

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

STATE OF TEXAS §

COUNTY OF DALLAS §

AGREEMENT FOR THE ADJUSTMENT OF MUNICIPAL UTILITIES  
IN CONNECTION WITH THE I-635 LBJ EAST PROJECT

THIS AGREEMENT is made by and between the State of Texas (“State”), acting through the Texas Department of Transportation (“TxDOT”) and the CITY OF MESQUITE, a Texas municipal corporation (“City”) (collectively, the “Parties”), in order to facilitate the adjustment of municipal utility facilities associated with the I-635 LBJ East Project.

WITNESSETH

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

WHEREAS, Transportation Code, Chapter 203, Subchapter E authorizes the State to regulate the placement of public utility facilities along a State Highway;

WHEREAS, the Government Code, Chapter 791, authorizes a contract or agreement between a local government and a state agency, and authorizes the Parties, in performing a service under the contract or agreement, to apply the law applicable to a party, as agreed by the Parties;

WHEREAS, Texas Transportation Commission Minute Order Number 115486 authorized TxDOT to undertake and complete a highway improvement generally described as the I-635 LBJ East Project (“Project”);

WHEREAS, City possesses water, wastewater, and fiber communications utility facilities and appurtenances that are or may be in conflict with the Project (the “City Utilities”);

WHEREAS, TxDOT has executed a certain Design-Build Contract (the “Design-Build Contract”), effective August 22, 2019, with Pegasus Link Constructors – LBJ East Project (“DB Contractor”), an unincorporated joint venture, that sets forth DB Contractor’s obligations to design and construct the Project, pursuant to Chapter 223, Subchapter F of the Texas Transportation Code;

WHEREAS, DB Contractor’s obligation to design and construct the Project includes the obligation to adjust, install and relocate (such work constituting an “Adjustment”) the City Utilities that TxDOT or DB Contractor determine to be in conflict with the Project, as necessary to accommodate the Project (the “City Adjustments”);

WHEREAS, pursuant to Section 203.092 of the Transportation Code: (a) the cost of all City Adjustments required by the improvement of I-635 (including any adjustments or relocations performed along I-635 and I-30 between Gus Thomasson and Northwest Drive or along stub outs

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

on roadways intersecting I-635) (the “Reimbursable Utility Adjustments”) will be 100% reimbursable by TxDOT, and (b) all other costs of the City Adjustments that are not Reimbursable Utility Adjustments (“Non-Reimbursable Utility Adjustments”), if any, will not be reimbursable by TxDOT and will be paid by City in accordance with this Agreement, and subject to appropriate authorization of the applicable governing body of the City;

WHEREAS, the Parties agree that the performance of the City Adjustments in accordance with the Design-Build Contract is important to the timely and successful completion of the Project;

WHEREAS, each Party, subject to their respective authorizations and approvals, shall work cooperatively to ensure that the responsibilities set forth in this Agreement are expeditiously executed;

WHEREAS, disputes relating to the performance of the City Adjustments or responsibilities herein shall be resolved in a cooperative manner and attempt to achieve a mutual benefit to both Parties;

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

## AGREEMENT

### 1. Definitions

Any capitalized terms or acronyms used but not defined in this Agreement have the meaning set forth in Section 1.2 of the Design-Build Agreement between DB Contractor and TxDOT, or Section 1.2 of the Design-Build Agreement General Conditions, Items 1-9 dated as of August 22, 2019, as applicable.

### 2. Time Period Covered

This Agreement becomes effective when signed by the last Party whose signing makes the agreement fully executed (the “Effective Date”), and the Parties will consider it to be in full force and effect until the Project has been completed and accepted by TxDOT or unless terminated, as provided herein.

### 3. Procurement

This Agreement defines the responsibilities for the funding, design, construction, and acceptance of the City Adjustments as necessary to accommodate the Project. Pursuant to the Texas Government Code, the Parties agree to apply the law applicable to TxDOT in procuring the contractor to perform that work, including but not limited to, Chapter 223, Subchapter F of the Texas Transportation Code, and the Texas Administrative Code, Title 43, Chapter 9, Subchapter I.

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

#### 4. Funding and Work Responsibilities

##### A. Project Funding

- 1) The cost of planning, specification, and estimate (“PS&E”) development and construction of the Reimbursable Utility Adjustments shall be the “Reimbursable Utility Costs,” detailed in Attachment A, which shall not include the cost of any Betterments and Non-Reimbursable Utility Adjustments. The Reimbursable Utility Costs are included in the Price under the Design-Build Contract. TxDOT shall be responsible for paying the Reimbursable Utility Costs through the Design-Build Contract. TxDOT will pay DB Contractor in accordance with the Design-Build Contract, and TxDOT will not be responsible under the Design-Build Contract for any additional payments to DB Contractor for DB Contractor to perform the Reimbursable Utility Adjustments.
- 2) City will be responsible for paying all costs associated with the PS&E development, and construction of the Non-Reimbursable Utility Adjustments and as described further in **Attachment A**. Additionally, all Betterments (hereinafter defined) shall be paid for entirely by City. The total cost of the Non-Reimbursable Utility Adjustments and the cost of the Betterments, if any, shall be the “City’s Adjustment Costs,” detailed in **Attachment A**.
- 3) City shall remit to TxDOT, within 60 days of the Effective Date, \$0 (the “City Payment”), which is the estimated total of City’s Adjustment Costs as of the Effective Date as detailed in **Attachment A**, which amount will be deposited to the Escrow Account in accordance with Paragraph 4(A)(8) below.

