

WATERSHED PROTECTION PLAN PROGRAM
INTERLOCAL CONTRACT No.
BETWEEN THE
CITY OF SAN MARCOS
AND
TEXAS STATE UNIVERSITY
FOR WATERSHED PROTECTION PLAN PROGRAM FUNDING

This INTERLOCAL CONTRACT for program funding associated with the Watershed Protection Plan Program ("Funding Contract") is made and entered into under the Interlocal Cooperation Act, Chapter 791, Texas Government Code, by and between TEXAS STATE UNIVERSITY ("UNIVERSITY"), a political subdivision of the State of Texas, with its principal place of business located at 601 University Drive, San Marcos, Texas 78666, and the CITY OF SAN MARCOS ("COSM"), a municipal corporation, with its principal place of business located at 630 East Hopkins, San Marcos, Texas 78666. UNIVERSITY and the COSM are each referred to hereinafter as a "Party," and collectively as the "Parties."

AGREEMENT

For and in consideration of the mutual promises and benefits contained herein, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

ARTICLE I
PURPOSE

In accordance with the Upper San Marcos River Watershed Protection Plan Implementation, Texas Commission on Environmental Quality Contract Number 582-18-80176 (WPP), the purpose of this Funding Contract is to agree that funding, up to \$35,000, provided to UNIVERSITY through the WPP for the development of a Best Management Practice ("BMP") in the COSM Downtown watershed, as described in the WPP, will be provided to the COSM to reimburse COSM expenditures (up to \$35,000) in the design and construction of said BMP; and as being the responsibility of the COSM as more specifically set out in the WPP.

ARTICLE II
TERM

This Funding Contract shall commence and be effective on *May 1, 2019*, ("Effective Date") and shall remain in effect through *August 31, 2020*, unless sooner terminated in accordance with Article VII.

ARTICLE III
PROGRAM REQUIREMENTS

- A. During the term of this Funding Contract, in accordance with WPP, Task 3, Parties will oversee installation of functioning Non-Point Source ("NPS") pollutant control technologies which will educate the public concerning the pollution reduction benefits of management

measures, low impact development ("LID"), and green infrastructure. BMPs will also serve as pilots to determine accurate NPS reductions. Informational signage at each BMP will include information about the watershed, NPS, water quality threats, city efforts and resources for the general public to explore LID, green infrastructure, and watershed stewardship activities.

B. The COSM will faithfully comply with WPP, Subtasks 3.1 and 3.3, as described below.

(1) Subtask 3.1 requires that the COSM will retrofit a site that receives significant stormwater runoff in or near downtown San Marcos. The site will be selected from an approved list of WPP proposed projects for retrofits using LID design criteria. Minimum criteria for demonstration projects include: significant pollution loadings from stormwater, excellent visibility and accessibility, and a drainage area of at least three acres. Potential pollution mitigation/ management must be equivalent to or greater than 80% removal of total suspended solids (TSS) (approximately 2,000 pounds (lbs) of TSS per year), five lbs. of total phosphorus (TP) per year, and removal of levels of bacteria consistent with the TSS management requirements and WPP specified water quality targets.

The COSM, in coordination with project partners, as well as, the stakeholder committee will assess the potential sites and BMPs to ensure that minimum criteria for pollutant removal will be met (using existing WPP and WQPP information and the TCEQ Edwards Aquifer Technical Guidance Manual on Best Management Practices information to calculate pollution removal, as well as calculations provided in the WPP and WQPP). BMP selection methodology will be written in a report to be submitted to TCEQ for review and approval. A BMP Design Report will also be submitted to TCEQ.

(2) Subtask 3.3 requires that the COSM will secure subcontractor(s) to retrofit the BMP designed in Subtasks 3.1. Progress will be reported quarterly. Documentation of BMP completion will be submitted to TCEQ, including photo documentation. BMP Post-Construction Reports including estimated site/area pollutant loadings, a photo documentation of signage installation will be provided, and BMP load reductions report will be submitted. Descriptive signage will be installed at each site.

ARTICLE IV PERFORMANCE

A. The COSM/UNIVERSITY agree to devote their diligent and professional efforts and abilities to implement Subtasks 3.1 and 3.3, and the Deliverables shown here, and for which Program Funding has been approved in accordance with the WPP.

