownsville, Texas, or his duly appointed representative, assistant, or agents.

27. **Director of Internal Service Department** – The officially appointed Director of the Internal Service Department of the City of Brownsville, Texas, or his duly appointed representative, assistant, or agents.

28. **Director of Parks and Recreation** – The officially appointed Director of the Parks and Recreation Department of the City of Brownsville, Texas, or his duly appointed representative, assistant, or agents.

29. **Director of Planning & Redevelopment Services** – The officially appointed Director of the Planning & Redevelopment Services Department of the City of Brownsville, Texas, or his duly appointed representative, assistant, or agents.

30. **Director of Multi Modal Transportation Department** – The officially appointed Director of the Multi Modal Transportation Department of the City of Brownsville, Texas, or his duly appointed representative, assistant, or agents.

31. **Drawings**—That part of the Construction Documents prepared or approved by Engineer which graphically shows the scope, extent, and character of the Work to be performed by LIT. Submittals are not Drawings as so defined.

32. **Effective Date of the Agreement**—The date indicated in the Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Agreement is signed and delivered by the last of the two parties to sign and deliver.

33. **Engineer**—The licensed professional engineer or engineering firm registered in the State of Texas performing professional services for the City.
34. *Extra Work* – Additional work made necessary by changes or alterations of the Construction Documents or of quantities or for other reasons for which no prices are provided in the Construction Documents. Extra work shall be part of the Work.

35. *Field Order* — A written order issued by City which requires changes in the Work but which does not involve a change in the Contract Price, Contract Time, or the intent of the Engineer. Field Orders are paid from Field Order Allowances incorporated into the Contract by funded work type at the time of award.

36. *Final Acceptance* – The written notice given by the City to LIT that the Work specified in the Construction Documents has been completed to the satisfaction of the City.

37. *Final Inspection* – Inspection carried out by the City to verify that LIT has completed the Work, and each and every part or appurtenance thereof, fully, entirely, and in conformance with the Construction Documents.

38. *General Requirements*—Sections 3 and Section 4 of the Engineer, Procurement, and Construction Contract.

39. *Hazardous Environmental Condition*—The presence at the Site of Asbestos, PCBs, Petroleum, Hazardous Waste, Radioactive Material, or other materials in such quantities or circumstances that may present a substantial danger to persons or property exposed thereto.

40. *Hazardous Waste*—Hazardous waste is defined as any solid waste listed as hazardous or possesses one or more hazardous characteristics as defined in the federal waste regulations, as amended from time to time.

41. *LIT*—The individual or entity with whom City has entered into the Agreement.

42. *Laws and Regulations*—Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.

43. *Liens*—Charges, security interests, or encumbrances upon Project funds, real property, or personal property.

44. *Major Item* – An Item of work included in the Construction Documents that has a total cost equal to or greater than 5% of the original Contract Price or $25,000 whichever is less.


46. *Notice of Award*—The written notice by City to the Successful Bidder stating that upon timely compliance by the Successful Bidder with the conditions precedent listed therein, City will sign and deliver the Agreement.
47. **Notice to Proceed**—A written notice given by City to LIT fixing the date on which the Contract Time will commence to run and on which LIT shall start to perform the Work specified in Construction Documents.

48. **PCBs**—Polychlorinated biphenyls.

49. **Petroleum**—Petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute), such as oil, petroleum, fuel oil, oil sludge, oil refuse, gasoline, kerosene, and oil mixed with other non-Hazardous Waste and crude oils.

50. **Plans**—See definition of Drawings.

51. **Project Schedule**—A schedule, prepared and maintained by LIT, in accordance with the General Requirements, describing the sequence and duration of the activities comprising LIT’s plan to accomplish the Work within the Contract Time.

52. **Project**—The Work to be performed under the Construction Documents.

53. **Project Manager**—The authorized representative of the City who will be assigned to the Site.

54. **Public Meeting**—An announced meeting conducted by the City to facilitate public participation and to assist the public in gaining an informed view of the Project.

55. **Radioactive Material**—Source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (42 USC Section 2011 et seq.) as amended from time to time.

56. **Regular Working Hours**—Hours beginning at 7:00 a.m. and ending at 6:00 p.m., Monday thru Friday (excluding legal holidays).

57. **Samples**—Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.

58. **Schedule of Submittals**—A schedule, prepared and maintained by LIT, of required submittals and the time requirements to support scheduled performance of related construction activities.

59. **Schedule of Values**—A schedule, prepared and maintained by LIT, allocating portions of the Contract Price to various portions of the Work and used as the basis for reviewing LIT’s Applications for Payment.

60. **Site**—Lands or areas indicated in the Construction Documents as being furnished by City upon which the Work is to be performed, including rights-of-way, permits, and
easements for access thereto, and such other lands furnished by City which are designated for the use of LIT.

61. **Specifications**—That part of the Construction Documents consisting of written requirements for materials, equipment, systems, standards and workmanship as applied to the Work, and certain administrative requirements and procedural matters applicable thereto. Specifications may be specifically made a part of the Construction Documents by attachment or, if not attached, may be incorporated by reference as indicated in the Table of Contents (Division 00 00 00) of each Project.

62. **Subcontractor**—An individual or entity having a direct contract with LIT or with any other Subcontractor for the performance of a part of the Work at the Site.

63. **Submittals**—All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for LIT and submitted by LIT to illustrate some portion of the Work.

64. **Substantial Completion**—The stage in the progress of the Project when the Work is sufficiently complete in accordance with the Construction Documents for Final Inspection.

65. **Successful Bidder**—The Bidder submitting the lowest and most responsive Bid to whom City makes an Award.

66. **Superintendent**—The representative of LIT who is available at all times and able to receive instructions from the City and to act for LIT.

67. **Supplementary Conditions**—That part of the Construction Documents which amends or supplements these General Conditions.

68. **Supplier**—A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with LIT or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by LIT or Subcontractor.

69. **Underground Facilities**—All underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including but not limited to, those that convey electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television, water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems.

70. **Unit Price Work**—See Paragraph 11.03 of these General Conditions for definition.

71. **Weekend Working Hours**—Hours beginning at 9:00 a.m. and ending at 5:00 p.m., Saturday, Sunday or legal holiday, as approved in advance by the City.
72. **Work** — The entire construction or the various separately identifiable parts thereof required to be provided under the Construction Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction including any Change Order or Field Order, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Construction Documents.

73. **Working Day** — A working day is defined as a day, not including Saturdays, Sundays, or legal holidays authorized by the City for contract purposes, in which weather or other conditions not under the control of LIT will permit the performance of the principal unit of work underway for a continuous period of not less than 7 hours between 7 a.m. and 6 p.m.

1.02 **Terminology**

A. The words and terms discussed in Paragraph 1.02.B through E are not defined but, when used in the Bidding Requirements or Construction Documents, have the indicated meaning.

B. **Intent of Certain Terms or Adjectives**: The Construction Documents include the terms “as allowed,” “as approved,” “as ordered,” “as directed” or terms of like effect or import to authorize an exercise of judgment by City. In addition, the adjectives “reasonable,” “suitable,” “acceptable,” “proper,” “satisfactory,” or adjectives of like effect or import are used to describe an action or determination of City as to the Work. It is intended that such exercise of professional judgment, action, or determination will be solely to evaluate, in general, the Work for compliance with the information in the Construction Documents and with the design concept of the Project as a functioning whole as shown or indicated in the Construction Documents (unless there is a specific statement indicating otherwise).

C. **Defective**:  

1. The word “defective,” when modifying the word “Work,” refers to Work that is unsatisfactory, faulty, or deficient in that it:

   a. does not conform to the Construction Documents; or
   
   b. does not meet the requirements of any applicable inspection, reference standard, test, or approval referred to in the Construction Documents; or
   
   c. has been damaged prior to City’s written acceptance.

D. **Furnish, Install, Perform, Provide**: The word “Furnish” or the word “Install” or the word “Perform” or the word “Provide” or the word “Supply,” or any combination or similar directive or usage thereof, shall mean furnishing and incorporating in the Work including all necessary labor, materials, equipment, and everything necessary to perform the Work indicated, unless specifically limited in the context used.
E. Unless stated otherwise in the Construction Documents, words or phrases that have a well-known technical or construction industry or trade meaning are used in the Construction Documents in accordance with such recognized meaning.

ARTICLE 2 – PRELIMINARY MATTERS

2.01 Copies of Documents. City shall furnish to LIT one (1) original executed copy and one (1) electronic copy of the Construction Documents, and four (4) additional copies of the Drawings. Additional copies will be furnished upon request at the cost of reproduction.

2.02 Commencement of Contract Time; Notice to Proceed. The Contract Time will commence to run on the day indicated in the Notice to Proceed. A Notice to Proceed may be given no earlier than 14 days after the Effective Date of the Agreement, unless agreed to by both parties in writing.

2.03 Starting the Work. LIT shall start to perform the Work on the date when the Contract Time commences to run. No Work shall be done at the Site prior to the date on which the Contract Time commences to run.

2.04 Before Starting Construction. Baseline Schedules: Submit in accordance with the Construction Documents, and prior to starting the Work.

2.05 Preconstruction Conference. Before any Work at the Site is started, LIT shall attend a Preconstruction Conference as specified in the Construction Documents.

2.06 Public Meeting. LIT may not mobilize any equipment, materials or resources to the Site prior to LIT attending the Public Meeting as scheduled by the City.

2.07 Initial Acceptance of Schedules. No progress payment shall be made to LIT until acceptable schedules are submitted to City in accordance with the Schedule Specification as provided in the Construction Documents.

ARTICLE 3 – CONSTRUCTION DOCUMENTS: INTENT, AMENDING, REUSE

3.01 Intent

A. The Construction Documents are complementary; what is required by one is as binding as if required by all.

B. It is the intent of the Construction Documents to describe a functionally complete project (or part thereof) to be constructed in accordance with the Construction Documents. Any labor, documentation, services, materials, or equipment that reasonably may be inferred from the Construction Documents or from prevailing custom or trade usage as being required to produce the indicated result will be provided whether or not specifically called for, at no additional cost to City.
C. Clarifications and interpretations of the Construction Documents shall be issued by City.

D. The Specifications may vary in form, format and style. Some Specification sections may be written in varying degrees of streamlined or declarative style and some sections may be relatively narrative by comparison. Omission of such words and phrases as “LIT shall,” “in conformity with,” “as shown,” or “as specified” are intentional in streamlined sections. Omitted words and phrases shall be supplied by inference. Similar types of provisions may appear in various parts of a section or articles within a part depending on the format of the section. LIT shall not take advantage of any variation of form, format or style in making Contract Claims.

E. The cross referencing of specification sections under the subparagraph heading “Related Sections include but are not necessarily limited to:” and elsewhere within each Specification section is provided as an aid and convenience to LIT. LIT shall not rely on the cross referencing provided and shall be responsible to coordinate the entire Work under the Construction Documents and provide a complete Project whether or not the cross referencing is provided in each section or whether or not the cross referencing is complete.

3.02 Reference Standards

A. Standards, Specifications, Codes, Laws, and Regulations

1. Reference to standards, specifications, manuals, or codes of any technical society, organization, or association, or to Laws or Regulations, whether such reference be specific or by implication, shall mean the standard, specification, manual, code, or Laws or Regulations in effect at the time of opening of Bids (or on the Effective Date of the Agreement if there were no Bids), except as may be otherwise specifically stated in the Construction Documents.

2. No provision of any such standard, specification, manual, or code, or any instruction of a Supplier, shall be effective to change the duties or responsibilities of City, LIT, or any of their subcontractors, consultants, agents, or employees, from those set forth in the Construction Documents. No such provision or instruction shall be effective to assign to City, or any of its officers, directors, members, partners, employees, agents, consultants, or subcontractors, any duty or authority to supervise or direct the performance of the Work or any duty or authority to undertake responsibility inconsistent with the provisions of the Construction Documents.

3.03 Reporting and Resolving Discrepancies

A. Reporting Discrepancies:

1. LIT’s Review of Construction Documents Before Starting Work: Before undertaking each part of the Work, LIT shall carefully study and compare the Construction Documents and check and verify pertinent figures therein against all
applicable field measurements and conditions. LIT shall promptly report in writing to City any conflict, error, ambiguity, or discrepancy which LIT discovers, or has actual knowledge of, and shall obtain a written interpretation or clarification from City before proceeding with any Work affected thereby.

2. **LIT’s Review of Construction Documents During Performance of Work:** If, during the performance of the Work, LIT discovers any conflict, error, ambiguity, or discrepancy within the Construction Documents, or between the Construction Documents and (a) any applicable Law or Regulation, (b) any standard, specification, manual, or code, or (c) any instruction of any Supplier, then LIT shall promptly report it to City in writing. LIT shall not proceed with the Work affected thereby (except in an emergency as required by Paragraph 6.17.A) until an amendment or supplement to the Construction Documents has been issued by one of the methods indicated in Paragraph 3.04.

3. LIT shall not be liable to City for failure to report any conflict, error, ambiguity, or discrepancy in the Construction Documents unless LIT had actual knowledge thereof.

B. **Resolving Discrepancies:**

1. Except as may be otherwise specifically stated in the Construction Documents, the provisions of the Construction Documents shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between the provisions of the Construction Documents and the provisions of any standard, specification, manual, or the instruction of any Supplier (whether or not specifically incorporated by reference in the Construction Documents).

2. In case of discrepancies, figured dimensions shall govern over scaled dimensions, Plans shall govern over Specifications, Supplementary Conditions shall govern over General Conditions and Specifications, and quantities shown on the Plans shall govern over those shown in the proposal.

3.04 **Amending and Supplementing Construction Documents**

A. The Construction Documents may be amended to provide for additions, deletions, and revisions in the Work or to modify the terms and conditions thereof by a Change Order.

B. The requirements of the Construction Documents may be supplemented, and minor variations and deviations in the Work not involving a change in Contract Price or Contract Time, may be authorized, by one or more of the following ways:

1. A Field Order;

2. City’s review of a Submittal (subject to the provisions of Paragraph 6.18.C); or

3. City’s written interpretation or clarification.
3.05 Reuse of Documents

A. LIT and any Subcontractor or Supplier shall not:

1. have or acquire any title to or ownership rights in any of the Drawings, Specifications, or other documents (or copies of any thereof) prepared by or bearing the seal of Engineer, including electronic media editions; or

2. reuse any such Drawings, Specifications, other documents, or copies thereof on extensions of the Project or any other project without written consent of City and specific written verification or adaptation by Engineer.

B. The prohibitions of this Paragraph 3.05 will survive final payment, or termination of the Contract. Nothing herein shall preclude LIT from retaining copies of the Construction Documents for record purposes.

3.06 Electronic Data

A. Unless otherwise stated in the Supplementary Conditions, the data furnished by City or Engineer to LIT, or by LIT to City or Engineer, that may be relied upon are limited to the printed copies included in the Construction Documents (also known as hard copies) and other Specifications referenced and located on the City’s on-line electronic document management and collaboration system site. Files in electronic media format of text, data, graphics, or other types are furnished only for the convenience of the receiving party. Any conclusion or information obtained or derived from such electronic files will be at the user’s sole risk. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.

B. When transferring documents in electronic media format, the transferring party makes no representations as to long term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the data’s creator.

ARTICLE 4 – AVAILABILITY OF LANDS; SUBSURFACE AND PHYSICAL CONDITIONS; HAZARDOUS ENVIRONMENTAL CONDITIONS; REFERENCE POINTS

4.01 Availability of Lands

A. City shall furnish the Site. City shall notify LIT of any encumbrances or restrictions not of general application but specifically related to use of the Site with which LIT must comply in performing the Work. City will obtain in a timely manner and pay for easements for permanent structures or permanent changes in existing facilities.

1. The City has obtained or anticipates acquisition of and/or access to right-of-way, and/or easements. Any outstanding right-of-way and/or easements are anticipated
to be acquired in accordance with the schedule set forth in the Supplementary Conditions. The Project Schedule submitted by LIT in accordance with the Construction Documents must consider any outstanding right-of-way, and/or easements.

2. The City has or anticipates removing and/or relocating utilities, and obstructions to the Site. Any outstanding removal or relocation of utilities or obstructions is anticipated in accordance with the schedule set forth in the Supplementary Conditions. The Project Schedule submitted by LIT in accordance with the Construction Documents must consider any outstanding utilities or obstructions to be removed, adjusted, and/or relocated by others.

B. Upon reasonable written request, City shall furnish LIT with a current statement of record legal title and legal description of the lands upon which the Work is to be performed.

C. LIT shall provide for all additional lands and access thereto that may be required for construction facilities or storage of materials and equipment.

4.02 Subsurface and Physical Conditions

A. Reports and Drawings: The Supplementary Conditions identify:

1. those reports known to City of explorations and tests of subsurface conditions at or contiguous to the Site; and

2. those drawings known to City of physical conditions relating to existing surface or subsurface structures at the Site (except Underground Facilities).

B. Limited Reliance by LIT on Technical Data Authorized: LIT may rely upon the accuracy of the “technical data” contained in such reports and drawings, but such reports and drawings are not Construction Documents. Such “technical data” is identified in the Supplementary Conditions. LIT may not make any Contract Claim against City, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors with respect to:

1. the completeness of such reports and drawings for LIT’s purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by LIT, and safety precautions and programs incident thereto; or

2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or

3. any LIT interpretation of or conclusion drawn from any “technical data” or any such other data, interpretations, opinions, or information.
4.03  *Differing Subsurface or Physical Conditions*

A.  *Notice:* If LIT believes that any subsurface or physical condition that is uncovered or revealed either:

1. is of such a nature as to establish that any “technical data” on which LIT is entitled to rely as provided in Paragraph 4.02 is materially inaccurate; or

2. is of such a nature as to require a change in the Construction Documents; or

3. differs materially from that shown or indicated in the Construction Documents; or

4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Construction Documents; then LIT shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.17.A), notify City in writing about such condition.

B.  *Possible Price and Time Adjustments.* LIT shall not be entitled to any adjustment in the Contract Price or Contract Time if:

1. LIT knew of the existence of such conditions at the time LIT made a final commitment to City with respect to Contract Price and Contract Time by the submission of a Bid or becoming bound under a negotiated contract; or

2. The existence of such condition could reasonably have been discovered or revealed as a result of the examination of the Construction Documents or the Site; or

3. LIT failed to give the written notice as required by Paragraph 4.03.A.

4.04  *Underground Facilities*

A.  *Shown or Indicated:* The information and data shown or indicated in the Construction Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to City or Engineer by the owners of such Underground Facilities, including City, or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

1. City and Engineer shall not be responsible for the accuracy or completeness of any such information or data provided by others; and

2. the cost of all of the following will be included in the Contract Price, and LIT shall have full responsibility for:
a. reviewing and checking all such information and data;

b. locating all Underground Facilities shown or indicated in the Construction Documents;

c. coordination and adjustment of the Work with the owners of such Underground Facilities, including City, during construction; and

d. the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.

B. **Not Shown or Indicated:**

1. If an Underground Facility which conflicts with the Work is uncovered or revealed at or contiguous to the Site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Construction Documents, LIT shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.17.A), identify the owner of such Underground Facility and give notice to that owner and to City. City will review the discovered Underground Facility and determine the extent, if any, to which a change may be required in the Construction Documents to reflect and document the consequences of the existence or location of the Underground Facility. LIT shall be responsible for the safety and protection of such discovered Underground Facility.

2. If City concludes that a change in the Construction Documents is required, a Change Order may be issued to reflect and document such consequences.

3. Verification of existing utilities, structures, and service lines shall include notification of all utility companies a minimum of 48 hours in advance of construction including exploratory excavation if necessary.

4.05 **Reference Points**

A. City shall provide engineering surveys to establish reference points for construction, which in City’s judgment are necessary to enable LIT to proceed with the Work. City will provide construction stakes or other customary method of marking to establish line and grades for roadway and utility construction, centerlines and benchmarks for bridgework. LIT shall protect and preserve the established reference points and property monuments, and shall make no changes or relocations. LIT shall report to City whenever any reference point or property monument is lost or destroyed or requires relocation because of necessary changes in grades or locations. The City shall be responsible for the replacement or relocation of reference points or property monuments not carelessly or willfully destroyed by LIT. LIT shall notify City in advance and with sufficient time to avoid delays.

B. Whenever, in the opinion of the City, any reference point or monument has been carelessly or willfully destroyed, disturbed, or removed by LIT or any of his employees, the full cost
for replacing such points plus 25% will be charged against LIT, and the full amount will be deducted from payment due LIT.

4.06 Hazardous Environmental Condition at Site

A. Reports and Drawings: The Supplementary Conditions identify those reports and drawings known to City relating to Hazardous Environmental Conditions that have been identified at the Site.

B. Limited Reliance by LIT on Technical Data Authorized: LIT may rely upon the accuracy of the “technical data” contained in such reports and drawings, but such reports and drawings are not Construction Documents. Such “technical data” is identified in the Supplementary Conditions. LIT may not make any Contract Claim against City, or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors with respect to:

1. the completeness of such reports and drawings for LIT’s purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences and procedures of construction to be employed by LIT and safety precautions and programs incident thereto; or

2. other data, interpretations, opinions and information contained in such reports or shown or indicated in such drawings; or

3. any LIT interpretation of or conclusion drawn from any “technical data” or any such other data, interpretations, opinions or information.

C. LIT shall not be responsible for any Hazardous Environmental Condition uncovered or revealed at the Site which was not shown or indicated in Drawings or Specifications or identified in the Construction Documents to be within the scope of the Work. LIT shall be responsible for a Hazardous Environmental Condition created with any materials brought to the Site by LIT, Subcontractors, Suppliers, or anyone else for whom LIT is responsible.

D. If LIT encounters a Hazardous Environmental Condition or if LIT or anyone for whom LIT is responsible creates a Hazardous Environmental Condition, LIT shall immediately: (i) secure or otherwise isolate such condition; (ii) stop all Work in connection with such condition and in any area affected thereby (except in an emergency as required by Paragraph 6.17.A); and (iii) notify City (and promptly thereafter confirm such notice in writing). City may consider the necessity to retain a qualified expert to evaluate such condition or take corrective action, if any.

E. LIT shall not be required to resume Work in connection with such condition or in any affected area until after City has obtained any required permits related thereto and delivered written notice to LIT: (i) specifying that such condition and any affected area is or has been rendered suitable for the resumption of Work; or (ii) specifying any special conditions under which such Work may be resumed.
F. If after receipt of such written notice LIT does not agree to resume such Work based on a reasonable belief it is unsafe, or does not agree to resume such Work under such special conditions, then City may order the portion of the Work that is in the area affected by such condition to be deleted from the Work. City may have such deleted portion of the Work performed by City’s own forces or others.