An “Unidentified City Utility” shall mean any City Utility that is an Unidentified Utility or a New Utility under the Design-Build Contract.

Any necessary Adjustment of an Unidentified City Utility shall be included within the scope of this Agreement and constitute a City Adjustment. City will be responsible for paying all Non-Reimbursable Utility Costs for such added City Adjustment and TxDOT will be responsible for any Reimbursable Utility Costs for such added City Adjustment. If the added City Adjustment requires additional payments from City, the Parties agree to negotiate to amend this Agreement to adjust the City’s Adjustment Costs and City Payment, either on a lump sum or a time and materials basis, following the presentation to, and approval of, the applicable governing body of the City, if required by law.

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- 4) TxDOT will pay DB Contractor, in accordance with the Design-Build Contract, the same amount paid by City to TxDOT under this Agreement for the Non-Reimbursable Utility Adjustments and any Betterments.
- 5) Promptly upon receipt, TxDOT will provide City with copies of all draw requests, payment applications, invoices, and other documents requesting payment submitted by DB Contractor to TxDOT and pertaining to the Non-Reimbursable Utility Adjustments and any Betterments (hereinafter defined). City shall review and approve or provide any comments to all such payment requests made by DB Contractor to TxDOT within ten (10) Business Days of receipt from TxDOT. TxDOT shall pay City funds to DB Contractor within ten (10) Business Days after City's written approval of DB Contractor's payment request, but in no case shall TxDOT pay City funds to DB Contractor without City's prior written approval. The Parties agree to expeditiously resolve any payment discrepancies to ensure payments are made promptly.
- 6) In the event the Parties agree to revise the scope of work under this Agreement, the City's Adjustment Costs, Reimbursable Utility Costs, and City Payment, as applicable, will be revised to account for the new scope of work.
- 7) In the event that the Parties determine that additional funding is required from City due to a revision of the scope of work under this Agreement, TxDOT will notify City in writing and the City's Adjustment Costs will be revised. City is responsible for 100% of the City's Adjustment Costs, notwithstanding that the actual costs may exceed the estimated costs. City shall pay any amounts due to TxDOT under this Agreement within 60 days from receipt of TxDOT's written payment request, or if the approval of any governing body of the City is needed for such payment, City shall make such payment as soon as practicable, subject to the appropriate authorization.
- 8) In connection with any payments by City to TxDOT under this Agreement, City will remit to TxDOT a warrant made payable to the "Texas Department of Transportation Trust Fund." TxDOT will deposit the warrant in an escrow account to be managed by the State (the "Escrow Account"). Funds in the Escrow Account may only be applied by TxDOT to the City's Adjustment Costs.
- 9) In accordance with the Actual Cost (as hereinafter defined) method, upon completion of the Project, the State will perform an audit of the actual City's Adjustment Costs, with notice of the results of the audit, including amount of over or under payments by City, sent to City within 180 days of the

RCSJ#:	2374-01-137, ETC.
DISTRICT#:	DALLAS DISTRICT
PROJECT:	I-635 LBJ EAST PROJECT

completion of the Project. To the extent that the amount advanced by City under this Agreement exceeds the actual City's Adjustment Costs, TxDOT will promptly refund the excess amount to City. To the extent that the actual City's Adjustment Costs exceeds the amount advanced by City, City will promptly remit to TxDOT the remaining portion of the City's Adjustment Costs.

- 10) TxDOT will remit, or cause DB Contractor to remit, all payments or reimbursements by DB Contractor payable to City under this Agreement to the Escrow Account within 240 days from Completion of Project. TxDOT shall send all payments or reimbursements intended for City to Public Works Director and referencing "I-635 LBJ East Utility Adjustments."
- 11) Payment or reimbursement by City under this Agreement beyond the City's Adjustment Costs set forth in Appendix A as of the Effective Date is subject to availability of funds approved by the City Council of the City. If funds are not approved, this Agreement shall terminate immediately with no liability to either Party. City will only make payment or reimbursement from currently approved funds.
- 12) Reimbursement of City's Reimbursable Indirect Costs.
  - a. TxDOT will cause DB Contractor, in accordance with the Design-Build Contract, to reimburse City through TxDOT, City's share of indirect costs associated with Reimbursable Utility Adjustments (including without limitation engineering, inspection, testing, and right-of-way ("ROW") acquisition or relinquishment) as calculated in **Attachment A** ("Reimbursable Indirect Costs"). When requested by City, monthly progress payments will be made to City. The monthly payment will not exceed 90% of the estimated indirect work completed to date. Once the indirect work is fully complete, final payment of the Reimbursable Indirect Costs, as quantified below, will be made to City. Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.
  - b. City's Reimbursable Indirect Costs associated with City Adjustments shall equal the actual related Reimbursable Indirect Costs accumulated in accordance with (i) a work order accounting procedure prescribed by the applicable Federal or State regulatory body or (ii) established accounting procedure developed by City and that City uses in its regular operations (either (i) or (ii) referred to as "Actual Cost").