- BMP Selection Methodology Report; including final BMP selection, and calculation of pollution reduction estimates;
- Timeline for BMP construction
- Notification of Bid solicitations
- Notification when subcontractors hired
- BMP Design Reports

- Quarterly BMP installation progress
 - BMP Post-Construction Reports
 - Documentation of completion of the Downtown BMP, including photo documentation.
 - Descriptive signs designed, manufactured and photo documentation of signs installed at each BMP site
- B. It shall be the COSM/UNIVERSITY responsibility to ensure that each Subtask is completed in accordance with the schedules, budgets, descriptions and specifications contained in the approved WPP.
- C. When implementing the Conservation Measures, the COSM will be responsible for its contractors in all respects including their compliance with applicable laws and their safety, including without limitation, all Occupational Safety and Health Administration (OSHA) standards, requirements, and regulations.
- D. The COSM warrants that it will implement the Subtasks described in the approved WPP in a good and workmanlike manner, strictly in accordance with the standards of the associated scopes of work and with the purpose and intent to achieve full compliance with the requirements of the approved WPP.

ARTICLE V INVOICING AND REIMBURSEMENTS

- A. The COSM shall submit only a final invoice to UNIVERSITY upon completion of the WPP Subtasks 3.1 and 3.3. The invoice packet shall contain, at a minimum:
- (1) a progress report, attached here to in template form as provided in Exhibit A, attached here to, which will contain:
 - a description of the work completed during the billing cycle, by each COSM contractor or subcontractor, as appropriate, within each Conservation Measure set out in Article III.B.;
 - documentation of compliance with the work schedule as it relates to achievement of WPP goals;
 - a discussion of any issues or problems that may result in an adjustment of the approved Conservation Measure budget or the total amount of Program Funding requested in the approved WPP;
 - (2) documentation of all costs and expenses incurred during the billing cycle, including copies of all invoices from the COSM contractors or subcontractors, including supporting documentation; and
 - (3) an invoice summary sheet signed by an authorized COSM representative (staff member) that such invoices have been approved for payment by the COSM.

- B. The final invoice packet will be submitted electronically in Adobe Acrobat (pdf) format via email to the Senior HCP Coordinator and the HCP Administrative Assistant.
- C. Upon review and acceptance of the final invoice packet, UNIVERSITY agrees to reimburse the COSM for all costs and expenses incurred for all work performed to implement the Conservation Measures set out in Article III.B. However, in no event shall reimbursement to the COSM exceed the amounts depicted in the current WPP (\$35,000), unless amended in accordance with Article V. UNIVERSITY will not be held accountable for any work performed or funds spent by the COSM which are not consistent with the current approved WPP.
- D. UNIVERSITY will reimburse funds to the COSM within 30 days of receipt and approval of a completed invoice packet.

ARTICLE VI LIMITATIONS ON FUNDING

No costs or expenses of the COSM may be reimbursed under this Funding Contract to:

- A. fund the costs of any employee of the City of San Marcos/Texas State University, except as may be authorized under Section 5.6.5.2 of the FMA;
- B. fund any of the City of San Marcos/Texas State University administrative costs, including, but not limited to overhead or any form of management, administration, research, planning, engineering, or legal services performed by an employee of the City of San Marcos/Texas State University; or
- C. for purchase of alcoholic beverages

ARTICLE VII TERMINATION

This Funding Contract may be terminated at any time by delivery of written notice of termination by either Party to the other Party. The termination of this Funding Contract shall be effective 90 days after the date of the notice of termination unless the Parties jointly agree otherwise in writing. Upon receipt of such termination notice, the COSM shall immediately stop all work in progress. Insofar as possible, all work in progress will be brought to a logical termination point or the date notice of termination was received, whichever is later. Within 120 days after the date of the notice of termination, and as long as consistent with the approved WPP, UNIVERSITY shall pay the COSM, all moneys then due and owing for the rendered work to be performed hereunder, costs and expenses reasonably incurred up to the logical termination point. Upon receipt of a termination notice, the COSM shall, within sixty (60) days, deliver or make copies available to the UNIVERSITY, all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been cumulated by the COSM in the performance of this Funding Contract, whether completed or in process.