G. To the fullest extent permitted by Laws and Regulations, LIT shall indemnify and hold harmless City, from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition created by LIT or by anyone for whom LIT is responsible; provided that LIT shall have no obligation to indemnify for any claims, costs, losses or damages arising out of or related to the gross negligence, willful misconduct or violation of law by the City, its agents, employees or representatives. Nothing in this Paragraph 4.06.G shall obligate LIT to indemnify any individual or entity from and against the consequences of that individual’s or entity’s own negligence.

H. The provisions of Paragraphs 4.02, 4.03, and 4.04 do not apply to a Hazardous Environmental Condition uncovered or revealed at the Site.

ARTICLE 5 – BONDS AND INSURANCE

5.01 Licensed Sureties and Insurers. All bonds and insurance required by the Construction Documents to be purchased and maintained by LIT shall be obtained from surety or insurance companies that are duly licensed or authorized in the State of Texas to issue bonds or insurance policies for the limits and coverages so required. Such surety and insurance companies shall also meet such additional requirements and qualifications as may be provided in the Supplementary Conditions.

5.02 Performance, Payment, and Maintenance Bonds

A. LIT shall furnish performance and payment bonds, in accordance with Texas Government Code Chapter 2253 or successor statute, each in an amount equal to the Contract Price as security for the faithful performance and payment of all of LIT’s obligations under the Construction Documents.

B. LIT shall furnish maintenance bonds in an amount equal to the Contract Price as security to protect the City against any defects in any portion of the Work described in the Construction Documents. Maintenance bonds shall remain in effect for two (2) years after the date of Final Acceptance by the City.

C. All bonds shall be in the form prescribed by the Construction Documents except as provided otherwise by Laws or Regulations, and shall be executed by such sureties as are named in the list of “Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies” as published in Circular 570 (amended) by the Financial Management Service, Surety Bond Branch, U.S. Department of the Treasury. All bonds signed by an agent or attorney-in-fact must be accompanied by
a sealed and dated power of attorney which shall show that it is effective on the date the agent or attorney-in-fact signed each bond.

D. If the surety on any bond furnished by LIT is declared bankrupt or becomes insolvent or its right to do business is terminated in the State of Texas or it ceases to meet the requirements of Paragraph 5.02.C, LIT shall promptly notify City and shall, within 30 days after the event giving rise to such notification, provide another bond and surety, both of which shall comply with the requirements of Paragraphs 5.01 and 5.02.C.

5.03  **Certificates of Insurance.** LIT shall deliver to City, with copies to each additional insured and loss payee identified in the Supplementary Conditions, certificates of insurance (other evidence of insurance requested by City or any other additional insured) in at least the minimum amount as specified in the Supplementary Conditions which LIT is required to purchase and maintain.

A. The certificate of insurance shall document the City, and all identified entities named in the Supplementary Conditions as “Additional Insured” on all liability policies.

B. LIT’s general liability insurance shall include a, “per project” or “per location”, endorsement, which shall be identified in the certificate of insurance provided to the City.

C. The certificate shall be signed by an agent authorized to bind coverage on behalf of the insured, be complete in its entirety, and show complete insurance carrier names as listed in the current A.M. Best Property & Casualty Guide

D. The insurers for all policies must be licensed and/or approved to do business in the State of Texas. Except for workers’ compensation, all insurers must have a minimum rating of A-= VII in the current A. M. Best Key Rating Guide or have reasonably equivalent financial strength and solvency to the satisfaction of Risk Management. If the rating is below that required, written approval of City is required.

E. All applicable policies shall include a Waiver of Subrogation (Rights of Recovery) in favor of the City. In addition, LIT agrees to waive all rights of subrogation against the Engineer (if applicable), and each additional insured identified in the Supplementary Conditions

F. Failure of the City to demand such certificates or other evidence of full compliance with the insurance requirements or failure of the City to identify a deficiency from evidence that is provided shall not be construed as a waiver of LIT’s obligation to maintain such lines of insurance coverage.

G. If insurance policies are not written for specified coverage limits, an Umbrella or Excess Liability insurance for any differences is required. Excess Liability shall follow form of the primary coverage.

H. Unless otherwise stated, all required insurance shall be written on the “occurrence basis”. If coverage is underwritten on a claims-made basis, the retroactive date shall be coincident
with or prior to the date of the effective date of the agreement and the certificate of insurance shall state that the coverage is claims-made and the retroactive date. The insurance coverage shall be maintained for the duration of the Contract and for three (3) years following Final Acceptance provided under the Construction Documents or for the warranty period, whichever is longer. An annual certificate of insurance submitted to the City shall evidence such insurance coverage.

I. Policies shall have no exclusions by endorsements, which, neither nullify or amend, the required lines of coverage, nor decrease the limits of said coverage unless such endorsements are approved in writing by the City. In the event a Contract has been bid or executed and the exclusions are determined to be unacceptable or the City desires additional insurance coverage, and the City desires LIT/engineer to obtain such coverage, the contract price shall be adjusted by the cost of the premium for such additional coverage plus 10%.

J. Any self-insured retention (SIR), in excess of $25,000.00, affecting required insurance coverage shall be approved by the City in regards to asset value and stockholders' equity. In lieu of traditional insurance, alternative coverage maintained through insurance pools or risk retention groups, must also be approved by City.

K. Any deductible in excess of $5,000.00, for any policy that does not provide coverage on a first-dollar basis, must be acceptable to and approved by the City.

L. City, at its sole discretion, reserves the right to review the insurance requirements and to make reasonable adjustments to insurance coverage’s and their limits when deemed necessary and prudent by the City based upon changes in statutory law, court decision or the claims history of the industry as well as of the contracting party to the City. The City shall be required to provide prior notice of 90 days, and the insurance adjustments shall be incorporated into the Work by Change Order.

M. City shall be entitled, upon written request and without expense, to receive copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modifications of particular policy terms, conditions, limitations, or exclusions necessary to conform the policy and endorsements to the requirements of the Contract. Deletions, revisions, or modifications shall not be required where policy provisions are established by law or regulations binding upon either party or the underwriter on any such policies.

N. City shall not be responsible for the direct payment of insurance premium costs for LIT’s insurance.

5.04 LIT’s Insurance

A. Workers Compensation and Employers’ Liability. LIT shall purchase and maintain such insurance coverage with limits consistent with statutory benefits outlined in the Texas Workers’ Compensation Act (Texas Labor Code, Ch. 406, as amended), and minimum limits for Employers’ Liability as is appropriate for the Work being performed and as will
provide protection from claims set forth below which may arise out of or result from LIT’s performance of the Work and LIT’s other obligations under the Construction Documents, whether it is to be performed by LIT, any Subcontractor or Supplier, or by anyone directly or indirectly employed by any of them to perform any of the Work, or by anyone for whose acts any of them may be liable:

1. claims under workers’ compensation, disability benefits, and other similar employee benefit acts;

2. claims for damages because of bodily injury, occupational sickness or disease, or death of LIT’s employees.

B. **Commercial General Liability.** Coverage shall include but not be limited to covering liability (bodily injury or property damage) arising from: premises/operations, independent LITs, products/completed operations, personal injury, and liability under an insured contract. Insurance shall be provided on an occurrence basis, and as comprehensive as the current Insurance Services Office (ISO) policy. This insurance shall apply as primary insurance with respect to any other insurance or self-insurance programs afforded to the City. The Commercial General Liability policy, shall have no exclusions by endorsements that would alter of nullify premises/operations, products/completed operations, contractual, personal injury, or advertising injury, which are normally contained with the policy, unless the City approves such exclusions in writing.

For construction projects that present a substantial completed operation exposure, the City may require LIT to maintain completed operations coverage for a minimum of no less than three (3) years following the completion of the project (if identified in the Supplementary Conditions).

C. **Automobile Liability.** A commercial business auto policy shall provide coverage on “any auto”, defined as autos owned, hired and non-owned and provide indemnity for claims for damages because bodily injury or death of any person and or property damage arising out of the work, maintenance or use of any motor vehicle by LIT, any Subcontractor or Supplier, or by anyone directly or indirectly employed by any of them to perform any of the Work, or by anyone for whose acts any of them may be liable.

D. **Railroad Protective Liability.** If any of the work or any warranty work is within the limits of railroad right-of-way, LIT shall comply with the requirements identified in the Supplementary Conditions.

E. **Notification of Policy Cancellation:** LIT shall immediately notify City upon cancellation or other loss of insurance coverage. LIT shall stop work until replacement insurance has been procured. There shall be no time credit for days not worked pursuant to this section.

5.05 **Acceptance of Bonds and Insurance; Option to Replace.** If City has any objection to the coverage afforded by or other provisions of the bonds or insurance required to be purchased and maintained by LIT in accordance with Article 5 on the basis of non-conformance with the Construction Documents, the City shall so notify LIT in writing within 10 Business Days after
receipt of the certificates (or other evidence requested). LIT shall provide to the City such additional information in respect of insurance provided as the City may reasonably request. If LIT does not purchase or maintain all of the bonds and insurance required by the Construction Documents, the City shall notify LIT in writing of such failure prior to the start of the Work, or of such failure to maintain prior to any change in the required coverage.

**ARTICLE 6 – LIT’S RESPONSIBILITIES**

6.01  *Supervision and Superintendence*

A. LIT shall supervise, inspect, and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Construction Documents. LIT shall be solely responsible for the means, methods, techniques, sequences, and procedures of construction.

B. At all times during the progress of the Work, LIT shall assign a competent, English-speaking, Superintendent who shall not be replaced without written notice to City. The Superintendent will be LIT’s representative at the Site and shall have authority to act on behalf of LIT. All communication given to or received from the Superintendent shall be binding on LIT.

C. LIT shall notify the City 24 hours prior to moving areas during the sequence of construction.

6.02  *Labor; Working Hours*

A. LIT shall provide competent, suitably qualified personnel to perform construction as required by the Construction Documents. LIT shall at all times maintain good discipline and order at the Site.

B. Except as otherwise required for the safety or protection of persons or the Work or property at the Site or adjacent thereto, and except as otherwise stated in the Construction Documents, all Work at the Site shall be performed during Regular Working Hours. LIT will not permit the performance of Work beyond Regular Working Hours or for Weekend Working Hours without City’s written consent (which will not be unreasonably withheld). Written request (by letter or electronic communication) to perform Work:

1. for beyond Regular Working Hours request must be made by noon at least two (2) Business Days prior;

2. for Weekend Working Hours request must be made by noon of the preceding Thursday;

3. for legal holidays request must be made by noon two Business Days prior to the legal holiday.
6.03 Services, Materials, and Equipment

A. Unless otherwise specified in the Construction Documents, LIT shall provide and assume full responsibility for all services, materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities, and all other facilities and incidentals necessary for the performance, LIT required testing, start-up, and completion of the Work.

B. All materials and equipment incorporated into the Work shall be as specified or, if not specified, shall be of good quality and new, except as otherwise provided in the Construction Documents. All special warranties and guarantees required by the Specifications shall expressly run to the benefit of City. If required by City, LIT shall furnish satisfactory evidence (including reports of required tests) as to the source, kind, and quality of materials and equipment.

C. All materials and equipment to be incorporated into the Work shall be stored, applied, installed, connected, erected, protected, used, cleaned, and conditioned in accordance with instructions of the applicable Supplier, except as otherwise may be provided in the Construction Documents.

D. All items of standard equipment to be incorporated into the Work shall be the latest model at the time of bid, unless otherwise specified.

6.04 Project Schedule

A. LIT shall adhere to the Project Schedule established in accordance with Paragraph 2.07 and the General Requirements as it may be adjusted from time to time as provided below.

1. LIT shall submit to City for acceptance (to the extent indicated in Paragraph 2.07 and the General Requirements) proposed adjustments in the Project Schedule that will not result in changing the Contract Time. Such adjustments will comply with any provisions of the General Requirements applicable thereto.

2. LIT shall submit to City a monthly Project Schedule with a monthly progress payment for the duration of the Contract or as otherwise reasonably requested by the City.

3. Proposed adjustments in the Project Schedule that will change the Contract Time shall be submitted in accordance with the requirements of Article 12. Adjustments in Contract Time may only be made by a Change Order.

6.05 Substitutes and “Or-Equals”

A. Whenever an item of material or equipment is specified or described in the Construction Documents by using the name of a proprietary item or the name of a particular Supplier, the specification or description is intended to establish the type, function, appearance, and quality required. Unless the specification or description contains or is followed by words
reading that no like, equivalent, or “or-equal” item or no substitution is permitted, other items of material or equipment of other Suppliers may be submitted to City for review under the circumstances described below.

1. **“Or-Equal” Items:** If in City’s sole discretion an item of material or equipment proposed by LIT is functionally equal to that named and sufficiently similar so that no change in related Work will be required, it may be considered by City as an “or-equal” item, in which case review and approval of the proposed item may, in City’s sole discretion, be accomplished without compliance with some or all of the requirements for approval of proposed substitute items. For the purposes of this Paragraph 6.05.A.1, a proposed item of material or equipment will be considered functionally equal to an item so named if:

   a. the City determines that:

      1) it is at least equal in materials of construction, quality, durability, appearance, strength, and design characteristics;

      2) it will reliably perform at least equally well the function and achieve the results imposed by the design concept of the completed Project as a functioning whole; and

      3) it has a proven record of performance and availability of responsive service; and

   b. LIT certifies that, if approved and incorporated into the Work:

      1) there will be no increase in cost to the City or increase in Contract Time; and

      2) it will conform substantially to the detailed requirements of the item named in the Construction Documents.

2. **Substitute Items:**

   a. If in City’s sole discretion an item of material or equipment proposed by LIT does not qualify as an “or-equal” item under Paragraph 6.05.A.1, it may be submitted as a proposed substitute item.

   b. LIT shall submit sufficient information as provided below to allow City to determine if the item of material or equipment proposed is essentially equivalent to that named and an acceptable substitute therefor. Requests for review of proposed substitute items of material or equipment will not be accepted by City from anyone other than LIT.

   c. LIT shall make written application to City for review of a proposed substitute item of material or equipment that LIT seeks to furnish or use.
The application shall comply with the following:

1) shall certify that the proposed substitute item will:
   a) perform adequately the functions and achieve the results called for by the general design;
   b) be similar in substance to that specified;
   c) be suited to the same use as that specified; and

2) will state:
   a) the extent, if any, to which the use of the proposed substitute item will prejudice LIT’s achievement of final completion on time;
   b) whether use of the proposed substitute item in the Work will require a change in any of the Construction Documents (or in the provisions of any other direct contract with City for other work on the Project) to adapt the design to the proposed substitute item;
   c) whether incorporation or use of the proposed substitute item in connection with the Work is subject to payment of any license fee or royalty; and

3) will identify:
   a) all variations of the proposed substitute item from that specified;
   b) available engineering, sales, maintenance, repair, and replacement services; and

4) shall contain an itemized estimate of all costs or credits that will result directly or indirectly from use of such substitute item, including costs of redesign and Damage Claims of other LITs affected by any resulting change.

B. Substitute Construction Methods or Procedures: If a specific means, method, technique, sequence, or procedure of construction is expressly required by the Construction Documents, LIT may furnish or utilize a substitute means, method, technique, sequence, or procedure of construction approved by City. LIT shall submit sufficient information to allow City, in City’s sole discretion, to determine that the substitute proposed is equivalent to that expressly called for by the Construction Documents. LIT shall make written application to City for review in the same manner as those provided in Paragraph 6.05.A.2.
C. **City’s Evaluation:** City will be allowed a reasonable time within which to evaluate each proposal or submittal made pursuant to Paragraphs 6.05.A and 6.05.B. City may require LIT to furnish additional data about the proposed substitute. City will be the sole judge of acceptability. No “or-equal” or substitute will be ordered, installed or utilized until City’s review is complete, which will be evidenced by a Change Order in the case of a substitute and an accepted Submittal for an “or-equal.” City will advise LIT in writing of its determination.

D. **Special Guarantee:** City may require LIT to furnish at LIT’s expense a special performance guarantee, warranty, or other surety with respect to any substitute. **LIT shall indemnify and hold harmless City and anyone directly or indirectly employed by them from and against any and all claims, damages, losses and expenses (including attorneys fees) arising out of the use of substituted materials or equipment; provided that LIT shall have no obligation to indemnify for any claims, costs, losses or damages arising out of or related to the gross negligence, willful misconduct or violation of law by the City, its agents, employees or representatives.**

E. **City’s Cost Reimbursement:** City will record City’s costs in evaluating a substitute proposed or submitted by LIT pursuant to Paragraphs 6.05.A.2 and 6.05.B. Whether or not City approves a substitute so proposed or submitted by LIT, LIT may be required to reimburse City for evaluating each such proposed substitute. LIT may also be required to reimburse City for the charges for making changes in the Construction Documents (or in the provisions of any other direct contract with City) resulting from the acceptance of each proposed substitute.

F. **LIT’s Expense:** LIT shall provide all data in support of any proposed substitute or “or-equal” at LIT’s expense.

G. **City Substitute Reimbursement:** Costs (savings or charges) attributable to acceptance of a substitute shall be incorporated to the Contract by Change Order.

H. **Time Extensions:** No additional time will be granted for substitutions.

6.06 **Concerning Subcontractors, Suppliers, and Others**

A. LIT shall perform with his own organization, work of a value not less than 35% of the value embraced on the Contract, unless otherwise approved by the City.

B. LIT shall not employ any Subcontractor, Supplier, or other individual or entity, whether initially or as a replacement, against whom City may have reasonable objection. LIT shall not be required to employ any Subcontractor, Supplier, or other individual or entity to furnish or perform any of the Work against whom LIT has reasonable objection (excluding those acceptable to City as indicated in Paragraph 6.06.C).

C. The City may from time to time require the use of certain Subcontractors, Suppliers, or other individuals or entities on the project, and will provide such requirements in the Supplementary Conditions.
D. LIT shall be fully responsible to City for all acts and omissions of the Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work just as LIT is responsible for LIT’s own acts and omissions. Nothing in the Construction Documents:

1. shall create for the benefit of any such Subcontractor, Supplier, or other individual or entity any contractual relationship between City and any such Subcontractor, Supplier or other individual or entity; nor

2. shall create any obligation on the part of City to pay or to see to the payment of any moneys due any such Subcontractor, Supplier, or other individual or entity except as may otherwise be required by Laws and Regulations.

E. LIT shall be solely responsible for scheduling and coordinating the Work of Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work under a direct or indirect contract with LIT.

F. All Subcontractors, Suppliers, and such other individuals or entities performing or furnishing any of the Work shall communicate with City through LIT.

G. All Work performed for LIT by a Subcontractor or Supplier will be pursuant to an appropriate agreement between LIT and the Subcontractor or Supplier which specifically binds the Subcontractor or Supplier to the applicable terms and conditions of the Construction Documents for the benefit of City.

6.07 Wage Rates

A. Duty to pay Prevailing Wage Rates. LIT shall comply with all requirements of Chapter 2258, Texas Government Code (as amended), including the payment of not less than the rates determined by the City Commission of the City of Brownsville to be the prevailing wage rates in accordance with Chapter 2258. Such prevailing wage rates are included in these Construction Documents.

B. Penalty for Violation. A LIT or any Subcontractor who does not pay the prevailing wage shall, upon demand made by the City, pay to the City $60 for each worker employed for each calendar day or part of the day that the worker is paid less than the prevailing wage rates stipulated in these Construction Documents. This penalty shall be retained by the City to offset its administrative costs, pursuant to Texas Government Code 2258.023.

C. Complaints of Violations and City Determination of Good Cause. On receipt of information, including a complaint by a worker, concerning an alleged violation of 2258.023, Texas Government Code, by a LIT or Subcontractor, the City shall make an initial determination, before the 31st day after the date the City receives the information, as to whether good cause exists to believe that the violation occurred. The City shall notify in writing LIT or Subcontractor and any affected worker of its initial determination. Upon the City’s determination that there is good cause to believe LIT or Subcontractor has violated Chapter 2258, the City shall retain the full amounts claimed by the claimant or claimants as the difference between wages paid and wages due under the prevailing wage rates, such
amounts being subtracted from successive progress payments pending a final determination of the violation.

D. *Arbitration Required if Violation Not Resolved.* An issue relating to an alleged violation of Section 2258.023, Texas Government Code, including a penalty owed to the City or an affected worker, shall be submitted to binding arbitration in accordance with the Texas General Arbitration Act (Article 224 et seq., Revised Statutes) if LIT or Subcontractor and any affected worker does not resolve the issue by agreement before the 15th day after the date the City makes its initial determination pursuant to Paragraph C above. If the persons required to arbitrate under this section do not agree on an arbitrator before the 11th day after the date that arbitration is required, a district court shall appoint an arbitrator on the petition of any of the persons. The City is not a party in the arbitration. The decision and award of the arbitrator is final and binding on all parties and may be enforced in any court of competent jurisdiction.

E. *Records to be Maintained.* LIT and each Subcontractor shall, for a period of three (3) years following the date of acceptance of the work, maintain records that show (i) the name and occupation of each worker employed by LIT in the construction of the Work provided for in this Contract; and (ii) the actual per diem wages paid to each worker. The records shall be open at all reasonable hours for inspection by the City. The provisions of Paragraph 6.23, Right to Audit, shall pertain to this inspection.

F. *Progress Payments.* With each progress payment or payroll period, whichever is less, LIT shall submit an affidavit stating that LIT has complied with the requirements of Chapter 2258, Texas Government Code.

G. *Posting of Wage Rates.* LIT shall post prevailing wage rates in a conspicuous place at all times.

H. *Subcontractor Compliance.* LIT shall include in its subcontracts and/or shall otherwise require all of its Subcontractors to comply with Paragraphs A through G above.

6.08 *Patent Fees and Royalties*

A. LIT shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product, or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, product, or device is specified in the Construction Documents for use in the performance of the Work and if, to the actual knowledge of City, its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by City in the Construction Documents. Failure of the City to disclose such information does not relieve LIT from its obligations to pay for the use of said fees or royalties to others.

B. To the fullest extent permitted by Laws and Regulations, LIT shall indemnify and hold harmless City, from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals
and all court or arbitration or other dispute resolution costs) arising out of or relating to any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product, or device not specified in the Construction Documents; provided that LIT shall have no obligation to indemnify for any claims, costs, losses or damages arising out of or related to the gross negligence, willful misconduct or violation of law by the City, its agents, employees or representatives.

6.09 **Permits and Utilities**

A. **LIT obtained permits and licenses.** LIT shall obtain and pay for all construction permits and licenses except those provided for in the Supplementary Conditions or Construction Documents. City shall assist LIT, when necessary, in obtaining such permits and licenses. LIT shall pay all governmental charges and inspection fees necessary for the prosecution of the Work which are applicable at the time of opening of Bids, or, if there are no Bids, on the Effective Date of the Agreement, except for permits provided by the City as specified in 6.09.B. City shall pay all charges of utility owners for connections for providing permanent service to the Work.