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- c. All Reimbursable Indirect Costs charged by City shall be reasonable and shall be computed using rates and schedules not exceeding those applicable to similar work performed by or for City at City's expense. The payment of all Reimbursable Indirect Costs charged by City and performance of the City Adjustments hereunder, if applicable, shall be full compensation to City for all costs incurred by City in relation to the City Adjustments (including without limitation costs of relinquishing or acquiring ROW).

B. Performance of Work

- 1) Subject to the terms of this Agreement, City agrees that TxDOT, through DB Contractor or DB Contractor's subcontractors, shall effect the City Adjustments. City acknowledges that (a) DB Contractor is an independent contractor of TxDOT, (b) TxDOT is not responsible or liable for design or construction work performed by DB Contractor in connection with the City Adjustments, and (c) TxDOT is not engaged in a joint enterprise with DB Contractor. TxDOT shall enforce all Design-Build Contract provisions requiring DB Contractor to comply with City's standards for design and construction contained in this Agreement.
- 2) TxDOT will authorize DB Contractor or its subcontractors to perform only Reimbursable Utility Adjustments or Non-Reimbursable Utility Adjustments that City has requested and has agreed to pay for under this Agreement, including all City Adjustments detailed in **Attachments A and B**.

C. Plans

- 1) Each Party acknowledges and agrees that the plans, specifications, and cost estimates necessary to perform the City Adjustments identified in **Attachment B** as of the Effective Date (the "Initial Plans") are approved and "Reviewed and Approved for Construction" by the City as to the location and manner in which the City Adjustments identified in the Initial Plans will be performed, subject to DB Contractor's satisfactory performance of the City Adjustments in accordance with the approved Initial Plans.
- 2) DB Contractor will provide to TxDOT and City proposed additional plans, specifications, and cost estimates that are necessary to perform the City Adjustments that are not contained in the Initial Plans (the "Additional Plans"). Upon approval by City, any proposed Additional Plans shall be deemed "Reviewed and Approved for Construction" by City, and City will submit such proposed Additional Plans to TxDOT for its review and

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

approval. The Parties agree to act expeditiously, and to cooperate in good faith to modify the proposed Additional Plans as necessary and acceptable to the Parties to respond to any modifications or comments. Upon approval of any Additional Plans by City and TxDOT, **Attachment B** shall be modified to include both the Initial Plans and all Additional Plans approved by City and TxDOT (collectively, the “Plans”) and **Attachment A** shall be amended to include any additional costs associated with such Additional Plans to the extent the estimated costs set forth therein require adjustment. In the event that the estimated City’s Adjustment Costs increase due to Additional Plans agreed pursuant to this Paragraph 4(C), the City shall cause to be deposited to the Escrow Account in accordance with Paragraph 4(A)(8) an amount equal to the difference between the amount then on deposit in the Escrow Account, and the estimated City’s Adjustment Costs outstanding.

- 3) City will provide to DB Contractor the standard specifications, standards of practice, and construction methods, current as of the Effective Date, that City customarily applies to utility facilities comparable to the City Utilities that are constructed by City or for City by its contractors at City’s expense (the “City Standards”), for DB Contractor’s use in performing the City Adjustments in accordance with applicable law. City will also, if available, simultaneously provide to TxDOT and DB Contractor electronic Geographic Information System (GIS) shape-files and “as-built” records illustrating to the best of City’s estimation, the location of existing City Utilities. City may also provide information regarding alternate City Utility configurations and Betterments (hereinafter defined).

D. Design and Construction Standards

- 1) Pursuant to the Design-Build Contract, DB Contractor shall comply with the requirements set forth in this Agreement for all City Adjustments.
- 2) All City Adjustments effected by TxDOT through DB Contractor or its subcontractors shall comply with the requirements for City Adjustments set forth in this Agreement. All City Adjustments shall comply with and conform to the following:
  - a. All applicable local and State laws, regulations, decrees, ordinances and policies, including the Utility Accommodation Rules set forth in Texas Administrative Code, Title 43, Part 1, Chapter 21, Subchapter C, the ROW Utility Manual issued by TxDOT (to the extent its requirements are mandatory for the City Adjustments), and the policies of TxDOT;