ARTICLE VIII
GENERAL

- A. Entire Funding Contract; Modification. This Funding Contract and the attached exhibits constitute the entire agreement between the Parties relating to the rights granted and the obligations assumed herein. There are no representations, warranties, agreements or commitments between the Parties hereto except as set forth herein. Any oral representations, modifications, or amendments concerning this Funding Contract shall be of no force or effect. No representations, modifications, or amendments to this Funding Contract shall be binding on the Parties unless in writing, properly approved, and signed by both Parties. This Funding Contract may be amended only by written agreement of all of the Parties. No change, amendment, or modification of this Funding Contract will be made or be effective that will cause this Funding Contract to diverge from or create an inconsistency with any WPP Program Document.
- B. Counterparts. This Funding Contract may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
- C. Succession and Assignment. The provisions of this Funding Contract shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided, however, neither Party may assign any of its rights or delegate any of its duties hereunder without written consent from the other Party.
- D. Applicable Law; Venue. This Funding Contract is deemed to have been made in and to be performable in the State of Texas and shall be construed in accordance with and governed by the laws of the State of Texas. It is specifically agreed among the Parties that in the event that any legal proceeding is brought to enforce this Funding Contract or any provision hereof, the same will be brought in the county in which the principal administrative offices of the Defendant are located.
- E. Headings. The heading and captions of the various sections of this Funding Contract are for convenience and descriptive purposes only and shall not be used to interpret or construe its provisions, nor alter or affect the terms and conditions of this Funding Contract.
- F. Interpretation. This Funding Contract or any portion thereof shall not be interpreted.
- G. Legal Authority; Approval by the Parties. The Parties each affirm and certify that they have the legal authority to enter into this Funding Contract, and that their execution of this Funding Contract has been duly authorized by action of their governing bodies as required by Section 791.011(d) (1), Texas Government Code; and that each Party has taken all necessary official action to approve this Funding Contract. Each Party to this Funding Contract represents to the others that it is empowered by law to execute this Funding Contract and other agreements and documents and to give such approvals, in writing or otherwise, as are or may hereafter be required to accomplish the same.

- H. Severability. The invalidity of any provision or provisions of this Funding Contract shall not affect any other provision of this Funding Contract, which shall remain in full force and effect, nor shall the invalidity of a portion of any provision of this Funding Contract affect the balance of such provision.
- I. Waiver. Notwithstanding anything to the contrary contained in this Funding Contract, any right or remedy or any default under this Funding Contract, except the right of a Party to receive the payments from another Party, which will never be determined to be waived, will be deemed to be conclusively waived unless asserted by a proper proceeding at law or in equity within four (4) years after the occurrence of such default. No waiver or waivers of any breach or default (or any breaches or defaults) by any Party hereto or of the performance by any other Party of any duty or obligation hereunder will be deemed a waiver thereof in the future, nor will any such waiver or waivers be deemed or construed to be a waiver of subsequent breaches or defaults of any kind, character or description, under any circumstances. Termination of this Funding Contract for breach shall not constitute a waiver of any rights or remedies available at law or in equity to a Party to redress such breach. All remedies, either under this Funding Contract or at law or in equity or otherwise available to a Party, are cumulative and not alternative and may be exercised or pursued separately or collectively in any order, sequence or combination. In addition, to these provisions, applicable provisions of this Funding Contract shall survive any termination of this Funding Contract.
- J. Exhibits. The Exhibits, schedules and/or other documents attached hereto or referred to herein, are incorporated herein and made a part of this Funding Contract for all purposes. As used herein, the expression "Funding Contract" means the body of this Contract and such attachments, Exhibits, schedules and/or other documents, and the expressions "herein," "hereof," and "hereunder" and other words of similar import refer to this Funding Contract and such attachments, exhibits, schedules and/or other documents as a whole and not to any particular part or subdivision thereof.
- K. Attorneys' Fees; Costs. If any legal action, arbitration or other proceeding is brought for the enforcement of this Funding Contract or because of an alleged breach or default relating to this Funding Contract, the successful or prevailing party shall be entitled to recover reasonable costs incurred, including but not limited to attorneys' fees, in such action or proceeding in addition to any other relief to which it or they may be entitled.
- L. No Third Party Beneficiary; No Partnership. This Funding Contract is not intended to confer any rights, privileges or causes of action upon any third party other than the Parties to this Funding Contract. The Parties understand and agree that this Funding Contract does not create a fiduciary relationship between them, they are separate entities, the COSM is an independent contractor with respect to the Program Activities to be implemented hereunder and is not subject to the direct or continuous control and supervision of the UNIVERSITY. Nothing in this Funding Contract is intended or will be construed to constitute either Party as a subsidiary, joint venturer, partner, employee, servant, representative, or other agent of the other Party for any purpose whatsoever. Nor will either Party have the authority to bind the other in any respect. Each Party will remain an independent contractor responsible for its own actions except as otherwise specifically provided herein. UNIVERSITY shall have no right of direction or control of the COSM, or its employees and agents, except as to the results to