B. **City obtained permits and licenses.** City will obtain and pay for all permits and licenses as provided for in the Supplementary Conditions or Construction Documents. It will be LIT’s responsibility to carry out the provisions of the permit. If LIT initiates changes to the Contract and the City approves the changes, LIT is responsible for obtaining clearances and coordinating with the appropriate regulatory agency. The City will not reimburse LIT for any cost associated with these requirements of any City acquired permit. The following are permits the City will obtain if required:

1. Texas Department of Transportation Permits
2. U.S. Army Corps of Engineers Permits
3. Texas Commission on Environmental Quality Permits
4. Railroad Company Permits

C. **Outstanding permits and licenses.** The City anticipates acquisition of and/or access to permits and licenses. Any outstanding permits and licenses are anticipated to be acquired in accordance with the schedule set forth in the Supplementary Conditions. The Project Schedule submitted by LIT in accordance with the Construction Documents must consider any outstanding permits and licenses.

6.10 **Laws and Regulations**

A. LIT shall give all notices required by and shall comply with all Laws and Regulations applicable to the performance of the Work. Except where otherwise expressly required by
applicable Laws and Regulations, the City shall not be responsible for monitoring LIT’s compliance with any Laws or Regulations.

B. If LIT performs any Work knowing or having reason to know that it is contrary to Laws or Regulations, LIT shall bear all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such Work. However, it shall not be LIT’s responsibility to make certain that the Specifications and Drawings are in accordance with Laws and Regulations, but this shall not relieve LIT of LIT’s obligations under Paragraph 3.02.

C. Changes in Laws or Regulations not known at the time of opening of Bids having an effect on the cost or time of performance of the Work may be the subject of an adjustment in Contract Price or Contract Time.

6.11 Taxes

A. On a contract awarded by the City, an organization which qualifies for exemption pursuant to Texas Tax Code, Subchapter H, Sections 151.301-335 (as amended), LIT may purchase, rent or lease all materials, supplies and equipment used or consumed in the performance of this contract by issuing to his supplier an exemption certificate in lieu of the tax, said exemption certificate to comply with State Comptroller’s Ruling .007. Any such exemption certificate issued to LIT in lieu of the tax shall be subject to and shall comply with the provision of State Comptroller’s Ruling .011, and any other applicable rulings pertaining to the Texas Tax Code, Subchapter H.

B. Texas Tax permits and information may be obtained from:

1. Comptroller of Public Accounts Sales Tax Division
   Capitol Station Austin, TX 78711; or


6.12 Use of Site and Other Areas

A. Limitation on Use of Site and Other Areas:

1. LIT shall confine construction equipment, the storage of materials and equipment, and the operations of workers to the Site and other areas permitted by Laws and Regulations, and shall not unreasonably encumber the Site and other areas with construction equipment or other materials or equipment. LIT shall assume full responsibility for any damage to any such land or area, or to the owner or occupant thereof, or of any adjacent land or areas resulting from the performance of the Work.
2. At any time when, in the judgment of the City, LIT has obstructed or closed or is carrying on operations in a portion of a street, right-of-way, or easement greater than is necessary for proper execution of the Work, the City may require LIT to finish the section on which operations are in progress before work is commenced on any additional area of the Site.

3. Should any Damage Claim be made by any such owner or occupant because of the performance of the Work, LIT shall promptly attempt to resolve the Damage Claim.

4. Pursuant to Paragraph 6.21, LIT shall indemnify and hold harmless City, from and against all claims, costs, losses, and damages arising out of or relating to any claim or action, legal or equitable, brought by any such owner or occupant against City.

B. Removal of Debris During Performance of the Work: During the progress of the Work LIT shall keep the Site and other areas free from accumulations of waste materials, rubbish, and other debris. Removal and disposal of such waste materials, rubbish, and other debris shall conform to applicable Laws and Regulations.

C. Site Maintenance Cleaning: 24 hours after written notice is given to LIT that the clean-up on the job site is proceeding in a manner unsatisfactory to the City, if LIT fails to correct the unsatisfactory procedure, the City may take such direct action as the City deems appropriate to correct the clean-up deficiencies cited to LIT in the written notice (by letter or electronic communication), and the costs of such direct action, plus 25% of such costs, shall be deducted from the monies due or to become due to LIT.

D. Final Site Cleaning: Prior to Final Acceptance of the Work LIT shall clean the Site and the Work and make it ready for utilization by City or adjacent property owner. At the completion of the Work LIT shall remove from the Site all tools, appliances, construction equipment and machinery, and surplus materials and shall restore to original condition or better all property disturbed by the Work.

E. Loading Structures: LIT shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall LIT subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

6.13 Record Documents. LIT shall maintain in a safe place at the Site or in a place designated by LIT and approved by the City, one (1) record copy of all Drawings, Specifications, Addenda, Change Orders, Field Orders, and written interpretations and clarifications in good order and annotated to show changes made during construction. These record documents together with all approved Samples and a counterpart of all accepted Submittals will be available to City for reference. Upon completion of the Work, these record documents, any operation and maintenance manuals, and Submittals will be delivered to City prior to Final Inspection. LIT shall include accurate locations for buried and imbedded items.
6.14  
Safety and Protection  

A. LIT shall be solely responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. Such responsibility does not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of their work, nor for compliance with applicable safety Laws and Regulations. LIT shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:  

1. all persons on the Site or who may be affected by the Work;  
2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the Site; and  
3. other property at the Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities, and Underground Facilities not designated for removal, relocation, or replacement in the course of construction.  

B. LIT shall comply with all applicable Laws and Regulations relating to the safety of persons or property, or to the protection of persons or property from damage, injury, or loss; and shall erect and maintain all necessary safeguards for such safety and protection. LIT shall notify owners of adjacent property and of Underground Facilities and other utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation, and replacement of their property.  

C. LIT shall comply with the applicable requirements of City’s safety programs, if any.  

D. LIT shall inform City of the specific requirements of LIT’s safety program, if any, with which City’s employees and representatives must comply while at the Site.  

E. All damage, injury, or loss to any property referred to in Paragraph 6.14.A.2 or 6.14.A.3 caused, directly or indirectly, in whole or in part, by LIT, any Subcontractor, Supplier, or any other individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, shall be remedied by LIT.  

F. LIT’s duties and responsibilities for safety and for protection of the Work shall continue until such time as all the Work is completed and City has accepted the Work.  

6.15  
Safety Representative. LIT shall inform City in writing of LIT’s designated safety representative at the Site.  

6.16  
Hazard Communication Programs. LIT shall be responsible for coordinating any exchange of material safety data sheets or other hazard communication information required to be made available to or exchanged between or among employers in accordance with Laws or Regulations.
6.17 *Emergencies and/or Rectification*

A. In emergencies affecting the safety or protection of persons or the Work or property at the Site or adjacent thereto, LIT is obligated to act to prevent threatened damage, injury, or loss. LIT shall give City prompt written notice if LIT believes that any significant changes in the Work or variations from the Construction Documents have been caused thereby or are required as a result thereof. If City determines that a change in the Construction Documents is required because of the action taken by LIT in response to such an emergency, a Change Order may be issued.

B. Should LIT fail to respond to a request from the City to rectify any discrepancies, omissions, or correction necessary to conform with the requirements of the Construction Documents, the City shall give LIT written notice that such work or changes are to be performed. The written notice shall direct attention to the discrepant condition and request LIT to take remedial action to correct the condition. In the event LIT does not take positive steps to fulfill this written request, or does not show just cause for not taking the proper action, within 24 hours, the City may take such remedial action with City forces or by contract. The City shall deduct an amount equal to the entire costs for such remedial action, plus 25%, from any funds due or become due LIT on the Project.

6.18 *Submittals*

A. LIT shall submit required Submittals to City for review and acceptance in accordance with the accepted Schedule of Submittals (as required by Paragraph 2.07). Each submittal will be identified as City may require.

1. Submit number of copies specified in the General Requirements.

2. Data shown on the Submittals will be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data to show City the services, materials, and equipment LIT proposes to provide and to enable City to review the information for the limited purposes required by Paragraph 6.18.C.

3. Submittals submitted as herein provided by LIT and reviewed by City for conformance with the design concept shall be executed in conformity with the Construction Documents unless otherwise required by City.

4. When Submittals are submitted for the purpose of showing the installation in greater detail, their review shall not excuse LIT from requirements shown on the Drawings and Specifications.

5. For-Information-Only submittals upon which the City is not expected to conduct review or take responsive action may be so identified in the Construction Documents.
6. Submit required number of Samples specified in the Specifications.

7. Clearly identify each Sample as to material, Supplier, pertinent data such as catalog numbers, the use for which intended and other data as City may require to enable City to review the submittal for the limited purposes required by Paragraph 6.18.C.

B. Where a Submittal is required by the Construction Documents or the Schedule of Submittals, any related Work performed prior to City’s review and acceptance of the pertinent submittal will be at the sole expense and responsibility of LIT.

C. City’s Review:

1. City will provide timely review of required Submittals in accordance with the Schedule of Submittals acceptable to City. City’s review and acceptance will be only to determine if the items covered by the submittals will, after installation or incorporation in the Work, conform to the information given in the Construction Documents and be compatible with the design concept of the completed Project as a functioning whole as indicated by the Construction Documents.

2. City’s review and acceptance will not extend to means, methods, techniques, sequences, or procedures of construction (except where a particular means, method, technique, sequence, or procedure of construction is specifically and expressly called for by the Construction Documents) or to safety precautions or programs incident thereto. The review and acceptance of a separate item as such will not indicate approval of the assembly in which the item functions.

3. City’s review and acceptance shall not relieve LIT from responsibility for any variation from the requirements of the Construction Documents unless LIT has complied with the requirements of the Construction Documents and City has given written acceptance of each such variation by specific written notation thereof incorporated in or accompanying the Submittal. City’s review and acceptance shall not relieve LIT from responsibility for complying with the requirements of the Construction Documents.

6.19 Continuing the Work. Except as otherwise provided, LIT shall carry on the Work and adhere to the Project Schedule during all disputes or disagreements with City. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as City and LIT may otherwise agree in writing.

6.20 LIT’s General Warranty and Guarantee

A. LIT warrants and guarantees to City that all Work will be in accordance with the Construction Documents and will not be defective. City and its officers, directors, members, partners, employees, agents, consultants, and subcontractors shall be entitled to rely on representation of LIT’s warranty and guarantee.
B. LIT’s warranty and guarantee hereunder excludes defects or damage caused by:

1. abuse, modification, or improper maintenance or operation by persons other than LIT, Subcontractors, Suppliers, or any other individual or entity for whom LIT is responsible; or

2. normal wear and tear under normal usage.

C. LIT’s obligation to perform and complete the Work in accordance with the Construction Documents shall be absolute. None of the following will constitute an acceptance of Work that is not in accordance with the Construction Documents or a release of LIT’s obligation to perform the Work in accordance with the Construction Documents:

1. observations by City;

2. recommendation or payment by City of any progress or final payment;

3. the issuance of a certificate of Final Acceptance by City or any payment related thereto by City;

4. use or occupancy of the Work or any part thereof by City;

5. any review and acceptance of a Submittal by City;

6. any inspection, test, or approval by others; or

7. any correction of defective Work by City.

D. LIT shall remedy any defects or damages in the Work and pay for any damage to other work or property resulting therefrom which shall appear within a period of two (2) years from the date of Final Acceptance of the Work unless a longer period is specified and shall furnish a good and sufficient maintenance bond, complying with the requirements of Paragraph 5.02.B. The City will give notice of observed defects with reasonable promptness.

6.21 Indemnification

A. LIT covenants and agrees to indemnify, hold harmless and defend, at its own expense, the City, its officers, servants and employees, from and against any and all claims arising out of, or alleged to arise out of, the work and services to be performed by LIT, its officers, agents, employees, subcontractors, licenses or invitees under this Contract; provided that LIT shall have no obligation to indemnify for any claims, costs, losses or damages arising out of or related to the gross negligence, willful misconduct or violation of law by the City, its agents, employees or representatives. This indemnity provision is intended to include, without limitation, indemnity for costs, expenses and legal fees incurred by the City in defending against such claims and causes of actions.
B. LIT covenants and agrees to indemnify and hold harmless, at its own expense, the City, its officers, servants and employees, from and against any and all loss, damage or destruction of property of the City, arising out of, or alleged to arise out of, the work and services to be performed by LIT, its officers, agents, employees, subcontractors, licensees or invitees under this Contract; provided that LIT shall have no obligation to indemnify for any claims, costs, losses or damages arising out of or related to the gross negligence, willful misconduct or violation of law by the City, its agents, employees or representatives.

6.22 Delegation of Professional Design Services

A. LIT is required to provide any and all professional design services specifically required by the Construction Documents for a portion of the Work, required by the City’s Code of Ordinances, or required to carry out LIT’s responsibilities for construction means, methods, techniques, sequences and procedures.

B. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of LIT by the Construction Documents, City will specify all performance and design criteria that such services must satisfy. LIT shall cause such services or certifications to be provided by a properly licensed professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, and Submittals prepared by such professional. Submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional’s written approval when submitted to City.

C. City shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals.

D. Pursuant to this Paragraph 6.22, City’s review and acceptance of design calculations and design drawings will be only for the limited purpose of checking for conformance with performance and design criteria given and the design concept expressed in the Construction Documents. City’s review and acceptance of Submittals (except design calculations and design drawings) will be only for the purpose stated in Paragraph 6.18.C; provided, however, this paragraph shall not waive, limit or replace the City’s right to review construction plans or require permits for any work performed under this Agreement by LIT or its contractors or subcontractors.

6.23 Right to Audit

A. Subject to and in accordance with Federal requirements that LIT maintain records, LIT agrees that the City shall, until the expiration of five (5) years after final payment under this Contract, have access to and the right to examine and photocopy any directly pertinent books, documents, papers, and records of LIT involving transactions relating to this Contract. LIT agrees that the City shall have access during Regular Working Hours to all necessary LIT facilities and shall be provided adequate and appropriate workspace in order
to conduct audits in compliance with the provisions of this Paragraph. The City shall give LIT reasonable advance notice of intended audits.

B. LIT further agrees to include in all its subcontracts hereunder a provision to the effect that the subcontractor agrees that the City shall, until the expiration of three (3) years after final payment under this Contract, have access to and the right to examine and photocopy any directly pertinent books, documents, papers, and records of such Subcontractor, involving transactions to the subcontract, and further, that City shall have access during Regular Working Hours to all Subcontractor facilities, and shall be provided adequate and appropriate workspace in order to conduct audits in compliance with the provisions of this Paragraph. The City shall give Subcontractor reasonable advance notice of intended audits.

C. LIT and Subcontractor agree to photocopy such documents as may be requested by the City. The City agrees to reimburse LIT for the cost of the copies as follows at the rate published in the Texas Administrative Code in effect as of the time copying is performed.

6.24 Nondiscrimination

A. The City is responsible for operating Public Transportation Programs and implementing transit-related projects, which are funded in part with Federal financial assistance awarded by the U.S. Department of Transportation and the Federal Transit Administration (FTA), without discriminating against any person in the United States on the basis of race, color, or national origin.

B. Title VI, Civil Rights Act of 1964 as amended: LIT shall comply with the requirements of the Act and the Regulations as further defined in the Supplementary Conditions for any project receiving Federal assistance.

ARTICLE 7 – OTHER WORK AT THE SITE

7.01 Related Work at Site

A. City may perform other work related to the Project at the Site with City’s employees, or other City consultants, or through other direct contracts therefor, or have other work performed by utility owners. If such other work is not noted in the Construction Documents, then written notice thereof will be given to LIT prior to starting any such other work; and

B. LIT shall afford each party to such a direct contract, each utility owner, and City, if City is performing other work with City’s employees or other City LITs, proper and safe access to the Site, provide a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such other work, and properly coordinate the Work with theirs. LIT shall do all cutting, fitting, and patching of the Work that may be required to properly connect or otherwise make its several parts come together and properly integrate with such other work. LIT shall not endanger any work of others by cutting, excavating, or otherwise altering such work; provided, however, that LIT may cut or alter others' work with the written consent of City and the others whose work will be affected.
C. If the proper execution or results of any part of LIT’s Work depends upon work performed by others under this Article 7, LIT shall inspect such other work and promptly report to City in writing any delays, defects, or deficiencies in such other work that render it unavailable or unsuitable for the proper execution and results of LIT’s Work. LIT’s failure to so report will constitute an acceptance of such other work as fit and proper for integration with LIT’s Work except for latent defects in the work provided by others.

7.02 Coordination

A. If City intends to contract with others for the performance of other work on the Project at the Site, the following will be set forth in Supplementary Conditions:

1. the individual or entity who will have authority and responsibility for coordination of the activities among the various LITs will be identified;
2. the specific matters to be covered by such authority and responsibility will be itemized; and
3. the extent of such authority and responsibilities will be provided.

B. Unless otherwise provided in the Supplementary Conditions, City shall have authority for such coordination.

ARTICLE 8 – CITY’S RESPONSIBILITIES

8.01 Communications to LIT. Except as otherwise provided in the Supplementary Conditions, City shall issue all communications to LIT.

8.02 Furnish Data. City shall timely furnish the data required under the Construction Documents.

8.03 Pay When Due. City shall make payments to LIT in accordance with Article 14.

8.04 Lands and Easements; Reports and Tests. City’s duties with respect to providing lands and easements and providing engineering surveys to establish reference points are set forth in Paragraphs 4.01 and 4.05. Paragraph 4.02 refers to City’s identifying and making available to LIT copies of reports of explorations and tests of subsurface conditions and drawings of physical conditions relating to existing surface or subsurface structures at or contiguous to the Site that have been utilized by City in preparing the Construction Documents.

8.05 Change Orders. City shall execute Change Orders in accordance with Paragraph 10.03.

8.06 Inspections, Tests, and Approvals. City’s responsibility with respect to certain inspections, tests, and approvals is set forth in Paragraph 13.03.
8.07 Limitations on City’s Responsibilities

A. The City shall not supervise, direct, or have control or authority over, nor be responsible for, LIT’s means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of LIT to comply with Laws and Regulations applicable to the performance of the Work. City will not be responsible for LIT’s failure to perform the Work in accordance with the Construction Documents.

B. City will notify LIT of applicable safety plans pursuant to Paragraph 6.14.

8.08 Undisclosed Hazardous Environmental Condition. City’s responsibility with respect to an undisclosed Hazardous Environmental Condition is set forth in Paragraph 4.06.

8.09 Compliance with Safety Program. While at the Site, City’s employees and representatives shall comply with the specific applicable requirements of LIT’s safety programs of which City has been informed pursuant to Paragraph 6.14.

ARTICLE 9 – CITY’S OBSERVATION STATUS DURING CONSTRUCTION

9.01 City’s Project Manager. City will provide one or more Project Manager(s) during the construction period. The duties and responsibilities and the limitations of authority of City’s Project Manager during construction are set forth in the Construction Documents. The City’s Project Manager for this Contract is identified in the Supplementary Conditions.

9.02 Visits to Site

A. City’s Project Manager will make visits to the Site at intervals appropriate to the various stages of construction as City deems necessary in order to observe the progress that has been made and the quality of the various aspects of LIT’s executed Work. Based on information obtained during such visits and observations, City’s Project Manager will determine, in general, if the Work is proceeding in accordance with the Construction Documents. City’s Project Manager will not be required to make exhaustive or continuous inspections on the Site to check the quality or quantity of the Work. City’s Project Manager’s efforts will be directed toward providing City a greater degree of confidence that the completed Work will conform generally to the Construction Documents.

B. City’s Project Manager’s visits and observations are subject to all the limitations on authority and responsibility in the Construction Documents including those set forth in Paragraph 8.07.

9.03 Authorized Variations in Work. City’s Project Manager may authorize minor variations in the Work from the requirements of the Construction Documents which do not involve an adjustment in the Contract Price or the Contract Time and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Construction Documents.
These may be accomplished by a Field Order and will be binding on City and also on LIT, who shall perform the Work involved promptly.

9.04 *Rejecting Defective Work.* City will have authority to reject Work which City’s Project Manager believes to be defective, or will not produce a completed Project that conforms to the Construction Documents or that will prejudice the integrity of the design concept of the completed Project as a functioning whole as indicated by the Construction Documents. City will have authority to conduct special inspection or testing of the Work as provided in Article 13, whether or not the Work is fabricated, installed, or completed.

9.05 *Determinations for Work Performed.* LIT will determine the actual quantities and classifications of Work performed. City’s Project Manager will review with LIT the preliminary determinations on such matters before rendering a written recommendation. City’s written decision will be final (except as modified to reflect changed factual conditions or more accurate data).

9.06 *Decisions on Requirements of Construction Documents and Acceptability of Work*

A. City will be the initial interpreter of the requirements of the Construction Documents and judge of the acceptability of the Work thereunder.

B. City will render a written decision on any issue referred.

C. City’s written decision on the issue referred will be final and binding on LIT, subject to the provisions of Paragraph 10.06.

**ARTICLE 10 – CHANGES IN THE WORK; CLAIMS; EXTRA WORK**

10.01 *Authorized Changes in the Work*

A. Without invalidating the Contract and without notice to any surety, City may, at any time or from time to time, order Extra Work. Upon notice of such Extra Work, LIT shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Construction Documents (except as otherwise specifically provided). Extra Work shall be memorialized by a Change Order which may or may not precede an order of Extra work.

B. For minor changes of Work not requiring changes to Contract Time or Contract Price, a Field Order may be issued by the City.

10.02 *Unauthorized Changes in the Work.* LIT shall not be entitled to an increase in the Contract Price or an extension of the Contract Time with respect to any work performed that is not required by the Construction Documents as amended, modified, or supplemented as provided in Paragraph 3.04, except in the case of an emergency as provided in Paragraph 6.17.
10.03 Execution of Change Orders

A. City and LIT shall execute appropriate Change Orders covering:

1. changes in the Work which are: (i) ordered by City pursuant to Paragraph 10.01.A, (ii) required because of acceptance of defective Work under Paragraph 13.08 or City’s correction of defective Work under Paragraph 13.09, or (iii) agreed to by the parties;

2. changes in the Contract Price or Contract Time which are agreed to by the parties, including any undisputed sum or amount of time for Work actually performed.

10.04 Extra Work

A. Should a difference arise as to what does or does not constitute Extra Work, or as to the payment thereof, and the City insists upon its performance, LIT shall proceed with the work after making written request for written orders and shall keep accurate account of the actual reasonable cost thereof. Contract Claims regarding Extra Work shall be made pursuant to Paragraph 10.06.

B. LIT shall furnish the City such installation records of all deviations from the original Construction Documents as may be necessary to enable the City to prepare for permanent record a corrected set of plans showing the actual installation.