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- b. All Federal laws, regulations, decrees, ordinances and policies applicable to projects receiving Federal funding, financing or credit assistance, including without limitation 23 C.F.R. Part 645, Subparts A and B; and the Buy America provisions of 23 U.S.C. § 313 and 23 C.F.R. § 635.410;
  - c. The terms of all governmental permits or other approvals, as well as any private approvals of third parties necessary for such work;
  - d. The City Standards, including the City of Mesquite Engineering Design Manual, which City has submitted to TxDOT in writing or by hyperlink;
  - e. The Plans; and
  - f. The warranty provided to TxDOT by DB Contractor in the Design-Build Contract with regard to all work performed under the Design-Build Contract. Pursuant to the Design-Build Contract, such DB Contractor warranty will extend to City with regard to all City Adjustments work (including design) performed by DB Contractor.
- 3) City Adjustments work effected by TxDOT through DB Contractor or its subcontractors shall be consistent and compatible with DB Contractor's current design and construction of the Project and any other utilities being installed in the same vicinity as a City Utility. In case of any inconsistency among any of the standards referenced in this Agreement, the most stringent standard shall apply.
- 4) The Plans shall identify all City Utilities that City intends to abandon in place rather than remove, including material type, quantity, size, age (if known), condition (if known), and method of abandonment, which shall be subject to TxDOT's approval. No City Utilities containing hazardous or contaminated materials may be abandoned, but shall be specifically identified and removed in accordance with applicable Federal, State, and local legal and regulatory requirements, and with the requirements of this Agreement. City agrees to pay for the assessment and remediation or other legally-required corrective action relating to soil and groundwater contamination caused by such City Utility prior to its removal, to the extent such is not reimbursable pursuant to State law.
- 5) City agrees that all service meters must be placed outside of the State Highway ROW unless such meter does not need to be adjusted to accommodate the Project and can remain in its current location, if approved by both Parties.



RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- 6) In connection with City Adjustments work effected by TxDOT through DB Contractor or its subcontractors, (a) no drilled shaft, pier or foundation will be installed or constructed in violation of the City Standards, local, State or Federal rules and regulations, and (b) no cleanout, valve, meter, fire hydrant, manhole, or other appurtenance will have any material placed or stored upon it, be covered, buried, paved over, or otherwise obstructed, during any phases of the Project construction without written authorization from City.
- 7) TxDOT hereby agrees that the embedment of existing or adjusted water mains and wastewater mains is an integral component to the performance and longevity of City's water mains and wastewater mains. If an existing or adjusted water or wastewater main is exposed, DB Contractor will contact City's inspectors and will support and protect the utility, and restore the embedment in a manner approved by City at DB Contractor's sole expense.

E. Design Changes and Field Modifications

TxDOT shall provide City with all submittals, requests for information, and change requests received from DB Contractor for changes to the Project relating to the City Adjustments. The Parties, for their mutual benefit, will cooperatively review change requests and field modifications for approval prior to implementation by DB Contractor. Approved changes or field modifications requiring modified Plans shall be prepared in accordance with the applicable provisions of the Design-Build Contract and Paragraph 4(C) of this Agreement, and shall be incorporated into **Attachment B** of this Agreement. Funding responsibilities for additional design or construction costs shall be in accordance with Paragraph 4(A) of this Agreement. TxDOT agrees to provide, upon request of City, a copy of any original, modified or revised Project improvement plans, including but not limited to paving, bridge, foundation, wall, drainage, subsurface investigations, and other utility adjustment plans. TxDOT shall cause DB Contractor to provide City "as-built" drawings of all design changes and field modifications that may affect City Adjustments or City Utilities, including minor changes, within 30 days after acceptance of the City Adjustments by City pursuant to Paragraph 4(J)(5) of this Agreement.

F. City-Provided Services

In addition to services provided by City as specified elsewhere in this Agreement, City shall provide the following services:

- 1) At DB Contractor's request made through calling one of the following: Public Works at (972) 216-6278 for Water or Sanitary Sewer facilities; "811" for City fiber facilities; or via online form submission for Traffic Engineering [locates<https://www.cityofmesquite.com/FormCenter/Public->

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

Works-6/Traffic-Engineering-Request-91],” the City shall assist DB Contractor in locating any City Utilities requiring City Adjustments. Without limiting the generality of the foregoing, or limiting DB Contractor’s obligation under the Design-Build Contract to make inspections and investigations necessary to locate and avoid existing utilities, in order to help facilitate that neither the adjusted City Utilities nor the existing, unadjusted City Utilities are damaged during construction of the Project, City shall make reasonable attempts based on available “as built” information, to mark in the field the location of all such City Utilities horizontally on the ground in advance of Project construction in the immediate area of such City Utilities. City will not be responsible for performance of any Subsurface Utility Engineering work.