be obtained, and in a general right to order the implementation of the Program Activities to start or stop as agreed to herein, to inspect the progress of the implementation of the Program Activities to be performed, and to receive reports. The COSM shall accommodate reasonable requests from the UNIVERSITY to allow UNIVERSITY employees, agents or representatives to accompany and observe the implementation of the Program Activities as described in each approved WPP.

- M. **Payment from Current Revenues.** Pursuant to Section 271.903(a), Texas Local Government Code, this Funding Contract is conditioned upon, and the UNIVERSITY agrees to use its best efforts to obtain and appropriate funds for the payment of all payments and obligations due under the terms of this Funding Contract. The COSM acknowledges and agrees that all payments and other obligations due under the terms of this Funding Contract shall be deemed to be the commitment of the EAA's current revenues only. Moreover, the COSM acknowledges that pursuant to Section 791.011 (d)(3), Texas Government Code, UNIVERSITY must make any payments made under this Funding Contract only from current revenues available to the UNIVERSITY. The COSM will not have the right to demand payment by the UNIVERSITY from any funds raised or to be raised by taxation and the UNIVERSITY's obligation under this Funding Contract will never be construed to be a debt of the UNIVERSITY of such kind as to require it under the Constitution and laws of the State to levy and collect an ad valorem tax to discharge such obligation, and that UNIVERSITY will not be obligated to provide funding beyond the sources and limitations identified in the approved WPP.
- N. **Informal Negotiations; Mediation.** In the event any controversy arising under this Funding Contract is not resolved by informal negotiations between the Parties within 30 days after any Party requests negotiations, then, upon the request of any Party, the controversy will be referred to mediation, which process will be governed by the Texas Civil Practice and Remedies Code, Chapter 154, as may be amended, or its successor statute. Failing identification of a mutually acceptable mediator, the mediation will be conducted by the University of Texas School of Law Center for Public Policy Dispute Resolution. The mediation process will continue until the controversy is resolved, the mediator makes a finding that there is no possibility of settlement through mediation, or either Party chooses not to continue further. All costs and expenses of the mediation (including the mediator's fees) will be shared equally by the Parties involved in the mediation, provided however, that costs incurred by each Party will be costs solely of such Party.
- O. **Force Majeure.** If by reason of Force Majeure any Party hereto will be rendered unable wholly or in part to carry out its obligations under this Funding Contract, then if such Party will give notice and full particulars of such Force Majeure in writing to the other Party within a reasonable time after the occurrence of the event or cause relied on, the obligation of the Party giving such notice, so far as its performance is prevented by such Force Majeure, will be suspended during the continuance of the inability then claimed, but for no longer period, and any such Party will endeavor to remove or overcome such inability with reasonable dispatch. The term "Force Majeure" as employed herein will mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, orders of any kind of the Government of the United States or the State of Texas, regulatory restrictions imposed on the UNIVERSITY by the Texas Legislature, any civil or military authority, insurrection, riots, epidemics,

landslides, lightning, earthquake, fires, hurricanes, tornados, blue northers, storms, floods, washouts, any drought, restraint of government and people, civil disturbances, explosions, extraordinary breakage or accidents to machinery, pipelines or canals, partial or entire failure of water supply, or on account of any other causes to the extent not reasonably within the control of the party claiming such inability. The Parties acknowledge that nothing in this provision affects the authority of the Service to suspend or revoke the Permit, either partially or in its entirety, as to the Party experiencing the inability or as to all Parties.