C. The compensation agreed upon for Extra Work whether or not initiated by a Change Order shall be a full, complete and final payment for all costs LIT incurs as a result or relating to the change or Extra Work, whether said costs are known, unknown, foreseen or unforeseen at that time, including without limitation, any costs for delay, extended overhead, ripple or impact cost, or any other effect on changed or unchanged work as a result of the change or Extra Work.

10.05 Notification to Surety. If the provisions of any bond require notice to be given to a surety of any change affecting the general scope of the Work or the provisions of the Construction Documents (including, but not limited to, Contract Price or Contract Time), the giving of any such notice will be LIT’s responsibility. The amount of each applicable bond will be adjusted by LIT to reflect the effect of any such change.

10.06 Contract Claims Process

A. City’s Decision Required: All Contract Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the City for decision. A decision by City shall be required as a condition precedent to any exercise by LIT of any rights or remedies he may otherwise have under the Construction Documents or by Laws and Regulations in respect of such Contract Claims.
B. **Notice:**

1. Written notice stating the general nature of each Contract Claim shall be delivered by LIT to City no later than 15 days after the start of the event giving rise thereto. The responsibility to substantiate a Contract Claim shall rest with the party making the Contract Claim.

2. Notice of the amount or extent of the Contract Claim, with supporting data shall be delivered to the City on or before 45 days from the start of the event giving rise thereto (unless the City allows additional time for LIT to submit additional or more accurate data in support of such Contract Claim).

3. A Contract Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.

4. A Contract Claim for an adjustment in Contract Time shall be prepared in accordance with the provisions of Paragraph 12.02.

5. Each Contract Claim shall be accompanied by LIT’s written statement that the adjustment claimed is the entire adjustment to which LIT believes it is entitled as a result of said event.

6. The City shall submit any response to LIT within 30 days after receipt of the claimant’s last submittal (unless Contract allows additional time).

C. **City’s Action:** City will review each Contract Claim and, within 30 days after receipt of the last submittal of LIT, if any, take one of the following actions in writing:

1. deny the Contract Claim in whole or in part;

2. approve the Contract Claim; or

3. notify LIT that the City is unable to resolve the Contract Claim if, in the City’s sole discretion, it would be inappropriate for the City to do so. For purposes of further resolution of the Contract Claim, such notice shall be deemed a denial.

D. City’s written action under Paragraph 10.06.C will be final and binding, unless City or LIT invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial.

E. No Contract Claim for an adjustment in Contract Price or Contract Time will be valid if not submitted in accordance with this Paragraph 10.06.
ARTICLE 11 – COST OF THE WORK; ALLOWANCES; UNIT PRICE WORK; PLANS QUANTITY MEASUREMENT

11.01 Cost of the Work

A. Costs Included: The term Cost of the Work means the sum of all costs, except those excluded in Paragraph 11.01.B, necessarily incurred and paid by LIT in the proper performance of the Work. When the value of any Work covered by a Change Order, the costs to be reimbursed to LIT will be only those additional or incremental costs required because of the change in the Work. Such costs shall not include any of the costs itemized in Paragraph 11.01.B, and shall include but not be limited to the following items:

1. Payroll costs for employees in the direct employ of LIT in the performance of the Work under schedules of job classifications agreed upon by City and LIT. Such employees shall include, without limitation, superintendents, foremen, and other personnel employed full time on the Work. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include;
   a. salaries with a 55% markup, or
   b. salaries and wages plus the cost of fringe benefits, which shall include social security contributions, unemployment, excise, and payroll taxes, workers’ compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. The expenses of performing Work outside of Regular Working Hours, Weekend Working Hours, or legal holidays, shall be included in the above to the extent authorized by City.

2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers’ field services required in connection therewith.

3. Rentals of all construction equipment and machinery, and the parts thereof whether rented from LIT or others in accordance with rental agreements approved by City, and the costs of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs shall be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts shall cease when the use thereof is no longer necessary for the Work.

4. Payments made by LIT to Subcontractors for Work performed by Subcontractors. If required by City, LIT shall obtain competitive bids from subcontractors acceptable to City and LIT and shall deliver such bids to City, who will then determine, which bids, if any, will be acceptable. If any subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work plus a fee, the Subcontractor’s Cost of the Work and fee shall be determined in the same manner as LIT’s Cost of the Work and fee as provided in this Paragraph 11.01.
5. Costs of special consultants (including but not limited to engineers, architects, testing laboratories, surveyors, attorneys, and accountants) employed for services specifically related to the Work.

6. Supplemental costs including the following:
   a. The proportion of necessary transportation, travel, and subsistence expenses of LIT’s employees incurred in discharge of duties connected with the Work.
   b. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office, and temporary facilities at the Site, and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost, less market value, of such items used but not consumed which remain the property of LIT.
   c. Sales, consumer, use, and other similar taxes related to the Work, and for which LIT is liable not covered under Paragraph 6.11, as imposed by Laws and Regulations.
   d. Deposits lost for causes other than negligence of LIT, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.
   e. Losses and damages (and related expenses) caused by damage to the Work, not compensated by insurance or otherwise, sustained by LIT in connection with the performance of the Work, provided such losses and damages have resulted from causes other than the negligence of LIT, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of City. No such losses, damages, and expenses shall be included in the Cost of the Work for the purpose of determining LIT’s fee.
   f. The cost of utilities, fuel, and sanitary facilities at the Site.
   g. Minor expenses such as telegrams, long distance telephone calls, telephone and communication services at the Site, express and courier services, and similar petty cash items in connection with the Work.
   h. The costs of premiums for all bonds and insurance LIT is required by the Construction Documents to purchase and maintain.
B. Costs Excluded: The term Cost of the Work shall not include any of the following items:

1. Payroll costs and other compensation of LIT’s officers, executives, principals (of partnerships and sole proprietorships), general managers, safety managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expediters, timekeepers, clerks, and other personnel employed by LIT, whether at the Site or in LIT’s principal or branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in Paragraph 11.01.A.1 or specifically covered by Paragraph 11.01.A.4, all of which are to be considered administrative costs covered by LIT’s fee.

2. Expenses of LIT’s principal and branch offices other than LIT’s office at the Site.

3. Any part of LIT’s capital expenses, including interest on LIT’s capital employed for the Work and charges against LIT for delinquent payments.

4. Costs due to the negligence of LIT, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied, and making good any damage to property.

5. Other overhead or general expense costs of any kind.

C. LIT’s Fee: When all the Work is performed on the basis of cost-plus, LIT’s fee shall be determined as set forth in the Agreement. When the value of any Work covered by a Change Order for an adjustment in Contract Price is determined on the basis of Cost of the Work, LIT’s fee shall be determined as set forth in Paragraph 12.01.C.

D. Documentation: Whenever the Cost of the Work for any purpose is to be determined pursuant to Paragraphs 11.01.A and 11.01.B, LIT will establish and maintain records thereof in accordance with generally accepted accounting practices and submit in a form acceptable to City an itemized cost breakdown together with supporting data.

11.02 Allowances

A. Specified Allowance: It is understood that LIT has included in the Contract Price all allowances so named in the Construction Documents and shall cause the Work so covered to be performed for such sums and by such persons or entities as may be acceptable to City.

B. Pre-bid Allowances:

1. LIT agrees that:
   a. the pre-bid allowances include the cost to LIT of materials and equipment required by the allowances to be delivered at the Site, and all applicable taxes; and
b. LIT’s costs for unloading and handling on the Site, labor, installation, overhead, profit, and other expenses contemplated for the pre-bid allowances have been included in the allowances, and no demand for additional payment on account of any of the foregoing will be valid.

C. **Contingency Allowance:** LIT agrees that a contingency allowance, if any, is for the sole use of City.

D. Prior to final payment, an appropriate Change Order will be issued to reflect actual amounts due LIT on account of Work covered by allowances, and the Contract Price shall be correspondingly adjusted.

11.03 **Unit Price Work**

A. Where the Construction Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the unit price for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement.

B. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Determinations of the actual quantities and classifications of Unit Price Work performed by LIT will be made by City subject to the provisions of Paragraph 9.05.

C. Each unit price will be deemed to include an amount considered by LIT to be adequate to cover LIT’s overhead and profit for each separately identified item. Work described in the Construction Documents, or reasonably inferred as required for a functionally complete installation, but not identified in the listing of unit price items shall be considered incidental to unit price work listed and the cost of incidental work included as part of the unit price.

D. City may make an adjustment in the Contract Price in accordance with Paragraph 12.01 if:

1. the quantity of any item of Unit Price Work performed by LIT differs materially and significantly from the estimated quantity of such item indicated in the Agreement; and

2. there is no corresponding adjustment with respect to any other item of Work.

E. **Increased or Decreased Quantities:** The City reserves the right to order Extra Work in accordance with Paragraph 10.01.

1. If the changes in quantities or the alterations do not significantly change the character of work under the Construction Documents, the altered work will be paid for at the Contract unit price.
2. If the changes in quantities or alterations significantly change the character of work, the Contract will be amended by a Change Order.

3. If no unit prices exist, this will be considered Extra Work and the Contract will be amended by a Change Order in accordance with Article 12.

4. A significant change in the character of work occurs when:
   a. the character of work for any Item as altered differs materially in kind or nature from that in the Contract or
   b. a Major Item of work varies by more than 25% from the original Contract quantity.

5. When the quantity of work to be done under any Major Item of the Contract is more than 125% of the original quantity stated in the Contract, then either party to the Contract may request an adjustment to the unit price on the portion of the work that is above 125%.

6. When the quantity of work to be done under any Major Item of the Contract is less than 75% of the original quantity stated in the Contract, then either party to the Contract may request an adjustment to the unit price.

11.04 Plans Quantity Measurement

A. Plans quantities may or may not represent the exact quantity of work performed or material moved, handled, or placed during the execution of the Contract. The estimated bid quantities are designated as final payment quantities, unless revised by the governing Section or this Article.

B. If the quantity measured as outlined under “Price and Payment Procedures” varies by more than 25% (or as stipulated under “Price and Payment Procedures” for specific Items) from the total estimated quantity for an individual Item originally shown in the Construction Documents, an adjustment may be made to the quantity of authorized work done for payment purposes. The party to the Contract requesting the adjustment will provide field measurements and calculations showing the final quantity for which payment will be made. Payment for revised quantity will be made at the unit price bid for that Item, except as provided for in Article 10.

C. When quantities are revised by a change in design approved by the City, by Change Order, or to correct an error, or to correct an error on the plans, the plans quantity will be increased or decreased by the amount involved in the change, and the 25% variance will apply to the new plans quantity.

D. If the total Contract quantity multiplied by the unit price bid for an individual Item is less than $250 and the Item is not originally a plans quantity Item, then the Item may be paid
as a plan quantity item if the City and LIT agree in writing to fix the final quantity as a plans quantity.

E. For callout work or non-site specific Contracts, the plans quantity measurement requirements are not applicable.

**ARTICLE 12 – CHANGE OF CONTRACT PRICE; CHANGE OF CONTRACT TIME**

12.01 *Change of Contract Price*

A. The Contract Price may only be changed by a Change Order.

B. The value of any Work covered by a Change Order will be determined as follows:

1. where the Work involved is covered by unit prices contained in the Construction Documents, by application of such unit prices to the quantities of the items involved (subject to the provisions of Paragraph 11.03); or

2. where the Work involved is not covered by unit prices contained in the Construction Documents, by a mutually agreed lump sum or unit price (which may include an allowance for overhead and profit not necessarily in accordance with Paragraph 12.01.C.2), and shall include the cost of any secondary impacts that are foreseeable at the time of pricing the cost of Extra Work; or

3. where the Work involved is not covered by unit prices contained in the Construction Documents and agreement to a lump sum or unit price is not reached under Paragraph 12.01.B.2, on the basis of the Cost of the Work (determined as provided in Paragraph 11.01) plus a LIT’s fee for overhead and profit (determined as provided in Paragraph 12.01.C).

C. *LIT’s Fee:* LIT’s additional fee for overhead and profit shall be determined as follows:

1. a mutually acceptable fixed fee; or

2. if a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:

   a. for costs incurred under Paragraphs 11.01.A.1, 11.01.A.2, and 11.01.A.3, LIT’s additional fee shall be 15 percent except for:
      
      1) rental fees for LIT’s own equipment using standard rental rates;
      
      2) bonds and insurance;

   b. for costs incurred under Paragraph 11.01.A.4 and 11.01.A.5, LIT’s fee shall be five percent (5%);
1) where one or more tiers of subcontracts are on the basis of Cost of the Work plus a fee and no fixed fee is agreed upon, the intent of Paragraphs 12.01.C.2.a and 12.01.C.2.b is that the Subcontractor who actually performs the Work, at whatever tier, will be paid a fee of 15 percent of the costs incurred by such Subcontractor under Paragraphs 11.01.A.1 and 11.01.A.2 and that any higher tier Subcontractor and LIT will each be paid a fee of five percent (5%) of the amount paid to the next lower tier Subcontractor, however in no case shall the cumulative total of fees paid be in excess of 25%;

c. no fee shall be payable on the basis of costs itemized under Paragraphs 11.01.A.6, and 11.01.B;

d. the amount of credit to be allowed by LIT to City for any change which results in a net decrease in cost will be the amount of the actual net decrease in cost plus a deduction in LIT’s fee by an amount equal to five percent (5%) of such net decrease.

12.02 Change of Contract Time

A. The Contract Time may only be changed by a Change Order.

B. No extension of the Contract Time will be allowed for Extra Work or for claimed delay unless the Extra Work contemplated or claimed delay is shown to be on the critical path of the Project Schedule or LIT can show by Critical Path Method analysis how the Extra Work or claimed delay adversely affects the critical path.

12.03 Delays

A. Where LIT is reasonably delayed in the performance or completion of any part of the Work within the Contract Time due to delay beyond the control of LIT, the Contract Time may be extended in an amount equal to the time lost due to such delay if a Contract Claim is made therefor. Delays beyond the control of LIT shall include, but not be limited to, acts or neglect by City, acts or neglect of utility owners or other LITs performing other work as contemplated by Article 7, fires, floods, epidemics, abnormal weather conditions, or acts of God. Such an adjustment shall be LIT’s sole and exclusive remedy for the delays described in this Paragraph.

B. If LIT is delayed, City shall not be liable to LIT for any claims, costs, losses, or damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by LIT on or in connection with any other project or anticipated project.
C. LIT shall not be entitled to an adjustment in Contract Price or Contract Time for delays within the control of LIT. Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of LIT.

D. LIT shall receive no compensation for delays or hindrances to the Work, except when direct and unavoidable extra cost to LIT is caused by the failure of the City to provide information or material, if any, which is to be furnished by the City.

ARTICLE 13 – TESTS AND INSPECTIONS; CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK

13.01 Notice of Defects. Notice of all defective Work of which City has actual knowledge will be given to LIT. Defective Work may be rejected, corrected, or accepted as provided in this Article 13.

13.02 Access to Work. City, independent testing laboratories, and governmental agencies with jurisdictional interests will have access to the Site and the Work at reasonable times for their observation, inspection, and testing. LIT shall provide them proper and safe conditions for such access and advise them of LIT’s safety procedures and programs so that they may comply therewith as applicable.

13.03 Tests and Inspections

A. LIT shall give City timely notice of readiness of the Work for all required inspections, tests, or approvals and shall cooperate with inspection and testing personnel to facilitate required inspections or tests.

B. If Construction Documents, Laws or Regulations of any public body having jurisdiction require any of the Work (or part thereof) to be inspected, tested, or approved, LIT shall assume full responsibility for arranging and obtaining such independent inspections, tests, retests or approvals, pay all costs in connection therewith, and furnish City the required certificates of inspection or approval; excepting, however, those fees specifically identified in the Supplementary Conditions or any Texas Department of Licensure and Regulation (TDLR) inspections, which shall be paid as described in the Supplementary Conditions.

C. LIT shall be responsible for arranging and obtaining and shall pay all costs in connection with any inspections, tests, re-tests, or approvals required for City’s acceptance of materials or equipment to be incorporated in the Work; or acceptance of materials, mix designs, or equipment submitted for approval prior to LIT’s purchase thereof for incorporation in the Work. Such inspections, tests, re-tests, or approvals shall be performed by organizations acceptable to City.

D. City may arrange for the services of an independent testing laboratory (“Testing Lab”) to perform any inspections or tests (“Testing”) for any part of the Work, as determined solely by City.
1. City will coordinate such Testing to the extent possible, with LIT;

2. Should any Testing under this Section 13.03 D result in a “fail”, “did not pass” or other similar negative result, LIT shall be responsible for paying for any and all retests. LIT’s cancellation without cause of City initiated Testing shall be deemed a negative result and require a retest.

3. Any amounts owed for any retest under this Section 13.03 D shall be paid directly to the Testing Lab by LIT. City will forward all invoices for retests to LIT.

4. If LIT fails to pay the Testing Lab, City will not issue Final Payment until the Testing Lab is paid.

E. If any Work (or the work of others) that is to be inspected, tested, or approved is covered by LIT without written concurrence of City, LIT shall, if requested by City, uncover such Work for observation.

F. Uncovering Work as provided in Paragraph 13.03.E shall be at LIT’s expense.

G. LIT shall have the right to make a Contract Claim regarding any retest or invoice issued under Section 13.03 D.

13.04 Uncovering Work

A. If any Work is covered contrary to the Construction Documents or specific instructions by the City, it must, if requested by City, be uncovered for City’s observation and replaced at LIT’s expense.

B. If City considers it necessary or advisable that covered Work be observed by City or inspected or tested by others, LIT, at City’s request, shall uncover, expose, or otherwise make available for observation, inspection, or testing as City may require, that portion of the Work in question, furnishing all necessary labor, material, and equipment.

1. If it is found that the uncovered Work is defective, LIT shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or other dispute resolution costs) arising out of or relating to such uncovering, exposure, observation, inspection, and testing, and of satisfactory replacement or reconstruction (including but not limited to all costs of repair or replacement of work of others); or City shall be entitled to accept defective Work in accordance with Paragraph 13.08 in which case LIT shall still be responsible for all costs associated with exposing, observing, and testing the defective Work.
2. If the uncovered Work is not found to be defective, LIT shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to such uncovering, exposure, observation, inspection, testing, replacement, and reconstruction.

13.05 City May Stop the Work. If the Work is defective, or LIT fails to supply sufficient skilled workers or suitable materials or equipment, or fails to perform the Work in such a way that the completed Work will conform to the Construction Documents, City may order LIT to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of City to stop the Work shall not give rise to any duty on the part of City to exercise this right for the benefit of LIT, any Subcontractor, any Supplier, any other individual or entity, or any surety for, or employee or agent of any of them.

13.06 Correction or Removal of Defective Work

A. Promptly after receipt of written notice, LIT shall correct all defective Work pursuant to an acceptable schedule, whether or not fabricated, installed, or completed, or, if the Work has been rejected by City, remove it from the Project and replace it with Work that is not defective. LIT shall pay all claims, costs, additional testing, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or removal (including but not limited to all costs of repair or replacement of work of others). Failure to require the removal of any defective Work shall not constitute acceptance of such Work.

B. When correcting defective Work under the terms of this Paragraph 13.06 or Paragraph 13.07, LIT shall take no action that would void or otherwise impair City’s special warranty and guarantee, if any, on said Work.

13.07 Correction Period

A. If within two (2) years after the date of Final Acceptance (or such longer period of time as may be prescribed by the terms of any applicable special guarantee required by the Construction Documents), any Work is found to be defective, or if the repair of any damages to the land or areas made available for LIT’s use by City or permitted by Laws and Regulations as contemplated in Paragraph 6.10.A is found to be defective, LIT shall promptly, without cost to City and in accordance with City’s written instructions:

1. repair such defective land or areas; or

2. correct such defective Work; or

3. if the defective Work has been rejected by City, remove it from the Project and replace it with Work that is not defective, and

4. satisfactorily correct or repair or remove and replace any damage to other Work, to the work of others or other land or areas resulting therefrom.
B. If LIT does not promptly comply with the terms of City’s written instructions, or in an emergency where delay would cause serious risk of loss or damage, City may have the defective Work corrected or repaired or may have the rejected Work removed and replaced. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or other dispute resolution costs) arising out of or relating to such correction or repair or such removal and replacement (including but not limited to all costs of repair or replacement of work of others) will be paid by LIT.

C. In special circumstances where a particular item of equipment is placed in continuous service before Final Acceptance of all the Work, the correction period for that item may start to run from an earlier date if so provided in the Construction Documents.

D. Where defective Work (and damage to other Work resulting therefrom) has been corrected or removed and replaced under this Paragraph 13.07, the correction period hereunder with respect to such Work may be required to be extended for an additional period of one year after the end of the initial correction period. City shall provide 30 days written notice to LIT should such additional warranty coverage be required. LIT may dispute this requirement by filing a Contract Claim, pursuant to Paragraph 10.06.

E. LIT’s obligations under this Paragraph 13.07 are in addition to any other obligation or warranty. The provisions of this Paragraph 13.07 shall not be construed as a substitute for, or a waiver of, the provisions of any applicable statute of limitation or repose.

13.08 **Acceptance of Defective Work.** If, instead of requiring correction or removal and replacement of defective Work, City prefers to accept it, City may do so. LIT shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or other dispute resolution costs) attributable to City’s evaluation of and determination to accept such defective Work and for the diminished value of the Work to the extent not otherwise paid by LIT. If any such acceptance occurs prior to Final Acceptance, a Change Order will be issued incorporating the necessary revisions in the Construction Documents with respect to the Work, and City shall be entitled to an appropriate decrease in the Contract Price, reflecting the diminished value of Work so accepted.

13.09 **City May Correct Defective Work**

A. If LIT fails within a reasonable time after written notice from City to correct defective Work, or to remove and replace rejected Work as required by City in accordance with Paragraph 13.06.A, or if LIT fails to perform the Work in accordance with the Construction Documents, or if LIT fails to comply with any other provision of the Construction Documents, City may, after seven (7) days written notice to LIT, correct, or remedy any such deficiency.

B. In exercising the rights and remedies under this Paragraph 13.09, City shall proceed expeditiously. In connection with such corrective or remedial action, City may exclude LIT from all or part of the Site, take possession of all or part of the Work and suspend LIT’s services related thereto, and incorporate in the Work all materials and equipment incorporated in the Work, stored at the Site or for which City has paid LIT but which are...
stored elsewhere. LIT shall allow City, City’s representatives, agents, consultants, employees, and City’s other LITs, access to the Site to enable City to exercise the rights and remedies under this Paragraph.

C. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or other dispute resolution costs) incurred or sustained by City in exercising the rights and remedies under this Paragraph 13.09 will be charged against LIT, and a Change Order will be issued incorporating the necessary revisions in the Construction Documents with respect to the Work; and City shall be entitled to an appropriate decrease in the Contract Price.