- 2) City shall secure any necessary local or municipal permits required for the City Adjustments that are not otherwise provided for under the Design-Build Contract.
- 3) City shall provide adequate inspectors for City Adjustment work. Further, upon request by DB Contractor or its subcontractors, with a two (2) Business Day minimum notice, City shall furnish an inspector at any reasonable time during City Adjustment work, including outside of normal business hours. City agrees to promptly notify DB Contractor and TxDOT of any concerns resulting from any such inspection.

G. TxDOT-Provided Services

In addition to services provided by TxDOT as specified elsewhere in this Agreement, TxDOT shall provide the following services:

- 1) TxDOT shall review and approve the final construction Plans for the City Adjustments prior to any construction-related activities and cause DB Contractor, in accordance with the Design-Build Contract, to perform the City Adjustments in accordance with the Plans included in **Attachment B**.
- 2) TxDOT shall participate with DB Contractor in inspections of the work by City and coordinate with City’s inspectors.
- 3) TxDOT shall provide a copy of DB Contractor’s monthly pay estimates to City.
- 4) TxDOT shall make timely payment to DB Contractor pursuant to the terms of the Design-Build Contract for City Adjustment work, subject to City approval. Within 15 days following such TxDOT payment to DB Contractor, TxDOT shall send City a statement of the Escrow Account showing any draw-downs.

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- 5) TxDOT shall ensure access and permit City's inspectors and other authorized representatives to inspect the City Adjustments at all times.
- 6) TxDOT shall assist City with the resolution of disputes with DB Contractor and, without limiting TxDOT's authority to administer the Design-Build Contract, work to resolve issues to the mutual benefit of the Parties.
- 7) TxDOT shall cause DB Contractor to deliver "as-built" drawings to City in accordance with City Standards.

#### H. Design-Build Contractor Provided Services

The Parties acknowledge that the Design-Build Contract will require DB Contractor to comply with the requirements set forth in this Agreement for all City Adjustments. DB Contractor shall, at a minimum:

- 1) Provide Project management and oversight while performing the City Adjustments and perform the City Adjustments in accordance with the standard of care provided under the Design-Build Contract for Project work.
- 2) Be responsible for performing all the work necessary to accomplish the City Adjustments in accordance with the design, plans and specifications for the Project.
- 3) Provide the Parties with documentation of any field modifications occurring in the City Adjustments.
- 4) Provide the Parties with design plans and specifications, including the "as-built" plans of the City Adjustments.
- 5) Keep detailed records of work and payments to manage and account for City's funds in the Escrow Account.
- 6) Maintain job file.
- 7) Perform hydrostatic testing on new mains to verify that they meet required pressure tolerances. Once DB Contractor believes the new mains will pass applicable pressure tests, DB Contractor shall coordinate through City's inspector in Public Works Engineering Division to perform pressure test and chlorination. Scheduling of each retest, if needed, City Engineering Inspector will require a 2-week notice.
- 8) Provide all other services required of DB Contractor by the Design-Build Contract not listed in this Agreement.

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- 9) Design-Build Contractor and subcontractors will not operate any water valves on City water mains. Should water valves need to be operated, the City inspector must be notified in advance so that City personnel can perform the operation of water valves.
- 10) All final plans, revised plans and final "Record Drawings" must be sealed by a Professional Engineer licensed in the State of Texas and one set of the plans, or specific revised sheet(s) and Record Drawing must be produced digital format.

I. Betterments

- 1) For purposes of this Agreement, the term "Betterment" means any upgrade of a City Utility adjusted under this Agreement that is not attributable to the construction of the Project and is made solely for the benefit of and at the election of City, including but not limited to an increase in the capacity, capability, efficiency or function of the adjusted City Utility over that provided by the existing City Utility or an expansion of the existing City Utility; provided, however, that the following are not Betterments:
  - a. Any upgrade required for accommodation of the Project;
  - b. Replacement devices or materials that are of equivalent standards but not identical;
  - c. Replacement of devices or materials no longer regularly manufactured with the next highest grade or size;
  - d. Any upgrade required by applicable laws, regulations, standards or ordinances;
  - e. Replacement devices or materials used for reasons of economy (e.g., non-stocked items that may be uneconomical to purchase);
  - f. Any upgrade required by City Standards; and
  - g. Any discretionary decision by City that is contemplated within a particular standard described in clause (f) above.
- 2) The Parties understand and agree that TxDOT shall not pay for any Betterments and that City shall be solely responsible therefor. No Betterment may be performed hereunder that (i) is incompatible with the Project, (ii) cannot be performed within the other constraints of applicable law or any applicable governmental approvals, or (iii) cannot be performed within the requirements of the Project schedule.

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- 3) The determinations and calculations of any Betterment described in this Paragraph 4(I) shall exclude ROW acquisition costs. Any Betterments that occur in connection with ROW acquisition are addressed in Paragraph 5 below.