- P. Remedies. The Parties recognize that failure in the performance of any Party's obligations hereunder may not be measurable solely in money damages. Each Party therefore agrees in the event of any default on its part that each Party will have available to it, in addition to all other legal remedies, the equitable remedy of mandamus and/or specific performance. It is the intent of the Parties to this Funding Contract that any default may be subject to the remedy of mandamus and/or specific performance to the extent that mandamus and/or specific performance is possible under the existing circumstances.
- Q. Default - Notice and Opportunity to Cure. If any Party fails to perform any obligation or make any payment in the required amount when due under this Funding Contract, the other Party may, without prejudice to any other right or remedy it may have under this Funding Contract, provide written notice of default to the nonperforming Party. The nonperforming Party has 60 days from receipt of the notice within which to remedy the default.
- R. Rights Regarding Books and Records. Each Party will permit the other Party upon reasonable notice to examine and copy all the books and records kept by the Party regarding this Funding Contract. In addition, upon reasonable prior written notice to the other Party, any Party may conduct a complete audit of the books and records kept by the Party regarding this Funding Contract and the approved WPP as well as upon the information and documentation used to prepare the books and records. Any such audit will be at the requesting Party's sole expense and will be prepared by a certified public accounting firm. If the audit report discloses actual errors in the books and records such that the charges assessed to the other Party are in error, then such error will be corrected for the period up to four years from the date the erroneous charge was paid and all payments reconciled over the subsequent twelfth month period beginning with the audited Party's fiscal year. If the error identified in the audit is greater than the cost of the audit, the audited Party will reimburse the requesting Party the cost of the audit.
- S. Assumption of the Risk; Indemnification. The COSM shall assume all risks associated with its contractor's performance of the Program Activities associated with the approved WPP under this Funding Contract, and shall waive any claim against the UNIVERSITY and other participants for damages arising out of the performance of such. Additionally, to the fullest extent allowed by law, the COSM agrees on behalf of itself and its successors and assigns to defend, save and hold harmless UNIVERSITY and their officers, directors, and employees from and against any and all claims, losses, expenses, costs, demands, judgments, causes of action, suits, and liability for personal injury or property damage (including but not limited to all costs of defense, such as fees and charges of attorneys, expert witnesses, and other professionals and all court or other dispute resolution costs) resulting from the negligence or other wrongful acts or omissions of the COSM or an officer, director, employee, contractor, or

subcontractor of the COSM in the performance or implementation of the Program Activities associated with the approved WPP associated with this Funding Contract.

T. Ownership and Disclosure of Materials.

- (I) All information, documents, property and materials produced, created or supplied under this Funding Contract by the COSM/UNIVERSITY, its employees, agents, contractors, or subcontractors or anyone else, and whether finished or unfinished or in draft or final form, will be the property of the COSM/UNIVERSITY. Said materials shall be provided upon request for archival purposes, for the development of the WPP administrative record, and to reflect the COSM/UNIVERSITY work performed, including after expiration or termination of the Funding Contract.

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IN WITNESS WHEREOF, the Parties have executed this Interlocal Contract in duplicate counterparts, both having equal force and effect, as of the date first above written.

FOR THE CITY OF SAN MARCOS:

Bert Lumbreras
City Manager

Date

ATTEST:

APPROVED AS TO FORM:

Jamie Lee Case
City Clerk

Michael J. Cosentino
City Attorney

FOR TEXAS STATE UNIVERSITY:

Dan Alden
Director of Procurement and
Strategic Sourcing

Date

ATTEST:

By: _____

Printed Name and Title

Date

EXHIBIT A
PROGRESS REPORT EXAMPLE TEMPLATE

Date:
HCP Measure(s) Addressed:
Project Name:
Invoice Number:
Invoice Period: mm/dd/yyyy to mm/dd/yyyy

I. Services Performed During the Invoice Period

Describe the activities that were performed for each Conservation Measure during the invoice period.

- | | |
|-------------------------|---|
| Conservation Measure 1. | Complete an assessment for the removal of an in-channel sediment island and stands of Arundo cane |
| Conservation Measure 2. | Complete a plan for re-vegetating targeted in-stream areas |

2. Schedule Issues

Describe the status of the project progress, identifying which activities, if any, are behind schedule.

3. Budget Issues