D. LIT shall not be allowed an extension of the Contract Time because of any delay in the performance of the Work attributable to the exercise of City’s rights and remedies under this Paragraph 13.09.

ARTICLE 14 – PAYMENTS TO LIT AND COMPLETION

14.01 Schedule of Values. The Schedule of Values for lump sum contracts established as provided in Paragraph 2.07 will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to City. Progress payments on account of Unit Price Work will be based on the number of units completed.

14.02 Progress Payments

A. Applications for Payments:

1. LIT is responsible for providing all information as required to become a vendor of the City.

2. At least 20 days before the date established in the General Requirements for each progress payment, LIT shall submit to City for review an Application for Payment filled out and signed by LIT covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Construction Documents.

3. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing, the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that City has received the materials and equipment free and clear of all Liens and evidence that the materials and equipment are covered by appropriate insurance or other arrangements to protect City’s interest therein, all of which must be satisfactory to City.

4. Beginning with the second Application for Payment, each Application shall include an affidavit of LIT stating that previous progress payments received on account of
the Work have been applied on account to discharge LIT’s legitimate obligations associated with prior Applications for Payment.

5. The amount of retainage with respect to progress payments will be as described in subsection C, unless otherwise stipulated in the Construction Documents.

B. Review of Applications:

1. City will, after receipt of each Application for Payment, either indicate in writing a recommendation of payment or return the Application to LIT indicating reasons for refusing payment. In the latter case, LIT may make the necessary corrections and resubmit the Application.

2. City’s processing of any payment requested in an Application for Payment will be based on City’s observations of the executed Work, and on City’s review of the Application for Payment and the accompanying data and schedules, that to the best of City’s knowledge:
   a. the Work has progressed to the point indicated;
   b. the quality of the Work is generally in accordance with the Construction Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Final Acceptance, the results of any subsequent tests called for in the Construction Documents, a final determination of quantities and classifications for Work performed under Paragraph 9.05, and any other qualifications stated in the recommendation).

3. Processing any such payment will not thereby be deemed to have represented that:
   a. inspections made to check the quality or the quantity of the Work as it has been performed have been exhaustive, extended to every aspect of the Work in progress, or involved detailed inspections of the Work beyond the responsibilities specifically assigned to City in the Construction Documents; or
   b. there may not be other matters or issues between the parties that might entitle LIT to be paid additionally by City or entitle City to withhold payment to LIT; or
   c. LIT has complied with Laws and Regulations applicable to LIT’s performance of the Work.

4. City may refuse to process the whole or any part of any payment because of subsequently discovered evidence or the results of subsequent inspections or tests, and revise or revoke any such payment previously made, to such extent as may be necessary to protect City from loss because:
a. the Work is defective or completed Work has been damaged by LIT or subcontractors requiring correction or replacement;
b. discrepancies in quantities contained in previous applications for payment;
c. the Contract Price has been reduced by Change Orders;
d. City has been required to correct defective Work or complete Work in accordance with Paragraph 13.09; or
e. City has actual knowledge of the occurrence of any of the events enumerated in Paragraph 15.02.A.

C. Retainage:
1. For contracts less than $400,000 at the time of execution, retainage shall be ten percent (10%).
2. For contracts greater than $400,000 at the time of execution, retainage shall be five percent (5%).

D. Liquidated Damages. For each calendar day that any work shall remain uncompleted after the time specified in the Construction Documents, the sum per day specified in the Agreement will be assessed against the monies due LIT, not as a penalty, but as damages suffered by the City.

E. Payment: LIT will be paid pursuant to the requirements of this Article 14 and payment will become due in accordance with the Construction Documents.

F. Reduction in Payment:
1. City may refuse to make payment of the amount requested because:
   a. Liens have been filed in connection with the Work, except where LIT has delivered a specific bond satisfactory to City to secure the satisfaction and discharge of such Liens;
   b. there are other items entitling City to a set-off against the amount recommended; or
   c. City has actual knowledge of the occurrence of any of the events enumerated in Paragraphs 14.02.B.4.a through 14.02.B.4.e or Paragraph 15.02.A.
2. If City refuses to make payment of the amount requested, City will give LIT written notice stating the reasons for such action and pay LIT any amount remaining after deduction of the amount so withheld. City shall pay LIT the amount so withheld,
or any adjustment thereto agreed to by City and LIT, when LIT remedies the reasons for such action.

14.03  *LIT's Warranty of Title.*  LIT warrants and guarantees that title to all Work, materials, and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to City no later than the time of payment free and clear of all Liens.

14.04  *Partial Utilization*

A. Prior to Final Acceptance of all the Work, City may use or occupy any part of the Work which has specifically been identified in the Construction Documents, or which City determines constitutes a separately functioning and usable part of the Work that can be used for its intended purpose without significant interference with LIT’s performance of the remainder of the Work. City at any time may notify LIT in writing to permit City to use or occupy any such part of the Work which City determines to be ready for its intended use, subject to the following conditions:

1. LIT at any time may notify City in writing that LIT considers any such part of the Work ready for its intended use.

2. Within a reasonable time after notification as enumerated in Paragraph 14.05.A.1, City and LIT shall make an inspection of that part of the Work to determine its status of completion. If City does not consider that part of the Work to be substantially complete, City will notify LIT in writing giving the reasons therefor.

3. Partial Utilization will not constitute Final Acceptance by City.

14.05  *Final Inspection*

A. Upon written notice from LIT that the entire Work is Substantially Complete in accordance with the Construction Documents:

1. Within 10 days, City will schedule a Final Inspection with LIT.

2. City will notify LIT in writing of all particulars in which this inspection reveals that the Work is incomplete or defective (“Punch List Items”). LIT shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies.

B. No time charge will be made against LIT between said date of notification to the City of Substantial Completion and the date of Final Inspection.

1. Should the City determine that the Work is not ready for Final Inspection, City will notify LIT in writing of the reasons and Contract Time will resume.
2. Should the City concur that Substantial Completion has been achieved with the exception of any Punch List Items, Contract Time will resume for the duration it takes for LIT to achieve Final Acceptance.

14.06 Final Acceptance. Upon completion by LIT to City’s satisfaction, of any additional Work identified in the Final Inspection, City will issue to LIT a letter of Final Acceptance.

14.07 Final Payment

A. Application for Payment:

1. Upon Final Acceptance, and in the opinion of City, LIT may make an application for final payment following the procedure for progress payments in accordance with the Construction Documents.

2. The final Application for Payment shall be accompanied (except as previously delivered) by:

   a. all documentation called for in the Construction Documents, including but not limited to the evidence of insurance required by Paragraph 5.03;

   b. consent of the surety, if any, to final payment;

   c. a list of all pending or released Damage Claims against City that LIT believes are unsettled; and

   d. affidavits of payments and complete and legally effective releases or waivers (satisfactory to City) of all Lien rights arising out of or Liens filed in connection with the Work.

B. Payment Becomes Due:

1. After City’s acceptance of the Application for Payment and accompanying documentation, requested by LIT, less previous payments made and any sum City is entitled, including but not limited to liquidated damages, will become due and payable.

2. After all Damage Claims have been resolved:

   a. directly by LIT or;

   b. LIT provides evidence that the Damage Claim has been reported to LIT’s insurance provider for resolution.

3. The making of the final payment by the City shall not relieve LIT of any guarantees or other requirements of the Construction Documents which specifically continue thereafter.
Final Completion Delayed and Partial Retainage Release

A. If final completion of the Work is significantly delayed, and if City so confirms, City may, upon receipt of LIT’s final Application for Payment, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance to be held by City for Work not fully completed or corrected is less than the retainage stipulated in Paragraph 14.02.C, and if bonds have been furnished as required in Paragraph 5.02, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by LIT to City with the Application for such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of Contract Claims.

B. Partial Retainage Release. For a Contract that provides for a separate vegetative establishment and maintenance, and test and performance periods following the completion of all other construction in the Construction Documents for all Work locations, the City may release a portion of the amount retained provided that all other work is completed as determined by the City. Before the release, all submittals and final quantities must be completed and accepted for all other work. An amount sufficient to ensure Contract compliance will be retained.

Waiver of Claims. The acceptance of final payment will constitute a release of the City from all claims or liabilities under the Contract for anything done or furnished or relating to the work under the Construction Documents or any act or neglect of City related to or connected with the Contract.

ARTICLE 15 – SUSPENSION OF WORK AND TERMINATION

City May Suspend Work

A. At any time and without cause, City may suspend the Work or any portion thereof by written notice to LIT and which may fix the date on which Work will be resumed. LIT shall resume the Work on the date so fixed. During temporary suspension of the Work covered by these Construction Documents, for any reason, the City will make no extra payment for stand-by time of construction equipment and/or construction crews.

B. Should LIT not be able to complete a portion of the Project due to causes beyond the control of and without the fault or negligence of LIT, and should it be determined by mutual consent of LIT and City that a solution to allow construction to proceed is not available within a reasonable period of time, LIT may request an extension in Contract Time, directly attributable to any such suspension.

C. If it should become necessary to suspend the Work for an indefinite period, LIT shall store all materials in such a manner that they will not obstruct or impede the public unnecessarily nor become damaged in any way, and he shall take every precaution to prevent damage or
deterioration of the work performed; he shall provide suitable drainage about the work, and erect temporary structures where necessary.

D. LIT may be reimbursed for the cost of moving his equipment off the job and returning the necessary equipment to the job when it is determined by the City that construction may be resumed. Such reimbursement shall be based on actual cost to LIT of moving the equipment and no profit will be allowed. Reimbursement may not be allowed if the equipment is moved to another construction project for the City.

15.02 City May Terminate for Cause

A. The occurrence of any one or more of the following events by way of example, but not of limitation, may justify termination for cause:

1. LIT’s persistent failure to perform the Work in accordance with the Construction Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment, failure to adhere to the Project Schedule established under Paragraph 2.07 as adjusted from time to time pursuant to Paragraph 6.04, or failure to adhere to the City’s Code of Ordinances;

2. LIT’s disregard of Laws or Regulations of any public body having jurisdiction;

3. LIT’s repeated disregard of the authority of City; or

4. LIT’s violation in any substantial way of any provisions of the Construction Documents; or

5. LIT’s failure to promptly make good any defect in materials or workmanship, or defects of any nature, the correction of which has been directed in writing by the City; or

6. Substantial indication that LIT has made an unauthorized assignment of the Contract or any funds due therefrom for the benefit of any creditor or for any other purpose; or

7. Substantial evidence that LIT has become insolvent or bankrupt, or otherwise financially unable to carry on the Work satisfactorily; or

8. LIT commences legal action in a court of competent jurisdiction against the City.

B. If one or more of the events identified in Paragraph 15.02A occur, City will provide written notice to LIT and Surety to arrange a conference with LIT and Surety to address LIT’s failure to perform the Work. Conference shall be held not later than 15 days, after receipt of notice.

1. If the City, LIT, and the Surety do not agree to allow LIT to proceed to perform the construction Contract, the City may, to the extent permitted by Laws and
Regulations, declare a LIT default and formally terminate LIT's right to complete the Contract. LIT default shall not be declared earlier than 20 days after LIT and Surety have received notice of conference to address LIT's failure to perform the Work.

2. If LIT's services are terminated, Surety shall be obligated to take over and perform the Work. If Surety does not commence performance thereof within 15 consecutive calendar days after date of an additional written notice demanding Surety's performance of its obligations, then City, without process or action at law, may take over any portion of the Work and complete it as described below.

   a. If City completes the Work, City may exclude LIT and Surety from the site and take possession of the Work, and all materials and equipment incorporated into the Work stored at the Site or for which City has paid LIT or Surety but which are stored elsewhere, and finish the Work as City may deem expedient.

3. Whether City or Surety completes the Work, LIT shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds all claims, costs, losses and damages sustained by City arising out of or resulting from completing the Work, such excess will be paid to LIT. If such claims, costs, losses and damages exceed such unpaid balance, LIT shall pay the difference to City. Such claims, costs, losses and damages incurred by City will be incorporated in a Change Order, provided that when exercising any rights or remedies under this Paragraph, City shall not be required to obtain the lowest price for the Work performed.

4. Neither City, nor any of its respective consultants, agents, officers, directors or employees shall be in any way liable or accountable to LIT or Surety for the method by which the completion of the said Work, or any portion thereof, may be accomplished or for the price paid therefor.

5. City, notwithstanding the method used in completing the Contract, shall not forfeit the right to recover damages from LIT or Surety for LIT's failure to timely complete the entire Contract. LIT shall not be entitled to any claim on account of the method used by City in completing the Contract.

6. Maintenance of the Work shall continue to be LIT's and Surety's responsibilities as provided for in the bond requirements of the Construction Documents or any special guarantees provided for under the Construction Documents or any other obligations otherwise prescribed by law.

C. Notwithstanding Paragraphs 15.02.B, LIT’s services will not be terminated if LIT begins within seven days of receipt of notice of intent to terminate to correct its failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt of said notice.
D. Where LIT’s services have been so terminated by City, the termination will not affect any rights or remedies of City against LIT then existing or which may thereafter accrue. Any retention or payment of moneys due LIT by City will not release LIT from liability.

E. If and to the extent that LIT has provided a performance bond under the provisions of Paragraph 5.02, the termination procedures of that bond shall not supersede the provisions of this Article.

15.03 City May Terminate For Convenience

A. City may, without cause and without prejudice to any other right or remedy of City, terminate the Contract. Any termination shall be effected by mailing a notice of the termination to LIT specifying the extent to which performance of Work under the contract is terminated, and the date upon which such termination becomes effective. Receipt of the notice shall be deemed conclusively presumed and established when the letter is placed in the United States Postal Service Mail by the City. Further, it shall be deemed conclusively presumed and established that such termination is made with just cause as therein stated; and no proof in any claim, demand or suit shall be required of the City regarding such discretionary action.

B. After receipt of a notice of termination, and except as otherwise directed by the City, LIT shall:

1. Stop work under the Contract on the date and to the extent specified in the notice of termination;

2. place no further orders or subcontracts for materials, services or facilities except as may be necessary for completion of such portion of the Work under the Contract as is not terminated;

3. terminate all orders and subcontracts to the extent that they relate to the performance of the Work terminated by notice of termination;

4. transfer title to the City and deliver in the manner, at the times, and to the extent, if any, directed by the City:

   a. the fabricated or unfabricated parts, Work in progress, completed Work, supplies and other material produced as a part of, or acquired in connection with the performance of, the Work terminated by the notice of the termination; and

   b. the completed, or partially completed plans, drawings, information and other property which, if the Contract had been completed, would have been required to be furnished to the City.
5. complete performance of such Work as shall not have been terminated by the notice of termination; and

6. take such action as may be necessary, or as the City may direct, for the protection and preservation of the property related to its contract which is in the possession of LIT and in which the owner has or may acquire the rest.

C. At a time not later than 30 days after the termination date specified in the notice of termination, LIT may submit to the City a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by City.

D. Not later than 15 days thereafter, the City shall accept title to such items provided, that the list submitted shall be subject to verification by the City upon removal of the items or, if the items are stored, within 45 days from the date of submission of the list, and any necessary adjustments to correct the list as submitted, shall be made prior to final settlement.

E. Not later than 60 days after the notice of termination, LIT shall submit his termination claim to the City in the form and with the certification prescribed by the City. Unless an extension is made in writing within such 60 day period by LIT, and granted by the City, any and all such claims shall be conclusively deemed waived.

F. In such case, LIT shall be paid for (without duplication of any items):

1. completed and acceptable Work executed in accordance with the Construction Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Work;

2. expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Construction Documents in connection with uncompleted Work, plus fair and reasonable sums for overhead and profit on such expenses; and

3. reasonable expenses directly attributable to termination.

G. In the event of the failure of LIT and City to agree upon the whole amount to be paid to LIT by reason of the termination of the Work, the City shall determine, on the basis of information available to it, the amount, if any, due to LIT by reason of the termination and shall pay to LIT the amounts determined. LIT shall not be paid on account of loss of anticipated profits or revenue or other economic loss arising out of or resulting from such termination.
ARTICLE 16 – DISPUTE RESOLUTION

16.01 Methods and Procedures

A. Either City or LIT may request mediation of any Contract Claim submitted for a decision under Paragraph 10.06 before such decision becomes final and binding. The request for mediation shall be submitted to the other party to the Contract. Timely submission of the request shall stay the effect of Paragraph 10.06.E.

B. City and LIT shall participate in the mediation process in good faith. The process shall be commenced within 60 days of filing of the request.

C. If the Contract Claim is not resolved by mediation, City’s action under Paragraph 10.06.C or a denial pursuant to Paragraphs 10.06.C.3 or 10.06.D shall become final and binding 30 days after termination of the mediation unless, within that time period, City or LIT:

1. elects in writing to invoke any other dispute resolution process provided for in the Supplementary Conditions; or

2. agrees with the other party to submit the Contract Claim to another dispute resolution process; or

3. gives written notice to the other party of the intent to submit the Contract Claim to a court of competent jurisdiction.

ARTICLE 17 – MISCELLANEOUS

17.01 Giving Notice

A. Whenever any provision of the Construction Documents requires the giving of written notice, it will be deemed to have been validly given if:

1. delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended; or

2. delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the notice.

B. Business address changes must be promptly made in writing to the other party.

C. Whenever the Construction Documents specifies giving notice by electronic means such electronic notice shall be deemed sufficient upon confirmation of receipt by the receiving party.

17.02 Computation of Times. When any period of time is referred to in the Construction Documents by days, it will be computed to exclude the first and include the last day of such period.
If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday the next Working Day shall become the last day of the period.

17.03 **Cumulative Remedies.** The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Laws or Regulations, by special warranty or guarantee, or by other provisions of the Construction Documents. The provisions of this Paragraph will be as effective as if repeated specifically in the Construction Documents in connection with each particular duty, obligation, right, and remedy to which they apply.

17.04 **Survival of Obligations.** All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Construction Documents, as well as all continuing obligations indicated in the Construction Documents, will survive final payment, completion, and acceptance of the Work or termination or completion of the Contract or termination of the services of LIT.

17.05 **Headings.** Article and paragraph headings are inserted for convenience only and do not constitute parts of these General Conditions.
Exhibit E
PAYMENT BOND
PAYMENT BOND

THE STATE OF TEXAS § KNOW ALL BY THESE PRESENTS:

COUNTY OF CAMERON §

That we, LIT TEXAS, LLC, known as “Principal” herein, and ___________________________________________, a corporate surety (sureties), duly authorized to do business in the State of Texas, known as “Surety” herein (whether one or more), are held and firmly bound unto the City of Brownsville, a municipal corporation created pursuant to the laws of the State of Texas, known as “City” herein, in the penal sum of___________________________________________ Dollars ($_______________________), lawful money of the United States, to be paid in Brownsville, Cameron County, Texas, for the payment of which sum well and truly be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents:

WHEREAS, Principal has entered into a certain written Contract with City, awarded the 20th day of July, 2022, which Contract is hereby referred to and made a part hereof for all purposes as if fully set forth herein, to furnish all materials, equipment, labor and other accessories as defined by law, in the prosecution of the Work as provided for in said Contract and designated as City’s Fiber Middle Mile Network or the Middle Mile Network.

NOW, THEREFORE, the condition of this obligation is such that if Principal shall pay all monies owing to any (and all) payment bond beneficiary (as defined in Chapter 2253 of the Texas Government Code, as amended) in the prosecution of the Work under the Contract, then this obligation shall be and become null and void; otherwise to remain in full force and effect.

This bond is made and executed in compliance with the provisions of Chapter 2253 of the Texas Government Code, as amended, and all liabilities on this bond shall be determined in accordance with the provisions of said statute.
IN WITNESS WHEREOF, the Principal and Surety have each SIGNED and SEALED this instrument by duly authorized agents and officers on this the _________ day of July, 2022.

PRINCIPAL:

____________________________________

____________________________________

ATTEST:

BY: ________________________________

Signature

(Principal) Secretary

Name and Title

Address: ______________________________________

____________________________________

Witness as to Principal

SURETY:

____________________________________

____________________________________

ATTEST:

BY: ________________________________

Signature

(Surety) Secretary

Name and Title

Address: ______________________________________

____________________________________

Witness as to Surety

Telephone Number: __________________________

*Note: If signed by an officer of the Surety, there must be on file a certified extract from the bylaws showing that this person has authority to sign such obligation. If Surety’s physical address is different from its mailing address, both must be provided.

The date of the bond shall not be prior to the date the Contract is awarded.
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit F
PERFORMANCE BOND
PERFORMANCE BOND

THE STATE OF TEXAS §
COUNTY OF CAMERON §
KNOW ALL BY THESE PRESENTS:

That we, LIT TEXAS, LLC., known as “Principal” herein and _____________________, a corporate surety (sureties, if more than one) duly authorized to do business in the State of Texas, known as “Surety” herein (whether one or more), are held and firmly bound unto the City of Brownsville, a municipal corporation created pursuant to the laws of Texas, known as “City” herein, in the penal sum of, ____________________________ Dollars ($_______________________), lawful money of the United States, to be paid in Brownsville, Cameron County, Texas for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written contract, entitled the Engineer, Procurement, and Construction Contract, with the City awarded the 20th day of July, 2022, which Contract is hereby referred to and made a part hereof for all purposes as if fully set forth herein, to furnish all materials, equipment labor and other accessories defined by law, in the prosecution of the Work, including any Change Orders, as provided for in said Contract designated as the City’s Fiber Middle Mile Network or the Middle Mile Network.

NOW, THEREFORE, the condition of this obligation is such that if the said Principal shall faithfully perform it obligations under the Contract and shall in all respects duly and faithfully perform the Work, including Change Orders, under the Contract, according to the plans, specifications, and contract documents therein referred to, and as well during any period of extension of the Contract that may be granted on the part of the City, then this obligation shall be and become null and void, otherwise to remain in full force and effect.

PROVIDED FURTHER, that if any legal action be filed on this Bond, venue shall lie in Cameron County, Texas or the United States District Court for the Southern District of Texas, Brownsville Division.
This bond is made and executed in compliance with the provisions of Chapter 2253 of the Texas Government Code, as amended, and all liabilities on this bond shall be determined in accordance with the provisions of said statute.

**IN WITNESS WHEREOF**, the Principal and the Surety have **SIGNED** and **SEALED** this instrument by duly authorized agents and officers on this the ___ day of July, 2022.