J. Substantial Completion and Completion of Construction

- 1) For this Agreement, “Substantial Completion” means that construction of one or more segments of the City Adjustments have been substantially completed in accordance with the Plans with the exception of only minor items to be corrected or completed before City’s approval of the Project (“Punch List Items”). DB Contractor will notify City of each Substantial Completion.
  - a. DB Contractor will provide City with a certified letter notifying City that Substantial Completion has been achieved and that the relevant City Adjustment work is substantially in accordance with the Plans and all applicable City Standards and all other design and construction standards provided in this Agreement;
  - b. TxDOT, DB Contractor, and City shall schedule and perform, within 14 days after notification of Substantial Completion, a joint punch-list inspection and identify Punch List Items;
  - c. DB Contractor will provide City with a certified letter indicating that the City Utilities are free and clear of all liens, claims and encumbrances; and
  - d. DB Contractor will complete all Punch List Items no later than 120 days after Substantial Completion, subject to any Change Order under the Design-Build Contract extending the Substantial Completion Deadline as a result of any delay in a Critical Path directly caused by a Force Majeure Event.
- 2) TxDOT or DB Contractor will maintain the adjusted City Utilities until City accepts such City Utilities as provided herein.
- 3) Before City will acknowledge full completion of the City Adjustments, and within 180 days after Substantial Completion, DB Contractor will submit to City written documentation that the City Adjustment has been completed as required by this Agreement.
- 4) Before City will acknowledge full completion of the City Adjustments, TxDOT or DB Contractor must provide City with the final costs and quantities of the City Adjustment work and any abandoned City Utilities,

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

an engineer's concurrence letter, and "as-built" drawings of the City Adjustments.

- 5) City shall perform a final inspection of the adjusted City Utilities, including conducting any necessary or appropriate tests. City shall accept such adjusted City Utilities by providing written notice of such acceptance to TxDOT and DB Contractor within ten Business Days after notice from TxDOT of the completion of all work required to place the relevant City Utility in active service, including but not limited to any necessary hydrostatic testing, bacterial testing, television inspections, tie-ins, service connections, appurtenance adjustments, and completion of all adjacent paving, drainage, franchise utility adjustments, walls, or other Project improvements in accordance with local, State and Federal rules and regulations ("Completion of Construction"). City's placement of an adjusted City Utility into service does not imply City's acceptance. If City does not accept the City Adjustment, then City shall, no later than the ten Business Days after it receives notice of Completion of Construction, notify TxDOT and DB Contractor in writing of the grounds for non-acceptance. TxDOT and DB Contractor will notify City in writing upon completion of corrections to the non-conforming City Adjustment work. With regard to any re-inspection (and re-testing, if appropriate) of any revised City Adjustment work, the Parties shall follow the same notice and inspection schedule set forth above.
- 6) Upon City's acceptance of an adjusted City Utility, City agrees to accept ownership of and full operation and maintenance responsibility for such City Utility, subject to the one-year warranty provided by DB Contractor as required in the City Standards. The one-year warranty begins upon the date of City's acceptance of an adjusted City Utility, and DB Contractor will maintain the City Utility until such time.

## 5. Real Property Interests

- A. City has provided, or upon the Effective Date shall promptly provide, to TxDOT and DB Contractor documentation indicating City's right, title or interest in the Existing Utility Property Interests. With proper City Council authorization, if necessary, City shall acquire any Replacement Utility Property Interest necessary for any City Adjustment. Failure of City to institute condemnation proceedings, however, shall not constitute a default by City under this Agreement. City shall use commercially reasonable efforts to implement each acquisition hereunder expeditiously so that related City Adjustment work can proceed in accordance with DB Contractor's Project schedules. TxDOT shall be responsible and pay, or cause DB Contractor to pay, for the actual costs of any such Replacement Utility Property Interest (including, without limitation, City's reasonable overhead charges, costs

RCSJ#:	2374-01-137, ETC.
DISTRICT#:	DALLAS DISTRICT
PROJECT:	I-635 LBJ EAST PROJECT

for environmental studies, and legal costs as well as all compensation paid to the landowner or judgment or award paid into the registry of the court) required by the Reimbursable Utility Adjustments, excluding any costs to the extent attributable to a Betterment, subject to the terms of this Paragraph 5(A). City shall segregate eligible acquisition costs from other costs on City's estimates and invoices. City shall obtain a written valuation for any such Replacement Utility Property Interest and shall acquire the interest in accordance with applicable law. TxDOT must provide prior written approval of TxDOT's share of any payments by City to a landowner pursuant to an agreement with the landowner. No such TxDOT approval is required for TxDOT's share of any payments by City to a landowner pursuant to a judgment or award.