**PRINCIPAL:**

____________________________________

____________________________________

**ATTEST:**

BY: ________________________________

Signature

(Principal) Secretary

____________________________________

Name and Title

Address: ____________________________

____________________________________

Witness as to Principal

**SURETY:**

____________________________________

____________________________________

**ATTEST:**

BY: ________________________________

Signature

(Surety) Secretary

____________________________________

Name and Title

Address: ____________________________

____________________________________

Witness as to Surety

Telephone Number: ____________________

*Note: If signed by an officer of the Surety Company, there must be on file a certified extract from the by-laws showing that this person has authority to sign such obligation. If Surety’s physical address is different from its mailing address, both must be provided. The date of the bond shall not be prior to the date the Contract is awarded. The date of the bond shall not be prior to the date the Contract is awarded.*
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit G
MAINTENANCE BOND
MAINTENANCE BOND

THE STATE OF TEXAS §
COUNTY OF CAMERON §

KNOW ALL BY THESE PRESENTS:

That we LIT TEXAS, LLC, known as “Principal” herein and _______________________, a corporate surety (sureties, if more than one) duly authorized to do business in the State of Texas, known as “Surety” herein (whether one or more), are held and firmly bound unto the City of Brownsville, a municipal corporation created pursuant to the laws of the State of Texas, known as “City” herein, in the sum of_________________________________________ Dollars ($_______________________), lawful money of the United States, to be paid in Brownsville, Cameron County, Texas, for payment of which sum well and truly be made unto the City and its successors, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a certain written contract with the City awarded the 20th day of July, 2022, which Contract is hereby referred to and a made part hereof for all purposes as if fully set forth herein, to furnish all materials, equipment labor and other accessories as defined by law, in the prosecution of the Work, including any Work resulting from a duly authorized Change Order (collectively herein, the “Work”) as provided for in said contract and designated as City’s Fiber Middle Mile Network or the Middle Mile Network; and

WHEREAS, Principal binds itself to use such materials and to so construct the Work in accordance with the plans, specifications and Contract Documents that the Work is and will remain free from defects in materials or workmanship for and during the period of two (2) years after the date of Final Acceptance of the Work by the City (“Maintenance Period”); and

WHEREAS, Principal binds itself to repair or reconstruct the Work in whole or in part upon receiving notice from the City of the need therefor at any time within the Maintenance Period.

NOW THEREFORE, the condition of this obligation is such that if Principal shall remedy any defective Work, for which timely notice was provided by City, to a completion satisfactory to the City, then this obligation shall become null and void; otherwise to remain in full force and effect.

PROVIDED, HOWEVER, if Principal shall fail so to repair or reconstruct any timely noticed defective Work, it is agreed that the City may cause any and all such defective Work to be repaired and/or reconstructed with all associated costs thereof being borne by the Principal and the Surety under this Maintenance bond; and

PROVIDED FURTHER, that if any legal action be filed on this Bond, venue shall lie in Cameron County, Texas or the United States District Court for the Southern District of Texas, Brownsville Division; and
PROVIDED FURTHER, that this obligation shall be continuous in nature and successive recoveries may be had hereon for successive breaches.

IN WITNESS WHEREOF, the Principal and the Surety have each SIGNED and SEALED this instrument by duly authorized agents and officers on this the ______ day of July, 2022.

PRINCIPAL:
____________________________________

ATTEST:                     BY: ______________________________
                                Signature

(Principal) Secretary   Name and Title
Address: ______________________________
____________________________________

Witness as to Principal

SURETY:
____________________________________

ATTEST:                     BY: ______________________________
                                Signature

(Surety) Secretary   Name and Title
Address: ______________________________
____________________________________

Witness as to Surety

Telephone Number: ______________________

*Note: If signed by an officer of the Surety Company, there must be on file a certified extract from the by-laws showing that this person has authority to sign such obligation. If Surety’s physical address is different from its mailing address, both must be provided. The date of the bond shall not be prior to the date the Contract is awarded.
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit H
NOTICE OF AWARD
NOTICE OF AWARD

To: LIT TEXAS, LLC

PROJECT Description: Middle Mile Network

The OWNER has considered the Response submitted by you for the above-described WORK in response to its RFQ/I for completion of the City’s Middle Mile Network.

You are hereby notified that your Response has been accepted for items in the amount not to exceed Nineteen Million Five Hundred Thousand Dollars ($19.5 Million).

You are required by the RFQ/I to execute the Agreement within ten (10) calendar days from the date of this Notice to you.

If you fail to execute said Agreement within ten (10) days from the date of this Notice, said OWNER will be entitled to consider all your rights arising out of the OWNER'S acceptance of your Response as abandoned. The OWNER will be entitled to such other rights as may be granted by law.

You are required to return an acknowledged copy of this NOTICE OF AWARD to the OWNER.

Dated this 20th day of July, 2022.

CITY OF BROWNSVILLE
(Owner)

By: _____________________________
Noel Bernal
City Manger

ACCEPTANCE OF NOTICE

Receipt of the above NOTICE OF AWARD is hereby acknowledged by LIT TEXAS, LLC this the _____ day of July, 2022.

By: _____________________________
Name: ___________________________
Title: ___________________________
Exhibit I

RESERVED
Exhibit J
AFFIDAVIT OF BILLS PAID
AFFIDAVIT OF BILLS PAID

THE STATE OF TEXAS §
COUNTY OF CAMERON §

KNOW ALL BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared LIT TEXAS, LLC, party to that certain Contract entered into on the 20th day of July, 2022, between City of Brownsville and LIT TEXAS, LLC, for the construction and completion of certain improvements and/or additions related to the completion of the City’s Middle Mile Network;

Said party being by me duly sworn states upon oath that the said improvements have been erected and completed in full compliance with the above referred to Contract and the agreed Plans and Specifications therefor.

Deponent further states that he has paid all bills and claims for materials furnished and labor performed on said Contract and that there are no outstanding unpaid bills or legal claims for labor performed or materials furnished upon said job.

This affidavit is being made by the undersigned realizing that it is in reliance upon the truthfulness of the statements contained herein that final and full settlement of the balance due on said Contract is being made, and in consideration of the disbursement of funds by LIT TEXAS, LLC, deponent expressly waives and releases all liens, claims and rights to assert a lien on said premises and agrees to indemnify and hold City of Brownsville, Texas safe and harmless from and against all losses, damages, costs and expenses of any character whatsoever specifically including court costs, bonding fees and attorney fees, arising out of or in any way relating to claims for unpaid labor or material used or associated with construction of improvements on the above-described premises.

________________________________________
________________________________________
BY: ____________________________________

Subscribed and sworn to before me, the undersigned authority, on this _____ day of July, 2022.

________________________________________
Notary Public in and for Cameron County, Texas
ENGINEER, PROCUREMENT AND CONSTRUCTION CONTRACT

Exhibit K
TEST DATA TEMPLATE
1. OTDR Bidirectional Report (1310 nm)

OTDR Bidirectional Report

Identification Information

Filename: TBN_NDC_EAST_PT_110_1310_0500_20.06.30
Test date: 11/27/2020
Test time: 2:14:14 AM (GMT-05:00)
Job ID: TBN_NDC_EAST-NDBC_Brown_TBN_FN1
Comments: ;B9=MOLET, MDSB=PT_00

Location A

Location Information

Location: D9
Unit model: FTB720-12CD-25B-E1-EA
Unit s/n: 732702
Calibration Date: 1/15/2014

Location B

Location Information

Location: D9
Unit model: FTB-720-12CD-25B-E1-EA
Unit s/n: 732702
Calibration Date: 1/15/2014

Test Parameters

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<td>100</td>
</tr>
<tr>
<td>Duration (µs)</td>
<td>30</td>
<td>30</td>
</tr>
</tbody>
</table>

Test Settings

<table>
<thead>
<tr>
<th>Test Settings</th>
<th>A-&gt;B</th>
<th>B-&gt;A</th>
</tr>
</thead>
<tbody>
<tr>
<td>IOR</td>
<td>1.467700</td>
<td>1.467768</td>
</tr>
<tr>
<td>Backscatter (dB)</td>
<td>-75.45</td>
<td>-75.45</td>
</tr>
<tr>
<td>Nex Factor (%)</td>
<td>6.00</td>
<td>6.00</td>
</tr>
<tr>
<td>Splice loss detection threshold (dB)</td>
<td>0.021</td>
<td>0.021</td>
</tr>
<tr>
<td>End of fiber detection threshold (dB)</td>
<td>5.000</td>
<td>5.000</td>
</tr>
</tbody>
</table>

Results (1310 nm)

<table>
<thead>
<tr>
<th>Span length (klm)</th>
<th>11,748.5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Span loss (dB)</td>
<td>1.247</td>
</tr>
<tr>
<td>Average loss (dB/Mi)</td>
<td>0.100</td>
</tr>
<tr>
<td>Avg. splice loss (dB)</td>
<td>0.021</td>
</tr>
<tr>
<td>Max. splice loss (dB)</td>
<td>0.095</td>
</tr>
</tbody>
</table>

Graphic (1310 nm)

Event Table (1310 nm)

<table>
<thead>
<tr>
<th>Type</th>
<th>No.</th>
<th>Location/Length (klm)</th>
<th>Average Attenuation (dB)</th>
<th>Average Loss (dB)</th>
<th>Cumulative Loss (dB)</th>
<th>Loss A-&gt;B (dB)</th>
<th>Loss B-&gt;A (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reflective</td>
<td>2</td>
<td>0.0000</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>0.493</td>
<td>0.493</td>
</tr>
<tr>
<td>Section</td>
<td>3</td>
<td>4.9674</td>
<td>0.335</td>
<td>0.568</td>
<td>0.568</td>
<td>0.525</td>
<td>-0.493</td>
</tr>
<tr>
<td>Positive</td>
<td>3</td>
<td>4.9674</td>
<td>-0.335</td>
<td>-0.473</td>
<td>-0.473</td>
<td>-0.614</td>
<td>-0.614</td>
</tr>
<tr>
<td>Section</td>
<td>3</td>
<td>1.0674</td>
<td>0.340</td>
<td>0.525</td>
<td>0.525</td>
<td>0.124</td>
<td>-0.351</td>
</tr>
<tr>
<td>Non-Reflective</td>
<td>3</td>
<td>2.4943</td>
<td>0.333</td>
<td>0.353</td>
<td>0.353</td>
<td>0.356</td>
<td>0.356</td>
</tr>
<tr>
<td>Section</td>
<td>4</td>
<td>8.9818</td>
<td>0.353</td>
<td>0.353</td>
<td>0.353</td>
<td>0.198</td>
<td>0.198</td>
</tr>
<tr>
<td>Section</td>
<td>5</td>
<td>3.8109</td>
<td>0.318</td>
<td>0.372</td>
<td>0.372</td>
<td>0.311</td>
<td>0.311</td>
</tr>
<tr>
<td>Reflective</td>
<td>5</td>
<td>11.7485</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
</tbody>
</table>

Pass/Fail Thresholds (1310 nm)

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Fail</th>
<th>Warning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under splice loss (dB)</td>
<td>1.600</td>
<td>1.900</td>
</tr>
<tr>
<td>Idle splice loss (dB)</td>
<td>0.100</td>
<td>0.100</td>
</tr>
<tr>
<td>Under connector loss (dB)</td>
<td>1.600</td>
<td>1.900</td>
</tr>
<tr>
<td>Idle connector loss (dB)</td>
<td>1.600</td>
<td>1.900</td>
</tr>
<tr>
<td>Fiber sect. att. (dB/km)</td>
<td>0.400</td>
<td>0.400</td>
</tr>
<tr>
<td>Span loss (dB)</td>
<td>45.600</td>
<td>45.600</td>
</tr>
<tr>
<td>Span length (klm)</td>
<td>0.0000</td>
<td>0.0000</td>
</tr>
</tbody>
</table>
OTDR Bidirectional Report

Identification Information

Filename: TN1_600.EAST_PT.11_1310.1550_20.06.31
Test date: 11/27/2000
Test time: 12:47:02 AM (GMT: 05:00)
Job ID: TN1_600.EAST.MGBC_Brown_TNB_PNL
Comments: (BD=VDSL, MGBC=PPT_3XX)

Location A
Location B

Operator: DNI
Unit model: FTB-730-1200-33-EXA
Unit u/s: 737902
Calibration Date: 1/15/2014

Test Parameters (1310 nm)

Range (ft): 22.8884
Pulse (ns): 100
Duration (s): 30

Results (1310 nm)

Span length (ft): 11.7495
Span loss (dB): 1.33
Span ORL (dB): <18.57
Average loss (dB/km): 0.158
Avg. splice loss (dB): 0.044
Max. splice loss (dB): 0.108

Graphical Result (1310 nm)

Event Table (1310 nm)

<table>
<thead>
<tr>
<th>Type</th>
<th>No.</th>
<th>Location/Length (ft)</th>
<th>Loss (dB)</th>
<th>Reflectance (dB)</th>
<th>Attenuation (dB/km)</th>
<th>Cumulative Loss (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reflective</td>
<td>1</td>
<td>0.6000</td>
<td>0.031</td>
<td>-69.3</td>
<td>0.035</td>
<td>0.035</td>
</tr>
<tr>
<td>Section</td>
<td></td>
<td>1.5674</td>
<td>0.025</td>
<td>-69.3</td>
<td>0.034</td>
<td>0.034</td>
</tr>
<tr>
<td>Positive</td>
<td>1</td>
<td>0.5674</td>
<td>0.066</td>
<td>--</td>
<td>0.024</td>
<td>0.024</td>
</tr>
<tr>
<td>Non-Reflective</td>
<td></td>
<td>1.4743</td>
<td>0.042</td>
<td>--</td>
<td>0.034</td>
<td>0.034</td>
</tr>
<tr>
<td>Section</td>
<td>3</td>
<td>0.6000</td>
<td>0.035</td>
<td>--</td>
<td>0.035</td>
<td>0.035</td>
</tr>
<tr>
<td>Non-Reflective</td>
<td></td>
<td>1.4743</td>
<td>0.042</td>
<td>--</td>
<td>0.034</td>
<td>0.034</td>
</tr>
<tr>
<td>Section</td>
<td>4</td>
<td>0.5381</td>
<td>0.040</td>
<td>--</td>
<td>0.035</td>
<td>0.035</td>
</tr>
<tr>
<td>Reflective</td>
<td>5</td>
<td>1.4743</td>
<td>0.042</td>
<td>--</td>
<td>0.034</td>
<td>0.034</td>
</tr>
</tbody>
</table>

Markers Information (1310 nm)

<table>
<thead>
<tr>
<th>Marker</th>
<th>Position (ft)</th>
<th>Value (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>3.558</td>
<td>23.175</td>
</tr>
<tr>
<td>A</td>
<td>9.8176</td>
<td>23.341</td>
</tr>
<tr>
<td>B</td>
<td>19.3809</td>
<td>11.286</td>
</tr>
<tr>
<td>B-A</td>
<td>6.5532</td>
<td>11.681</td>
</tr>
</tbody>
</table>

Manual Measurements (1310 nm)

<table>
<thead>
<tr>
<th>Measurement</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 points event loss (dB)</td>
<td>10.000</td>
</tr>
<tr>
<td>A-B ESA loss (dB)</td>
<td>15.359</td>
</tr>
<tr>
<td>A-B ESA attenuation (dB/km)</td>
<td>5.525</td>
</tr>
<tr>
<td>3 points reflectance (dB)</td>
<td>14.696</td>
</tr>
<tr>
<td>3 points max. reflectance (dB)</td>
<td>14.696</td>
</tr>
<tr>
<td>A-B PDF (dB)</td>
<td>15.430</td>
</tr>
</tbody>
</table>

Pass/Fail Thresholds (1310 nm)

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Fail</th>
<th>Warning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Splice loss (dB)</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Connector loss (dB)</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Reflectance (dB)</td>
<td>-10.0</td>
<td>-10.0</td>
</tr>
</tbody>
</table>

EXFO

Signature: ___________________________  27-13-2006  Page 2 of 5
### OTDR Bidirectional Report

<table>
<thead>
<tr>
<th></th>
<th>0.400</th>
<th>0.460</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fiber sect. att. (dB/km)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Span loss (dB)</td>
<td>45.000</td>
<td>45.080</td>
</tr>
<tr>
<td>Span length (kft)</td>
<td>0.0000</td>
<td>0.0000</td>
</tr>
<tr>
<td>Span DRL (dB)</td>
<td>15.00</td>
<td>15.00</td>
</tr>
</tbody>
</table>
# OTDR Bidirectional Report

## Identification Information
- **Filename:** TBN_WOC_EAST_PT_110_13101552_20-05-31
- **Test date:** 11/27/2020
- **Test time:** 2:29:29 PM (GMT-06:00)
- **Job ID:** TBN_WOC_EAST-MGBC_Brown_TBN_PNL
- **Cookie:** Bo=100; LE=1; MGBC=PT_002
- **Cable ID:** PT_110
- **Operator:** FTB-728-12C-D-20B-E1-EA
- **Unit type:** 72982
- **Customer:** Bo=100; LE=1; MGBC=PT_002
- **Company:** 72982
- **Calibration Date:** 1/5/2014

## Test Parameters (1310 nm)
- **Range (ft):** 85.8180
- **Pulse (ns):** 100
- **Duration (s):** 30

## Results (1310 nm)
- **Span length (ft):** 29.3884
- **Span loss (dB):** 0.287
- **Span ORL (dB):** 33.71
- **Average loss (dB/km):** 0.125
- **Max. splice loss (dB):** 0.107

## Graphic (1310 nm)

![Graph](image)

## Event Table (1310 nm)

<table>
<thead>
<tr>
<th>Type</th>
<th>No.</th>
<th>Location Length (ft)</th>
<th>Loss (dB)</th>
<th>Reflectance (dB)</th>
<th>Attenuation (dB/km)</th>
<th>Cumulative Loss (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reflective</td>
<td>1</td>
<td>0.6500</td>
<td>0.287</td>
<td>-0.1</td>
<td>0.158</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>2</td>
<td>2.8397</td>
<td>0.361</td>
<td>0.349</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>Reflective</td>
<td>2</td>
<td>2.8397</td>
<td>0.260</td>
<td>0.349</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>3</td>
<td>2.5214</td>
<td>0.351</td>
<td>0.337</td>
<td>1.155</td>
<td></td>
</tr>
<tr>
<td>Reflective</td>
<td>4</td>
<td>1.3589</td>
<td>0.139</td>
<td>0.326</td>
<td>1.336</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>5</td>
<td>4.5579</td>
<td>0.453</td>
<td>0.316</td>
<td>1.831</td>
<td></td>
</tr>
<tr>
<td>Reflective</td>
<td>6</td>
<td>18.6314</td>
<td>1.796</td>
<td>0.326</td>
<td>1.665</td>
<td></td>
</tr>
</tbody>
</table>

## Markers Information (1310 nm)

<table>
<thead>
<tr>
<th>Marker</th>
<th>Position (ft)</th>
<th>Value (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>-9.6169</td>
<td>24.916</td>
</tr>
<tr>
<td>A</td>
<td>3.2586</td>
<td>23.546</td>
</tr>
<tr>
<td>B</td>
<td>6.5381</td>
<td>23.533</td>
</tr>
<tr>
<td>b</td>
<td>9.8318</td>
<td>23.148</td>
</tr>
<tr>
<td>B-A</td>
<td>3.2735</td>
<td>0.297</td>
</tr>
</tbody>
</table>

## Manual Measurements (1310 nm)

<table>
<thead>
<tr>
<th>Measurement</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 points event loss (dB)</td>
<td>0.256</td>
</tr>
<tr>
<td>B-8 USA loss (dB)</td>
<td>0.287</td>
</tr>
<tr>
<td>2 points section att. (dB/km)</td>
<td>0.297</td>
</tr>
<tr>
<td>B-8 USA attenuation (dB/km)</td>
<td>0.287</td>
</tr>
<tr>
<td>3 points max. reflectance (dB)</td>
<td>-61.1</td>
</tr>
<tr>
<td>A-B ORL (dB)</td>
<td>35.9</td>
</tr>
</tbody>
</table>

## Pass/Fail Thresholds (1310 nm)

- **Threshold:**
  - **Splice loss (dB):** 1.000
  - **Fail:** 1.000
  - **Warning:** 1.000

---

Footnotes:
- **Signature:**
- **Date:** 27-15-2020
- **Page:** 4 of 5
## OTDR Bidirectional Report

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Value 1</th>
<th>Value 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connector loss (dB)</td>
<td>1.000</td>
<td>1.690</td>
</tr>
<tr>
<td>Reflectance (dB)</td>
<td>-10.0</td>
<td>-10.0</td>
</tr>
<tr>
<td>Fiber sect. att. (dB/km)</td>
<td>0.400</td>
<td>0.400</td>
</tr>
<tr>
<td>Span loss (dB)</td>
<td>45.000</td>
<td>45.000</td>
</tr>
<tr>
<td>Span length (ft)</td>
<td>0.0000</td>
<td>0.0000</td>
</tr>
<tr>
<td>$\Delta$ span ORL (dB)</td>
<td>15.00</td>
<td>15.00</td>
</tr>
</tbody>
</table>
2. OTDR Bidirectional Report (1550 nm)

OTDR Bidirectional Report

Identification Information

Filename: TBN_NDC_EAST_PT_110_10101550_20.05.20.i
Test date: 11/07/2020
Test time: 2:14:14 AM (GMT -6:00)
Job ID: TBN_NDC_EAST,MDC_Brown_TBN_PNL
Comments: [00]=VIOLET, [00]=[PT_002]

Location A

Location: DHI
Operator: FTB-720-12CD-23B-E1EA
Unit model: 737062
Calibration Date: 1/15/2014

Location B

Location: DHI
Operator: FTB-720-12CD-23B-E1EA
Unit model: 737062
Calibration Date: 1/15/2014

Test Parameters

<table>
<thead>
<tr>
<th>A&gt;B</th>
<th>B&gt;A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wavelength [nm]: 1550</td>
<td>1550</td>
</tr>
<tr>
<td>Fiber Core Size [μm]: 9</td>
<td>9</td>
</tr>
<tr>
<td>Range [m]: 131.064</td>
<td>65.659</td>
</tr>
<tr>
<td>Pulse [μs]: 100</td>
<td>100</td>
</tr>
<tr>
<td>Duration [μs]: 30</td>
<td>30</td>
</tr>
</tbody>
</table>

Test Settings

<table>
<thead>
<tr>
<th>A&gt;B</th>
<th>B&gt;A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Backscatter [dB]: -81.87</td>
<td>-81.87</td>
</tr>
<tr>
<td>Rise Factor [%]: 0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>Splice loss detection threshold [dB]: 0.620</td>
<td>0.626</td>
</tr>
<tr>
<td>Reflectance detection threshold [dB]: -72.0</td>
<td>-72.0</td>
</tr>
<tr>
<td>End-of-fiber detection threshold [dB]: 5.000</td>
<td>5.000</td>
</tr>
</tbody>
</table>

Results (1550 nm)

Span length [m]: 11.7477
Span loss [dB]: 0.778
Span ORL [dB]: 0.000
Average loss [dB/km]: 0.006
Max. splice loss [dB]: 0.000

Graphic (1550 nm)