- B. TxDOT shall only be responsible for and pay, or cause DB Contractor to pay, the costs of any Replacement Utility Property Interest required by a Reimbursable Utility Adjustment for a replacement-in-kind of an Existing Utility Property Interest (e.g., in width and type), unless a Replacement Utility Property Interest exceeding such standard (i) is required in order to accommodate the Project or by compliance with applicable law or (ii) is requested by DB Contractor in the interest of overall Project economy. Any Replacement Utility Property Interest that is not TxDOT's responsibility pursuant to the preceding sentence shall be considered a Betterment to the extent that it upgrades the Existing Utility Property Interest that it replaces, and if the related City Utility was not installed pursuant to an Existing Utility Property Interest it shall be considered a Betterment in its entirety. City shall bear sole responsibility for such Betterment costs.
- C. For each Existing Utility Property Interest located within the final Project ROW, upon completion of the related City Adjustment work, its acceptance by City, and after City has abandoned the Existing Utility Property Interest pursuant to City's code, rules and regulations, City agrees to execute a quitclaim deed relinquishing such Existing Utility Property Interest to TxDOT, unless the affected City Utility is remaining in its original location or is being re-installed in a new location within the area subject to such Existing Utility Property Interest. All quitclaim deeds or other relinquishment documents shall be subject to TxDOT's approval, which shall not be unreasonably withheld; provided, however, that such documents shall release City's interests in the Existing Utility Property Interest on an "as-is, where-is" basis and City shall not be required to give any warranty of title. For each such Existing Utility Property Interest required by a Reimbursable Utility Adjustment relinquished by City, TxDOT shall do one of the following to compensate City for such Existing Utility Property Interest, as appropriate:
  - 1) If City acquires a Replacement Utility Property Interest required by a Reimbursable Utility Adjustment for the affected City Utility, DB Contractor will reimburse City for TxDOT's share of City's actual acquisition costs in accordance with the terms of this Paragraph 5; or

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

- 2) If City does not acquire a Replacement Utility Property Interest required by a Reimbursable Utility Adjustment for the affected City Utility, DB Contractor will compensate City pursuant to City's abandonment rules, processes and procedures.

The compensation provided to City pursuant to this Paragraph 5(C) shall constitute complete compensation to City for the relinquished Existing Utility Property Interest and any Replacement Utility Property Interest, and no further compensation shall be due to City from either TxDOT or DB Contractor on account of such Existing Utility Property Interest or Replacement Utility Property Interest.

- D. As required by TxDOT, City shall execute a Utility Joint Use Acknowledgment (UJUA) or Utility Installation Request (Form 1082), as appropriate, for each City Adjustment when the utility will remain within the boundaries of its existing utility property interest location within TxDOT right-of-way or the utility will remain or be relocated within TxDOT right-of-way. All City UJUAs and Utility Installation Requests shall be the forms attached to this Agreement as **Attachments C and D**, respectively.

## 6. Termination

- A. This Agreement may be terminated in the following manner:

- 1) By mutual written agreement and consent of both Parties;
- 2) By either Party upon the failure of the other party to cure an Event of Default as provided below;
- 3) By either Party if a Party fails to appropriate funds for the completion of the City Adjustments; or
- 4) By either Party if the Project is cancelled or modified so as to eliminate the necessity of the City Adjustment work described herein. Upon such termination, the Parties shall negotiate in good faith an amendment that shall provide mutually acceptable terms and conditions for handling the respective rights and liabilities of the Parties relating to such termination. In particular, and without limitation, each Party shall be liable to the other for its share of any costs incurred by the other Party prior to receipt of notice of termination, and for its share of any costs incurred by the other Party after receipt of notice of termination, in each case only if such costs could not be reasonably avoided.

- B. In the event either Party fails to perform its material obligations as set forth in this Agreement (an "Event of Default"), the other Party (the "Non-Defaulting Party") shall provide prompt written notice of such failure. The Party receiving the notice



RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

(the “Defaulting Party”) shall then have 30 days to cure the Event of Default, or if the failure is such that it cannot be cured in 30 days, to make substantial and continued progress toward curing the Event of Default within a reasonable time. In the event that, after written notice as provided herein, the Defaulting Party fails, within 30 days, to cure the Event of Default, or, if the Event of Default is such that it cannot be cured in 30 days, to make substantial and continued progress toward curing the Event of Default within a reasonable time, then the Non-Defaulting Party, by further written notice to the Defaulting Party, may immediately terminate this Agreement.

- C. If the Agreement is terminated in accordance with the above provisions, City will be responsible for payment to TxDOT of all City’s Adjustment Costs incurred by TxDOT on behalf of City up to the time of termination.

#### 7. Right of Access

If City owns any part of the Project site, City shall permit TxDOT, DB Contractor, or their authorized representatives to access the site to perform any activities required to execute the City Adjustments.

#### 8. Responsibilities of the Parties and Indemnity

City acknowledges that it is not an agent, servant, employee of the State, TxDOT, or DB Contractor, nor is City engaged in a joint enterprise with any of them, and City is responsible for its own acts and deeds and for those of its agents or employees during the performance of the City Adjustments.