Event Table (1550 nm)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Reflective</td>
<td>1</td>
<td>0.0000</td>
<td>—</td>
<td>—</td>
<td>0.000</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>SLC</td>
<td>1</td>
<td>5.0607</td>
<td>6.217</td>
<td>0.344</td>
<td>0.334</td>
<td>0.334</td>
<td>0.858</td>
</tr>
<tr>
<td>Positive</td>
<td>2</td>
<td>5.0607</td>
<td>—</td>
<td>-0.845</td>
<td>0.289</td>
<td>-0.845</td>
<td>-0.009</td>
</tr>
<tr>
<td>SLC</td>
<td>2</td>
<td>1.3774</td>
<td>6.157</td>
<td>0.346</td>
<td>0.259</td>
<td>0.259</td>
<td>0.027</td>
</tr>
<tr>
<td>Non-Reflective</td>
<td>3</td>
<td>6.1881</td>
<td>0.983</td>
<td>0.198</td>
<td>0.198</td>
<td>0.198</td>
<td>0.027</td>
</tr>
<tr>
<td>SLC</td>
<td>3</td>
<td>5.3269</td>
<td>6.234</td>
<td>0.180</td>
<td>0.778</td>
<td>0.450</td>
<td>0.316</td>
</tr>
<tr>
<td>Reflective</td>
<td>4</td>
<td>11.7477</td>
<td>—</td>
<td>0.778</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
</tbody>
</table>

Thresholds (1550 nm)

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Fail</th>
<th>Warning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Min. splice loss [dB]</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Max. splice loss [dB]</td>
<td>6.000</td>
<td>6.000</td>
</tr>
<tr>
<td>Min. connector loss [dB]</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Max. connector loss [dB]</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Fiber sect. att. [dB/km]</td>
<td>6.000</td>
<td>6.000</td>
</tr>
<tr>
<td>Span loss [dB]</td>
<td>45.000</td>
<td>45.000</td>
</tr>
<tr>
<td>Span length [km]</td>
<td>0.0000</td>
<td>0.0000</td>
</tr>
</tbody>
</table>

EXFO

Signature: ___________________________________________ 11-15-2010
Page 1 of 5
OTDR Bidirectional Report

Identification Information

Filename: TBN_NOC_EAST_PT_110_13101550_20-06-31
Test date: 11/27/2002
Test time: 12:47:34 AM (GMT-05:00)
Job ID: TBN_NOC_EAST, MGB, Brown, TBN_PIL
Comments: BD=400, LET, MBG=M1402

Location A
Location: DA
Operator: FTB730-12CG-23BE-EA
Unit #: 100
Calibration Date: 1/15/2014

Location B
Location: DA
Operator: FTB730-12CG-23BE-EA
Unit #: 100
Calibration Date: 1/15/2014

Test Parameters (1550 nm)

Range (ft): 32,000
Pulse (ns): 100
Duration (s): 30

Test Parameters (1650 nm)

Span length (ft): 11.7477
Span loss (dB): 1.800
Span ORL (dB): -19.22
Average loss (dB/km): 0.182
Avg. splice loss (dB): 0.000
Max. splice loss (dB): 0.000

Graphic (1550 nm)

![Graphic Image]

Event Table (1550 nm)

<table>
<thead>
<tr>
<th>Type</th>
<th>No.</th>
<th>Location Length (ft)</th>
<th>Loss (dB)</th>
<th>Reflectance (dB)</th>
<th>Attenuation (dB/km)</th>
<th>Cumulative Loss (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reflective</td>
<td>1</td>
<td>6.6000</td>
<td>6.079</td>
<td>-50.0</td>
<td>0.550</td>
<td>1.550</td>
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<tr>
<td>Section</td>
<td>2</td>
<td>5.6000</td>
<td>6.365</td>
<td>0.381</td>
<td>-1.304</td>
<td>1.000</td>
</tr>
<tr>
<td>Positive</td>
<td>3</td>
<td>13.774</td>
<td>6.675</td>
<td>1.400</td>
<td>0.345</td>
<td>1.357</td>
</tr>
<tr>
<td>Section</td>
<td>4</td>
<td>4.5000</td>
<td>6.855</td>
<td>0.301</td>
<td>1.400</td>
<td>1.400</td>
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<tr>
<td>Non-Reflective</td>
<td>5</td>
<td>5.3296</td>
<td>6.405</td>
<td>0.377</td>
<td>1.400</td>
<td>1.400</td>
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<td>Reflective</td>
<td>6</td>
<td>11.7477</td>
<td>-16.6</td>
<td>1.006</td>
<td>1.550</td>
<td>1.550</td>
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Markers Information (1650 nm)

<table>
<thead>
<tr>
<th>Marker</th>
<th>Position (ft)</th>
<th>Value (dB)</th>
</tr>
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<tbody>
<tr>
<td>a</td>
<td>3.7377</td>
<td>22.218</td>
</tr>
<tr>
<td>A</td>
<td>9.8176</td>
<td>22.218</td>
</tr>
<tr>
<td>B</td>
<td>16.3822</td>
<td>11.538</td>
</tr>
<tr>
<td>b</td>
<td>22.5437</td>
<td>11.538</td>
</tr>
<tr>
<td>B-A</td>
<td>9.5545</td>
<td>10.694</td>
</tr>
</tbody>
</table>

Manual Measurements (1650 nm)

<table>
<thead>
<tr>
<th>Measurement</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 points: event loss (dB)</td>
<td>10.267</td>
</tr>
<tr>
<td>A-B ESA loss (dB)</td>
<td>10.584</td>
</tr>
<tr>
<td>2 points: attenuation (dB/km)</td>
<td>5.045</td>
</tr>
<tr>
<td>A-B ESA attenuation (dB/km)</td>
<td>7.386</td>
</tr>
<tr>
<td>3 points: reflectance (dB)</td>
<td>0.060</td>
</tr>
<tr>
<td>3 points: max. reflectance (dB)</td>
<td>0.060</td>
</tr>
<tr>
<td>A-B ORL (dB)</td>
<td>17.63</td>
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</table>

Pass/Fail Thresholds (1550 nm)

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Fail</th>
<th>Warning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Optical loss (dB)</td>
<td>1.060</td>
<td>1.060</td>
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<tr>
<td>Connector loss (dB)</td>
<td>1.060</td>
<td>1.060</td>
</tr>
<tr>
<td>Reflectance (dB)</td>
<td>10.0</td>
<td>-10.0</td>
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<tr>
<td>Fiber sect. att. (dB/km)</td>
<td>0.400</td>
<td>-0.400</td>
</tr>
<tr>
<td>Span loss (dB)</td>
<td>45.0</td>
<td>45.0</td>
</tr>
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</table>

EXFO
Signature: ___________________________ 27-13-2006
## OTDR Bidirectional Report

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Span length (ft)</td>
<td>0.0000</td>
<td>0.0000</td>
</tr>
<tr>
<td>Span ORL (dB)</td>
<td>15.00</td>
<td>15.00</td>
</tr>
</tbody>
</table>
OTDR Bidirectional Report

Identification Information
Filename: TBN_NOC_EAST_PT_110_13101550_20-05-31
Test date: 11/27/2000
Test time: 2:24:00 PM (GMT-06:00)
Job ID: TBN_NOC_EAST_MGBC_Brown_TBN_PNL
Comments: (BD=TOOTLET; MOBC=PT_002)
Cable ID: PT_110
File ID: PT_110
Customer:
Company:

Location A
Location:
Operator:
Unit ID:
Calibration Date: 10.5.2014

Location B
Location:
Operator:
Unit ID:
Calibration Date: 10.5.2014

Test Parameters (1650 nm)
Range (mi): 85.8183
Pulse (ns): 100
Duration (s): 30

Results (1650 nm)
Span length (mi): 28.4829
Span loss (dB): 2.1599
Span ORL (dB): 34.98
Average loss (dB/km): 0.078
Avg. splice loss (dB): 0.039
Max. splice loss (dB): 0.189

Graphic (1650 nm)

Event Table (1650 nm)

<table>
<thead>
<tr>
<th>Type</th>
<th>No.</th>
<th>Location/Length (mi)</th>
<th>Loss (dB)</th>
<th>Reflectance (dB)</th>
<th>Attenuation (dB/km)</th>
<th>Cumulative Loss (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reflective</td>
<td>1</td>
<td>6.6000</td>
<td>0.321</td>
<td>-56.9</td>
<td>0.331</td>
<td>0.331</td>
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<tr>
<td>Section</td>
<td>2</td>
<td>6.361</td>
<td>0.341</td>
<td>6.221</td>
<td>0.561</td>
<td>0.561</td>
</tr>
<tr>
<td>Non-Reflective</td>
<td>2</td>
<td>2.695</td>
<td>0.168</td>
<td>--</td>
<td>0.730</td>
<td>0.730</td>
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<tr>
<td>Section</td>
<td>3</td>
<td>2.439</td>
<td>0.118</td>
<td>6.325</td>
<td>0.845</td>
<td>0.845</td>
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<tr>
<td>Passive</td>
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<td>1.051</td>
<td>0.047</td>
<td>6.174</td>
<td>0.880</td>
<td>0.880</td>
</tr>
<tr>
<td>Section</td>
<td>5</td>
<td>1.051</td>
<td>0.047</td>
<td>--</td>
<td>1.607</td>
<td>1.607</td>
</tr>
<tr>
<td>Reflective</td>
<td>5</td>
<td>25.4036</td>
<td>1.382</td>
<td>6.386</td>
<td>3.389</td>
<td>3.389</td>
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Markers Information (1650 nm)

<table>
<thead>
<tr>
<th>Marker</th>
<th>Position (mi)</th>
<th>Value (dB)</th>
</tr>
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<tbody>
<tr>
<td>a</td>
<td>-9.0369</td>
<td>24.344</td>
</tr>
<tr>
<td>b</td>
<td>3.5757</td>
<td>23.588</td>
</tr>
<tr>
<td>c</td>
<td>6.5355</td>
<td>23.962</td>
</tr>
<tr>
<td>d</td>
<td>9.9718</td>
<td>23.186</td>
</tr>
<tr>
<td>E-A</td>
<td>3.2813</td>
<td>9.116</td>
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Manual Measurements (1650 nm)

<table>
<thead>
<tr>
<th>Measurement</th>
<th>Value (dB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 points event loss</td>
<td>0.342</td>
</tr>
<tr>
<td>A-B ESA loss</td>
<td>0.180</td>
</tr>
<tr>
<td>3 points section attenuation</td>
<td>0.175</td>
</tr>
<tr>
<td>A-B ESA attenuation</td>
<td>0.175</td>
</tr>
<tr>
<td>3 points reflectance</td>
<td>-0.31</td>
</tr>
<tr>
<td>3 points max. reflectance</td>
<td>-0.73</td>
</tr>
<tr>
<td>A-B CR (dB)</td>
<td>42.09</td>
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</table>

Pass/Fail Thresholds (1650 nm)

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Fail</th>
<th>Warning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Splice loss (dB)</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Connector loss (dB)</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Reflectance (dB)</td>
<td>-10.0</td>
<td>-10.0</td>
</tr>
</tbody>
</table>

EXFO

Signature: ___________________________ 27-13-2000
Page 4 of 5
## OTDR Bidirectional Report

<table>
<thead>
<tr>
<th>Parameter</th>
<th>1</th>
<th>2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fiber sect. att. (dB/km)</td>
<td>0.400</td>
<td>0.400</td>
</tr>
<tr>
<td>Span loss (dB)</td>
<td>45.000</td>
<td>45.000</td>
</tr>
<tr>
<td>Span length (kft)</td>
<td>0.0000</td>
<td>0.0000</td>
</tr>
<tr>
<td>Span DRL (dB)</td>
<td>15.00</td>
<td>15.00</td>
</tr>
</tbody>
</table>
LIST OF MIDDLE MILE NETWORK PRIORITY LIST, MAPPING IMAGES, AND JULY 2022 PRICE SHEET
BROWNSVILLE MIDDLE MILE CONNECTION AGREEMENT AND
GRANT OF INDEFEASIBLE RIGHTS OF USE

by and between

CITY OF BROWNSVILLE, TEXAS

and

BTX FIBER, LLC
BROWNSVILLE MIDDLE MILE CONNECTION AGREEMENT
AND GRANT OF INDEFEASIBLE RIGHTS OF USE

This BROWNSVILLE MIDDLE MILE CONNECTION AGREEMENT (as may be amended and supplemented from time to time as set forth herein, and including all exhibits and appendices attached hereto, collectively, this “Agreement”), effective as of June 21, 2022 (the “Effective Date”), by and between CITY OF BROWNSVILLE, TEXAS (the “City”), and BTX FIBER, LLC, a Delaware limited liability company (the “Subscriber”, together with the City, are individually referred to as a “Party”, and collectively referred to as the “Parties” herein).

RECITALS:

WHEREAS, the City owns or will own a fiber optic cable network generally known as the [Brownsville Fiber Network], as may be amended, increased, expanded, modified or supplemented from time to time (as further defined below, collectively, the “Middle Mile Network”); and

WHEREAS, to promote business, economic, civic or community development in the City, the City may grant the right to use the Middle Mile Network, or portions thereof, to non-governmental entities pursuant to agreements to provide lit fiber service or dark fiber, including by bandwidth use agreements, User Leases or indefeasible rights-of-use or “IRU”; and

WHEREAS, the Subscriber desires to use the Middle Mile Network, and connections thereto, to develop, deploy and operate a transport network of optical fiber to the premises of residential and non-governmental commercial and institutional structures in, but not limited to, the City (the “FTTP Network”); and

WHEREAS, the Subscriber agrees that any service provided to a household over the Brownsville Fiber Network will participate in the FCC’s Affordable Connectivity Program (ACP) or provide access to a broad-based affordability program to low-income consumers that provides benefits commensurate to ACP Recipients; and

WHEREAS, to develop, deploy and operate the FTTP Network, Subscriber desires to enter into this Agreement, and in order to promote, foster and enhance economic development, recreation, housing services, culture, and education, the City is willing to permit the use of the Middle Mile Network, by the Subscriber, as described in and under the terms of this Agreement.

NOW THEREFORE, for ten dollars and other good and valuable consideration, the receipt, adequacy and sufficiency of which are hereby acknowledged, the City and Subscriber agree as follows:

Section 1. Definitions. As used in this Agreement, the following capitalized terms have the meanings given below:

1.1. “Addendum or Addenda” means any and all addenda, exhibits, or attachments related to and incorporated into this Agreement or regardless of whether attached to this Agreement in its original form or executed by the Parties pursuant to Section 20 and made a part of this Agreement by reference.
1.2. “Cable” means the bundles of optical fiber strands within sheathing of the Middle Mile Network.

1.3. “Carrier” means a provider of services via the internet, or that use the internet as a platform, internet services over the FTTP Network pursuant to a written contract with Subscriber (if applicable) to provide such services to a residential or business location. Subscriber may also serve as the Carrier.

1.4. “Customer” means any residential location or business purchasing services that may include, but are not limited to, broadband, telecommunications, video, or signaling services from a Carrier.

1.5. “Dark Fiber” means the optical fiber strands within the Middle Mile Network that are not, as of a given point in time, in use for the transmission of optical signals.

1.6. “Demarcation Point” means the connection point or points where the FTTP Network is connected to the Middle Mile Network. Anticipated locations for Demarcation Points are identified on Appendix D (such locations being subject to change). A connection point “prior to the Demarcation Point” denotes a connection point within the Middle Mile Network; a connection point “beyond the Demarcation Point” denotes a connection point within the FTTP Network.

1.7. “Effective Date” is defined in the introductory paragraph.

1.8. “Facilities Connected” means residential, commercial, and institutional locations to which internet services connected through the FTTP Network are operational.

1.9. “Force Majeure” means a condition beyond the reasonable control of a Party that delays or prevents performance of obligations (other than payment obligations) under this Agreement. Force Majeure includes, without limitation: fire, flood, lightning, explosion, war, act of terrorism, strike, riots, embargo, labor dispute, government requirement, imposition of military authority, act of God or nature, acts or failure to act of any governmental authority other than the Parties.

1.10. “FTTP” means infrastructure to be constructed and installed by Subscriber to bring optical fiber services to residential and business premises where feasible within the City, from Demarcation Points in the Middle Mile Network.

1.11. “Initial Term” means the twenty-one (21) year period commencing upon the Effective Date and ending on the same date in the year 2043.

1.12. “Lease” means any User Lease or other lease between the Subscriber and the City or between the City and any other person which may have an effect on the Parties’ compliance with or ability to perform the terms and provisions of this Agreement.

1.13. “Lit Port Connection” means the port on an ONT that enables data to be transmitted to and from a Customer on the FTTP Network.

1.14. “Lit Port Connection Fee” means the fee stated in Appendix A.
1.15. “Middle Mile Network” includes (i) all Cable equipment, optronics and electronics installed within the Middle Mile Network or (if not in fact within the Middle Mile Network) associated with the use of the optical fiber Cable and unless specifically provided otherwise in an Addendum to this Agreement (ii) all connection points controlled and operated by or on behalf of the City prior to a Demarcation Point.

1.16. “Monthly Service Subscription” shall mean at any particular time a monthly service contract, then in full force and effect, by and between a Customer and a Carrier, for which the Customer is current in payments due under the monthly service contract.

1.17. “Network Outage” means an unplanned period of time during which Subscriber is unable to connect to destinations beyond a Demarcation Point in accordance with this Agreement due to a problem or failure of the Middle Mile Network.

1.18. “ONT” or “Optical Network Terminal” means equipment owned by the Subscriber that terminates optical fibers at the Customer’s premises. Using electricity from the Customer’s AC source, the Optical Network Terminal converts the incoming optical signals into a format usable by the Customer for the reception and transmission of voice, video and data.

1.19. “Services” means each of the rights and responsibilities performed by the City or caused to be performed on its behalf as described in Sections 2.1 and 2.2.

1.20. “Service Threatening Disruption” is defined as an interruption in the delivery of optical fiber services over the FTTP Network that affects at least a majority of Facilities Connected by a complete failure of a device or fiber optics system, including a Carrier outage where all or most Facilities Connected through a Carrier are without service.

1.21. “Subscriber Request” is a communication from Subscriber to the City in the form set forth in Appendix C, in which Subscriber will request a connection to optic fiber strands at a Demarcation Point.

1.22. “Term” means the term of this Agreement as set out in Section 6, as may be extended.

1.23. "User Leases" means User Leases as defined in the Lease.

Section 2. Rights and Responsibilities

2.1. City

   (a) Subject to the terms of the Lease, the City shall provide connections to two (2) strands of Dark Fiber within the Middle Mile Network with an additional two (2) strands, if needed, allowing Subscriber to use the Middle Mile Network to provide services to Customers pursuant to the terms and conditions of this Agreement. It is anticipated that by an Addenda to this Agreement the City shall provide connections to additional strands of Dark Fiber according to needs demonstrated by Subscriber, subject to City’s obligation
to provide nondiscriminatory, non-preferential access to other subscribers as determined by the City at the City’s sole discretion, to allow Subscriber to expand the FTTP Network.

(b) Upon receipt of a Subscriber Request, the City shall promptly identify the strands of optic fiber to be connected at specified Demarcation Points.

(c) The City shall have no right to discontinue or abandon any segment of the Middle Mile Network that is in service on the FTTP Network or is the subject of a pending Subscriber Request that has been approved hereunder during the Term of this Agreement, or (if shorter) any applicable term of an approved Subscriber Request.

(d) The City may discontinue or abandon all, or any segment of, the Middle Mile Network that is not in service on the FTTP Network nor subject to a pending Subscriber Request, provided that the City shall provide Subscriber with one hundred twenty (120) days’ prior written notice of its intention to discontinue or abandon any such segment.

2.2. Grant of Indefeasible Right of Use. Subscriber shall be entitled to the IRU fibers as allowed under the Grant of Indefeasible Rights of Use Effective June 21, 2022, memorialized under Exhibit B, attached hereto. The initial IRU term shall start upon execution of this Agreement and shall terminate 21 years from the Effective Date. Subject to written approval by the City, absent a party being in default or the City providing notice of non-renewal thirty (30) days prior to the term of the then current term, the IRU term shall automatically renew for three (3) additional ten (10) year terms unless the City gives the Subscriber notice of its intent not to renew at least thirty (30) days prior to the expiration of the then current term or extension.

2.3. Subscriber.

(a) Subscriber will provide all the equipment necessary to support its FTTP Network, as well as the appropriate equipment necessary to connect to the Middle Mile Network which shall conform to industry standards. Subscriber will designate appropriate equipment by which FTTP Network will be connected to the Middle Mile Network. The City will install any fiber network equipment such as a fiber termination rack necessary to support the Services. Subscriber will utilize the Services to install any fiber optic cable necessary to support its FTTP Network.

(b) For each Subscriber request for a connection to the Middle Mile Network, Subscriber shall consult with the Authority regarding the specific strands within the Middle Mile Network to be subject to a license for satisfaction of that Subscriber Request, and to identify the best Demarcation Point for each such strand, and shall submit to the Authority a Subscriber Request substantially in the form of Appendix C.

(c) The City and Subscriber shall cooperate in the determinations or designations required above, in a commercially reasonable, technically reasonable, and timely manner in accordance with best practices in the industry.
(d) The City and Subscriber each shall assign a qualified operational and technical contact person to coordinate with the Authority regarding Services being provided under this Agreement.

(e) Subscriber is solely responsible for design, engineering, procurement, construction, operation and maintenance for the distribution, feeder and drop fiber of its FTTP Network and its equipment on the FTTP Network beyond the Demarcation Point, and is solely responsible for insuring its own property, including its network equipment. The City is not responsible for maintaining the security of Subscriber’s Network or for implementing any security protocols or procedures on FTTP Network beyond the Demarcation Point.

(f) Subscriber may consult with the City on the design of the FTTP Network, on an as-needed basis and without charge.

(g) It is in the mutual interest of the Parties to cooperate on building Subscriber’s FTTP infrastructure and connecting unserved or underserved customers to it. The Parties shall reasonably cooperate in this effort; provided, however, the City does not waive its right to require permits in accordance with state and local law for any action of Subscriber under this agreement, nor does the City’s cooperation under this Section impact the City in any way in its role as a local government and regulatory entity.

(h) Subscriber shall provide to the City administrative access, which for the avoidance of doubt shall be “read only”, to Subscriber’s portal for purpose of verifying information and providing network reports related to Subscriber’s obligations herein.

(i) Subscriber commits to participate in any existing or future broadband subsidy program funded by the State or federal government that could benefit low-income consumers within City, including the federal Affordable Connectivity and Lifeline programs. Subscriber acknowledges that the Middle Mile Network was constructed using federal funds under the American Rescue Plan Act (“ARPA”) and Subscriber further agrees to comply with all ARPA requirements, including but not limited to providing affordable services as such term is defined by ARPA.

2.4. Parties.

(a) All services provided hereunder by or on behalf of either Party shall be consistent with industry standards for broadband network services, shall be rendered in a manner consistent with that level of care and skill ordinarily exercised within the industry, and in compliance with all federal, state, and local laws and regulations.

(b) For purposes of determining whether Services are available on the Middle Mile Network:

i. On a regular basis, but no less often than every six (6) months, the Parties shall meet and confer on their respective estimates of demand over the next six (6)
months, and shall work to ensure that sufficient Dark Fiber will be available to meet the estimated demand.

Section 3. Unauthorized Access to Facilities or Use of Connections

3.1. Unauthorized Access. The City shall not be liable for any damage, disruption, or claims made, caused by unauthorized access to Subscriber’s transmission facilities or Subscriber’s datacenter or equipment by any individual or entity, or for unauthorized access to, or alteration, theft, or destruction of Subscriber’s data files, programs or other information through accident, wrongful means, or any other good cause, unless and only to the extent that such access and resultant alteration, theft, or destruction is the result of activity prior to the pertinent Demarcation Point, or is caused by the gross negligence or the willful misconduct of the City, its employees, or its agents.

3.2. Use of Connections. Except as contemplated by this Agreement, neither Party is entitled to use a connection owned or controlled by the other Party to transport any data without the prior consent of the Party that owns or controls the connection.

3.3. Connections made at a Demarcation Point are owned by the City.

Section 4. Fees, Expenses and Payment

4.1. Fees. Subject to the provisions of this Agreement, in exchange for access to the Middle Mile Network and for other “in kind” consideration set forth on the Attached Appendix B, which the City shall provide or shall cause to be provided on its behalf, Subscriber will pay the City the fees and other amounts set forth in Appendix A and in any other Addenda, in accordance with the provisions of this Section 4.

4.2. Expenses. The fees set forth in Appendix A are inclusive of all actual net expenses and costs of the City, and Subscriber will not be required to pay any amounts in excess of those fees except to the extent that expenses and costs are identified in an applicable Addendum which expressly requires those expenses and costs to be paid by Subscriber in addition to the fees set forth in Appendix A.

4.3. Invoicing and Payment. The City will invoice Subscriber in accordance with the fees set forth in attached Appendix A. Unless otherwise provided in an applicable Addendum, Subscriber will pay the undisputed amount of each invoice within thirty (30) days after its receipt by Subscriber. Disputed amounts shall be promptly reported by Subscriber to the City for resolution. Prior to the institution of any legal action, the Parties shall confer regarding any disputed amount of an invoice in a good faith effort to resolve the dispute.

4.4. Taxes. Unless otherwise set forth in an applicable Addendum, fees do not include sales, use, value added or other excise tax, which Subscriber shall pay on its own account. Subscriber will not be charged sales tax if it provides a valid exemption therefor. In addition, Subscriber will pay or, if paid by the City, reimburse the City for, all taxes imposed upon the provision of services by the City under this Agreement. Notwithstanding
the foregoing, Subscriber shall not be responsible for any taxes based upon the City’s gross revenues or net income.

Section 5. Service Disruption or Suspension

5.1. Suspension of Service. The City may temporarily assume operational ownership of Subscriber’s connections or related communication services if, and for so long as may be reasonably necessary, (a) to prevent Service Threatening Disruptions, (b) in the event of violations of a Carrier’s terms and conditions, or fraudulent or illegal activity which originates on FTTP Network, whether or not knowingly caused or permitted by Subscriber, or (c) to perform or cause the performance of, necessary maintenance (e.g. by an entity experienced in maintaining the Middle Mile Network), provided that the City has given written notice to Subscriber and Subscriber has not performed the necessary maintenance within 30 days. As soon as practical after becoming aware that a planned disruption or suspension of service will occur for the reasons set forth in clauses (a) and (b) above the City will notify Subscriber. In the event of a planned disruption or suspension of service for the performance of necessary maintenance or service, the City will consult with Subscriber, and the Parties shall jointly determine the scheduling of such disruption or suspension of service in a manner that is reasonably calculated to minimize disruption to the FTTP Network. In the event the City exercises its right to disrupt or otherwise suspend service and such suspension of service continues for more than eight (8) hours, any fees to be paid by Subscriber under this Agreement shall be similarly suspended, and Subscriber shall incur no liability or obligation in connection therewith.

5.2. Termination Right for Repeated Disruptions. Notwithstanding anything herein to the contrary, Subscriber shall be permitted to terminate this Agreement with an effective date of termination not less than sixty (60) days from the date of such written notice to City, upon the occurrence of any of the following: (a) four Network Outages in any twelve consecutive months, or (b) planned disruptions of eight (8) Business hours in the aggregate during any calendar month for two consecutive calendar months.

Section 6. Term

6.1. The Term of this Agreement shall be the Initial Term, as may be extended, subject to Section 6.2.

6.2. Provided that no default or breach of this Agreement (beyond any cure period) by Subscriber then exists, Subscriber and the City may, on three (3) occasions, extend the Term (as so extended, an “Extension Term”) to a date that is ten (10) calendar years from the expiration date of the Initial Term or any Extension Term then in effect. Such extension option must be executed in writing and signed by both parties to be effective. Subscriber’s delivery of written notice to the City requesting such an extension shall be delivered to the City no later than one hundred eighty (180) days prior to the expiration of the Term then in effect.
Section 7. Termination

7.1. Termination Due to Non-Performance. If either Party defaults or fails to perform any material provision of the Agreement, the other Party may serve written notice upon the non-performing Party specifying the nature of the failure. If, within thirty (30) days of the date notice is served, the non-conforming Party has not cured the default or presented a plan reasonably acceptable to the other Party to cure the default, then, upon expiration of the thirty (30) day period, the Party giving notice may, at its option, terminate the Agreement, provided that if such breach cannot reasonably be cured within such thirty (30) day period, such period shall be extended for up to an additional ninety (90) days so long as the non-performing party continues to diligently pursue such cure during such period.

7.2. Other Termination Situations. Any Party shall have the right to immediately terminate this Agreement, in whole or in part, upon written notice to the other if another Party:

(a) Ceases to do business as a going concern;

(b) Makes an assignment for the benefit of its creditors;

(c) Admits in writing that it is insolvent or is unable to pay its debts as they become due;

(d) Authorizes, applies for, or consents to the appointment of a trustee or receiver of all or a substantial portion of its assets;

(e) Reserved;

(f) Ninety (90) days after the commencement of any proceeding against such Party seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, if the proceeding has not been dismissed; or

Section 8. Confidentiality

8.1. “Confidential Information” means information or material proprietary to a Party or its agents, which has been specifically designated in writing as confidential, independent of this Section, and which is disclosed by one Party or its agents to the other. Confidential information includes, but is not limited to, trade secrets (including pricing, materials, designs, specifications, techniques, models, data, diagrams, software in various stages of development, source code, object code, documentation, and research data, whether disclosed visually, orally, or in writing) and information about or belonging to a Party’s vendors, customers, employees or consultants. Confidential Information does not include information which:

(a) is now public domain or is made public domain as the result of its disclosure in a publication that is not in violation of this Section 8;
(b) the receiving Party can prove was in its possession in written form at the
time of the disclosure by the other Party and is held without an obligation of confidentiality;
(c) comes into the hands of the receiving Party by means of a third party (not
an agent of either party) who is entitled to make such disclosure without obtaining a
promise of confidentiality; or,
(d) is considered to be a public record under Texas law.

8.2. Except for information that must be disclosed pursuant to a lawful order of a court
or other duly constituted authority with the power and jurisdiction to impose such an order,
including but not limited to the Texas attorney general, or as may otherwise be required by
applicable laws, the recipient agrees to hold in confidence and not to publish, transfer or
otherwise disclose any Confidential Information, directly or indirectly, to any third party.
The recipient further agrees not to use Confidential Information for any purpose other than
to perform its obligations under this Agreement. For the avoidance of doubt, in no event
will the City or its agents or representatives, be entitled to access the data transmitted by
or through the Services except to the extent necessary to perform its obligations under this
Agreement.

Section 9. Representations and Warranties

9.1. Each Party represents and warrants to the other Party that:

(a) It is duly organized, validly existing and in good standing as represented
herein under the laws and regulations of its jurisdiction of incorporation, organization, or
formation, and licensed to do business in the State of Texas;

(b) It has the full right, power, and authority to enter into this Agreement, to
grant the rights and licenses granted hereunder, and to perform its obligations hereunder;

(c) The execution of this Agreement by its representative whose signature is set
forth at the end hereof has been duly authorized by all necessary corporation action of the
Party; and

(d) When executed and delivered by such Party, this Agreement will constitute
the legal, valid, and binding obligation of such Party, enforceable against such Party in
accordance with its terms.

9.2. NO OTHER WARRANTIES. EXCEPT AS EXPRESSLY SET FORTH IN THIS
AGREEMENT OR IN ANY APPLICABLE SERVICE LEVEL AGREEMENT OR
OTHER APPLICABLE AGREEMENT, EACH PARTY EXPRESSLY DISCLAIMS
ALL WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY. WITHOUT
LIMITING THE GENERALITY OF THE FOREGOING, THE CITY EXPRESSLY
DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY, OR FITNESS
FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE USE OR PROVISION OF
THE SERVICES, INCLUDING THE USE OF THE MIDDLE MILE NETWORK, OR
ANY ADDITIONAL SERVICES OR WITH RESPECT TO ANY EQUIPMENT.
Section 10. Limitations of Liability

10.1. GENERAL LIABILITY LIMITATION. EXCEPT FOR A TERMINATION PURSUANT TO SECTION 7, OR A BREACH OF SECTION 8 OR OF SUBSCRIBER'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 14, THE ENTIRE LIABILITY OF THE CITY, ON THE ONE HAND, AND OF SUBSCRIBER, ON THE OTHER HAND, FOR EACH CLAIM OF WHATEVER NATURE (INCLUDING CLAIMS BASED ON NEGLIGENCE BUT EXCLUDING BREACHES OF THE REPRESENTATIONS MADE IN SECTION 9) ARISING OUT OF THIS AGREEMENT INCLUDING, BUT NOT LIMITED TO, DAMAGE TO REAL OR PERSONAL PROPERTY, SHALL NOT EXCEED THE GREATER OF (A) THE LIMITS OF ANY INSURANCE REQUIRED HEREUNDER, AND (B) AN AMOUNT EQUAL TO THE FEES PAID BY SUBSCRIBER HEREUNDER IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT(S) GIVING RISE TO SUCH CLAIM(S). THE CITY’S LIABILITY HEREUNDER TO SUBSCRIBER, OR ANYONE CLAIMING UNDER OR THROUGH SUBSCRIBER, SHALL BE REDUCED IN THE PROPORTION AND TO THE EXTENT CAUSED IN WHOLE OR IN PART BY SUBSCRIBER OR ANY THIRD PARTY, OR A SUBCONTRACTOR OR AN AGENT OF SUBSCRIBER.

10.2. Time Limit. No action or proceeding against the City or the Subscriber may be commenced by the other more than two (2) years after the event which is the basis for the action or proceeding. The Parties acknowledge that this limitation constitutes an express waiver of any rights under any applicable statute of limitations which would otherwise afford additional time for such a claim.

Section 11. Force Majeure

Neither Party shall be liable to another Party for delays, interruptions or other failures to perform under this Agreement due to Force Majeure. Subscriber, by reason of such cause, shall not be relieved of its obligation to make any required payments that are due to the City, or which may become due from Subscriber’s continued use of Services; provided, however, except to the extent any Customer remains liable pursuant to a Monthly Service Subscription for the delayed, interrupted or failed service, in no event will Subscriber be liable for fees related to Services that are not available during the period of time that the Force Majeure continues (for the period or periods of unavailability).

Section 12. Compliance with Applicable Law and Other Obligations

Subscriber shall comply with all laws and governmental regulations applicable thereunder to its use of the Middle Mile Network and any communication services it utilizes in connection with its use of the Middle Mile Network including, without limitation, U.S. export laws concerning the transmission of technical data and other regulated materials.
Section 13. Insurance

13.1. Each Party shall obtain and maintain at its sole expense and from one or more responsible insurance companies or otherwise as provided below, comprehensive general, accident and public liability insurance policies covering bodily injury or death to persons and property damage in an aggregate amount of not less than $2,000,000 resulting from any one occurrence in connection with the delivery of the Services and the use of the Middle Mile Network. Such policies may include aggregate deductibles or self-insurance retention of up to $100,000 per occurrence in any one year in such policies; provided, that the insurance to be obtained and maintained by the City hereunder may be obtained through a cooperative or pool program that provides insurance to one or more political subdivisions of the State.

13.2. With respect to casualty insurance, each of the Parties shall be responsible for adequately insuring or causing the insurance of all of its respective properties within the Middle Mile Network or the FTTP Network, as applicable, in an amount reasonably calculated to protect the continued operation thereof in the event of physical damage.

13.3. Subscriber shall cause each contractor engaged in the construction of the FTTP Network to carry all risk insurance with limits not less than as set forth in section 13.1, and which names the City as an additional insured as to liability coverage, and as loss payees for property damage, to the extent of damage to the Middle Mile Network.

13.4. Insurance amounts contained in this section 13 shall be increased by the respective parties every ten (10) years in proportion to any increase in the Consumer Price Index.

Section 14. Indemnity; Limit of Liability of the City.

TO THE EXTENT ALLOWED BY LAW, EACH PARTY (THE “INDEMNIFYING PARTY”) SHALL INDEMNIFY, HOLD HARMLESS AND DEFEND THE OTHER PARTY AGAINST ANY CLAIMS FROM ANY AND ALL THIRD PARTIES, AND FOR PAYMENT OF ANY COSTS, FEES, LIABILITIES, REASONABLE ATTORNEY FEES, DAMAGES OR PENALTIES, TO THE EXTENT SUCH CLAIMS ARISE AS A RESULT OF THE INDEMNIFYING PARTY’S NEGLIGENCE, NON-COMPLIANCE OR BREACH OF ANY REPRESENTATION, WARRANTY, OR OBLIGATION UNDER THIS AGREEMENT, WILLFUL MISCONDUCT OR VIOLATION OF LAW.

Section 15. Dark Fiber Exclusivity

15.1. The City shall reserve two (2) fibers for the exclusive use of the Subscriber. An additional two (2) fibers shall be made exclusively available to the Subscriber, as long as the remaining capacity of the Middle Mile Network is sufficient to provide services required under its existing and reasonably anticipated User Leases.

15.2. The City will provide over-lash rights to Subscriber.
Section 16. Notices

16.1. Notices to Subscriber. The City may provide all notices and other communications electronically to Subscriber at:

Name and title: Brian Snider, CEO
Email address: brian@litcommunities.net

Electronic notices and communications to Subscriber shall be considered effective when received into Subscriber’s email system.

All notices given to Subscriber in writing pursuant to this Agreement shall be delivered to Subscriber at the address below, which may be changed by notice given as provided in this Agreement:

Entity Name: BTX Fiber, LLC
Attention: Brian Snider, CEO
Street Address: c/o Lit Communities Broadband, Inc.
3500 Blue Lake Drive, Suite 225
Birmingham, Alabama 35243

Non-electronic notices and communications to Subscriber shall be considered effective when received by Subscriber via certified mail, or by any national commercial courier service that provides evidence of receipt, as indicted by the applicable record of receipt.

16.2. Notices to the City. The Subscriber may provide all notices and other communications electronically to the City at:

Name and title: Noel Bernal, City Manager
Email address: noel.bernal@brownsville.tx.gov

Electronic notices and communications to Subscriber shall be considered effective when received into Subscriber’s email system.

16.3. All notices given to the City in writing pursuant to this Agreement shall be delivered to the address below, which the City shall be responsible to update as needed:

Entity Name: City of Brownsville
Attention: Noel Bernal, City Manager
Street Address: 1001 East Elizabeth Street
Brownsville, Texas 78520

Copy sent to:
Victor A. Flores, City Attorney
1001 East Elizabeth Street
Brownsville, Texas 78520
Non-electronic notices and communications to the City shall be considered effective when received by the City via certified mail, or by any national commercial courier service that provides evidence of receipt, as indicated by the applicable record of receipt.

Section 17. Assignment, Severability, Survivability, Successors and Assigns, Counterparts

17.1. Assignment. No Party may assign any rights or obligations under this Agreement without the other Parties’ prior written consent not to be unreasonably withheld. City may subcontract any service or obligation to be performed for Subscriber after providing prior written notice to the Subscriber, but the City shall remain responsible under the terms of this Agreement.

17.2. Severability. If any provision of this Agreement is illegal or unenforceable, the Agreement’s all other provisions will remain in effect.

17.3. Survivability. The terms and conditions of this Agreement regarding confidential information, indemnification, warranties, payment and all others that are stated to survive the expiration or termination of this Agreement will survive such expiration and termination and continue in effect.

17.4. Successors and Assigns. This Agreement shall inure to the benefit of and be binding on the Parties and their respective successors and any permitted assigns.

Section 18. Conflicts

If documents referred to in this Agreement conflict with one another (such as conflicting contract expiration dates), they will prevail in the following order: (i) Addenda shall be given effect over the terms of the Agreement as of the effective date of an Addendum; and (ii) later Addenda shall prevail over earlier Addenda).

Section 19. Addenda

This Agreement includes such addenda as the Parties shall from time to time agree to include within its terms (“Addenda”). Addenda may be incorporated into this Agreement, provided that to be effective each such Addendum shall make specific reference to this Agreement and be executed by authorized representatives of all the Parties.

Section 20. Entire Agreement

This Agreement constitutes the entire agreement between the Parties and supersedes all prior or contemporaneous negotiations or agreements, whether oral or written, relating to the subject matter hereof.

Section 21. Governing Law

This Agreement, including any Addenda referenced herein, will be governed by and construed in accordance with applicable U.S. federal law and the laws of the State of Texas, without regard to conflict of law principles. Each party consents to the exclusive jurisdiction and venue of the Texas state courts located in and serving the City and the applicable United States
federal court for the federal district encompassing the City, in connection with any dispute or controversy arising out of or in connection with this Agreement and/or its subject matter.

Section 22. Counterparts

This Agreement may be executed in counterparts, all of which together shall constitute the original of the Agreement, and each signed counterpart may be sent by email in portable document format ("PDF") and shall be considered the original of that counterpart. One assemblage of all signed counterparts shall be sufficient to prove this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the day and year first written above.

City:  
CITY OF BROWNSVILLE, TEXAS  

By: __________________________  
Name: ________________________  
Its: ____________________________  
Date: _________________________

Subscriber:  
BTX FIBER, LLC  

By: ____________________________  
Name: Brian Snider  
Its: CEO  
Date: 7/15/2022

ATTEST:  
By: ____________________________  
Interim City Secretary

APPROVED AS TO FORM:  
By: ____________________________  
Victor A. Flores  
City Attorney
MIDDLE MILE CONNECTION AGREEMENT AND GRANT OF IRU
ATTACHMENTS

Exhibit A – Middle Mile Network
Exhibit B – Grant of Indefeasible Rights of Use to BTX Fiber, LLC

Appendix A – Lit Port Connection Fee
Appendix B – Reserved
Appendix C – Subscriber Request Form
Appendix D – Demarcation Points
EXHIBIT A

Middle Mile Network
MIDDLE MILE CONNECTION AGREEMENT AND GRANT OF IRU

EXHIBIT B

Grant of Indefeasible Rights of Use Effective July __, 2022

Pursuant to this Agreement, the City grants the following Indefeasible Rights of Use to BTX Fiber, LLC:

Description of Cable Segment: ___________________________________________________

Mileage/Footage: ___________________

Estimated Completion Date: _____________________

BTX Fiber, LLC Number of Fibers: ____________

IRU Fee: ________________

One-time Application Fee: ________________

Annual Rights of Way Fees: ________________

Annual Maintenance Fee (per mile): ________________

UNLESS AND TO THE EXTENT MODIFIED HEREIN, ALL TERMS AND CONDITIONS OF THE AGREEMENT AS OTHERWISE AMENDED, REMAIN IN FULL FORCE AND EFFECT.

City of Brownsville, Texas        BTX FIBER, LLC

By: _______________________        By: _______________________

Name: _______________________   Name: _______________________ 

Its: _________________________   Its: _________________________ 

Date: ________________________   Date: ________________________
MIDDLE MILE CONNECTION AGREEMENT AND GRANT OF IRU

Appendix A

Capitalized terms used but not defined in this Appendix shall be ascribed the meanings given those terms in the Brownsville Middle Mile Connection Agreement to which it is appended.

Subscriber shall pay the City as follows:

- Beginning on the date which is twelve (12) months after the first month that the first Customer is connected to the FTTP Network (the “Commencement Date”), Subscriber shall pay the City a monthly fee payable in arrears (the “Lit Port Connection Fee”) of $5.00 per Monthly Service Subscription and the aggregate amount of all Lit Port Connection Fees shall not exceed $____________ in any year. Notwithstanding the foregoing, the Lit Port Connection Fee shall not be payable by Subscriber to the City for any Customer that participates in any governmental, quasi-governmental or non-governmental subsidized subscription plan, to include, without limitation, the Affordable Connectivity Program, which plans are currently priced at or below $30 per month, but remain subject to adjustment by Subscriber;

- If the Affordable Connectivity Program is no longer available due to lack of federal funding or otherwise, Subscriber and City will work together in good faith to support and co-fund a similar program to ensure that qualifying low-income residents can remain connected to the Subscriber Network;

- Subscriber shall pay each Lit Port Connection Fee monthly on the first (1st) business day of each month, in arrears for the preceding month;

- The City shall apply its revenue from Lit Port Connection Fees for the purposes and in the order set forth in the Lease.

- In the event that Subscriber provides services or desires to provide services to Customers that are beyond the scope of the agreement of the parties hereto during the Term and in the same geographic area as the Subscriber Network, Subscriber and the City will explore revenue sharing options available thereunder, based on the scope and structure of such expanded services. The ultimate determination as to whether such an arrangement will be feasible will be with Subscriber.
MIDDLE MILE CONNECTION AGREEMENT AND GRANT OF IRU

Appendix B

RESERVED
MIDDLE MILE CONNECTION AGREEMENT AND GRANT OF IRU

Appendix C

Subscriber Request Form

Subscriber

Submitted by: ____________________________________________

Name: __________________________________________________

Title: ___________________________________________________

Date: ___________________________________________________

Location of FTTP Network Cable for which connection is requested:

________________________________________________________

________________________________________________________

Requested Demarcation Point:

________________________________________________________

City

Identify specific strands: _________________________________

Specify Demarcation Points: _______________________________

Approved by: __________________________________________

Name: _________________________________________________

Title: _________________________________________________

Date: _________________________________________________
MIDDLE MILE CONNECTION AGREEMENT AND GRANT OF IRU

Appendix D

Demarcation Points