**TXDOT AND CITY AGREE THAT EACH SHALL BE RESPONSIBLE FOR ITS OWN NEGLIGENT ACTS OR OMISSIONS OR OTHER TORTIOUS CONDUCT IN THE COURSE OF PERFORMANCE OF THIS AGREEMENT, WITHOUT WAIVING ANY SOVEREIGN OR GOVERNMENTAL IMMUNITY AVAILABLE TO TXDOT OR CITY OR THEIR RESPECTIVE OFFICIALS, OFFICERS, EMPLOYEES, OR AGENTS UNDER TEXAS OR OTHER LAW AND WITHOUT WAIVING ANY AVAILABLE DEFENSES UNDER TEXAS OR OTHER LAW. NOTHING IN THIS PARAGRAPH SHALL BE CONSTRUED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, IN OR TO ANY THIRD PERSONS OR ENTITIES.**

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

9. Entire Agreement

This Agreement embodies the entire agreement between the Parties, supersedes all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to its subject matter, and there are no oral or written agreements between the Parties or any representations made that are not expressly set forth herein.

10. Successors and Assigns

Each Party binds itself, its successors, executors, assigns, and administrators to the other Party and to the successors, executors, assigns, and administrators of such other Party in respect to all covenants of this Agreement.

11. Amendments

This Agreement may be amended only in a writing signed by both Parties.

12. Notices

All notices to either Party by the other required under this Agreement shall be delivered by receipted overnight delivery service, addressed to such Party at the following addresses:

<b>CITY:</b> City of Mesquite Attention: Public Works Director 1515 North Galloway Avenue Mesquite, Texas 75149	<b>STATE:</b> Texas Department of Transportation Attention: Jeremy Miller 4777 East Highway 80 Mesquite, Texas 75150
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All notices shall be deemed given on the date so delivered, unless otherwise provided in this Agreement. Either party may change the above address by sending written notice of the change to the other party.

13. State Auditor

The state auditor may conduct an audit or investigation of any entity receiving funds from the State directly under this Agreement or indirectly through a subcontract under this Agreement. Acceptance of funds directly under this Agreement or indirectly through a subcontract under this Agreement acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. An entity that is the subject of an audit or investigation must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit.

RCSJ#:	2374-01-137, ETC.
DISTRICT#:	DALLAS DISTRICT
PROJECT:	I-635 LBJ EAST PROJECT

#### 14. Approvals

Any acceptance, approval, or any other like action (collectively, "Approval") required or permitted to be given by either City or TxDOT pursuant to this Agreement:

- A. Must be in writing to be effective (except if deemed granted pursuant hereto); and
- B. Shall not be unreasonably withheld or delayed; and if Approval is withheld, such withholding shall be in writing and shall state with specificity the reason for withholding such Approval, and every effort shall be made to identify with as much detail as possible what changes are required for Approval.

#### 15. Signatory Warranty

Each signatory warrants that the signatory has necessary authority to execute this Agreement on behalf of the entity represented.

RCSJ#: 2374-01-137, ETC.  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

THIS AGREEMENT IS EXECUTED by the Parties in duplicate.

TEXAS DEPARTMENT  
OF TRANSPORTATION

THE UTILITY:  
CITY OF MESQUITE

By: \_\_\_\_\_  
Cliff Keheley, City Manager

By: Mohamed K. Bur, P.E.

Attested:

By: \_\_\_\_\_  
Sonja Land, City Secretary

\_\_\_\_\_  
District Engineer

Approved as to Form:  
David Paschall  
City Attorney

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Assistant City Attorney

DB Contractor agrees that the general warranty under TxDOT Design Build Contract General Conditions section 3.8 for the adjustment of City of Mesquite Utilities shall extend to the City of Mesquite and DB Contractor agrees to take any further action required to evidence such warranties to City of Garland.

Pegasus Link Constructors

By Jason Estes  
Project Director

\_\_\_\_\_

Date: \_\_\_\_\_

RCSJ#:  
DISTRICT#: DALLAS DISTRICT  
PROJECT: I-635 LBJ EAST PROJECT

ATTACHMENT A

ESTIMATED CITY'S ADJUSTMENT COSTS; REIMBURSABLE INDIRECT COSTS

The estimated City's Adjustment Costs for Non-Reimbursable Utility Adjustments is \$0.

The estimated City's Adjustment Costs for Betterments is \$[ ].

The calculation of Reimbursable Indirect Costs shall be as follows:

RCSJ#:	2374-01-137, ETC.
DISTRICT#:	DALLAS DISTRICT
PROJECT:	I-635 LBJ EAST PROJECT

ATTACHMENT B

CITY ADJUSTMENT PLANS

RCSJ#:	2374-01-137, ETC.
DISTRICT#:	DALLAS DISTRICT
PROJECT:	I-635 LBJ EAST PROJECT

ATTACHMENT C

UTILITY JOINT USE ACKNOWLEDGMENT

[TxDOT to provide.]

RCSJ#:	2374-01-137, ETC.
DISTRICT#:	DALLAS DISTRICT
PROJECT:	I-635 LBJ EAST PROJECT

ATTACHMENT D

UTILITY INSTALLATION REQUEST (FORM 1082)

[TxDOT to provide.]