



December 5, 2016

Leathers and Associates, Inc.
1771 Hanshaw Road, Ste. B
Ithaca, New York 14850

Contract Number: 217-140

Attention: Marc Leathers, President

LETTER OF AGREEMENT

Dear Mr. Leathers:

This letter will serve as an agreement (the "Agreement") between Leathers and Associates, Inc. (the "Consultant") 1771 Hanshaw Road, Ste. B, Ithaca, New York 14850 and the City of San Marcos (the "City"), 630 East Hopkins, San Marcos, Texas 78666 for professional design services in connection with the Reconstruction of the San Marcos Playscape (the "Project"). The Consultant will perform its services as described in the scope of Work attached as Attachment A. The Consultant agrees to perform all of its services in accordance with the attached City of San Marcos Terms and Conditions for Professional Service Agreements (Attachment B). In the event of any conflict between the provisions of Attachment A and the provisions of Attachment B, the provisions of Attachment B will control.

The City agrees to pay the Consultant a fixed fee of \$65,300.00 for the satisfactory performance of basic services in accordance with the provisions of Attachment A. Since the Consultant's compensation is a fixed fee for basic services, including minor deviations from those described in this Agreement, compensation to the Consultant for additional services will only be for substantial deviations from the scope of services described in this Agreement. Reimbursable expenses, including such things as expenses for reproduction of documents, permit fees, auto travel mileage (at the prevailing IRS rate), lodging, delivery charges, long distance communications and freight are included in the Consultant's basic services compensation. The City will compensate the Consultant for the performance of additional services based on the Consultant's standard hourly rates and direct expenses as specified in Attachment A.

The City will pay the Consultant monthly following the City's receipt and approval of the Consultant's itemized invoices showing direct and indirect labor costs; expenses for materials and supplies and any other reimbursable expenses; and fees for additional services performed and included on the invoice submitted. The Consultant will base its invoices upon the extent of work it has completed on a percentage basis, reimbursable expenses and additional services (if any), less any disputed amounts, pending resolution thereof. Each material change (deletion or

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addition) in the services to be provided by Consultant must be authorized by the City on the Authorization of Change in Services form attached to this Agreement as Attachment C. In no event will this Agreement be increased to an amount in excess of \$50,000.00 without prior approval by City Council.

Please indicate your acceptance of this agreement by counter-signing both agreements, retaining one executed copy for your files and returning one fully executed original to Renate Claybourn, Contracts Manager at the address above.

City of San Marcos

Leathers and Associates, Inc.

By: _____

By: _____

Printed Name/Title

Printed Name/Title

(Date)

(Date)

Attachment A

Reconstruction of the San Marcos Playscape

This Project involves the Consultant's provision of professional design services in connection with the reconstruction of the San Marcos Playscape which was originally constructed in 1992. The Consultant will provide services to include project design, administration, and post-construction documentation and analysis, and those related professional services deemed necessary by the City.

I. SCOPE OF CONSULTANT'S BASIC SERVICES

The Consultant will:

A. Task 1 – Design Development.

1. Review with the City the design parameters for the new design of the Project. The Consultant will also solicit City and public feedback in a design session and prepare a schematic design. In addition, the Consultant will review the schematic design with the City and finalize any design changes. This task includes two on-site visits, one for the initial design and one for final approval.
2. Prepare a materials list and specifications for the Project for City review and approval. The Consultant will provide the City with a materials list along with the drawings and specifications identified in 3) below for inclusion in the bid documents. The Consultant is not be responsible for purchasing or delivering materials necessary for the construction of the Project.
3. Prepare the necessary working drawings and specifications setting forth the requirements for the construction of the Project in a manner that conforms with current safety and accessibility guidelines and standards as set forth in ASTM F1487, *Standard Consumer Safety Performance Specification for Playground Equipment for Public Use*, ("ASTM F1487") and ASTM F1951, *Standard Specification for Determination of Accessibility of Surface Systems Under and Around Playground Equipment* ("ASTM F1951") standards, United States Consumer Product Safety Commission Publication #325 ("CPSC Pub. #325"). In addition, the Consultant will ensure that the drawings and specifications prepared under this subsection comply with the Americans with Disabilities Act ("ADA"). The Consultant will provide the following plan view drawings:
 - a) 1/8" plan view;
 - b) 1/4" plan view;
 - c) 1/8" stakeout;
 - d) 1/8" plan of safety surfacing area; and
 - e) any other drawings the Consultant deems necessary.

The drawings identified above are not construction drawings and are prepared for use by the Consultant and its subconsultants. The Consultant will certify the final product meets ASTM F1487-11 and ASTM F1951 standards, United States Consumer Product Safety Commission Publication #325 and current ADA requirements.

4. Marc Leathers will serve as the Consultant's Project Manager for this Project. The Consultant will not substitute another representative for this Project unless approved in writing by the City in advance of such proposed substitution. In the event the City and the Consultant cannot agree to the substitution of the Project Manager, the City may terminate this agreement in accordance with Article 12 of the Standard Terms and Conditions, Attachment B. Prior to the start of construction, the Consultant's Project Manager will be available from 9:00 a.m. to 6:00 p.m. Eastern Standard Time and can be reached by telephone or email. The Consultant will also provide the City with access to an on-line project management website to track progress, assign tasks and share documents. The Consultant's Project Manager or his designee will serve as the City's and the construction contractor's main contact with the Consultant for the duration of the construction of the Project This includes one on-site visit prior to construction to meet with the construction contractor to review the design and coordinate with the City and the contractor regarding the start of construction.
5. Sub-contract with Mr. Daniel Brewer, licensed Texas Architect, in order to provide stamped drawings. However, this arrangement will not diminish the Consultant's responsibility to the City for all work product under this Agreement.

B. Task 2 - Construction Bidding and Administration

1. Perform Construction Bidding and Administration as detailed in Sections three (3) and four (4) of the City's standard Terms and Conditions, attached as Attachment B. The construction phase of this Project will commence with the award of the construction contract and the terms of this Agreement will remain in full force and effect and the Consultant is responsible for all work included in this Agreement until the associated construction Project has been completed by the Contractor and accepted by the City except for the work referenced in Section 4(s) of Attachment B. The Consultant's responsibility for work referenced in Section 4(s) will survive the expiration of this Agreement until such time that the specified warranty period for this Project is complete in accordance with the construction contract. The projected construction period for this Project is approximately 90 calendar days. It is anticipated that the Consultant will make two site visits during the construction phase of this Project. Additional site visits will be performed as additional services.

II. CITY RESPONSIBILITIES

The City will:

- A. Provide full and accurate information to the Consultant regarding the City's requirements for the Consultant's services under this Agreement. In addition, the City will furnish the Consultant with copies of data and information in the City's possession needed by the Consultant pertinent to the Consultant's provision of services required under this Agreement at the Consultant's request including a base file of existing conditions in Autocad format. The City will provide this information and render decisions expeditiously for the orderly progress of the Consultant's services.
- B. Designate William Ford, Assistant Director of Community Services as the City's authorized representative to act on the City's behalf with respect to this Agreement. The City will examine all documents and information submitted by the Consultant and promptly render responses to the Consultant on issues requiring a decision by the City.
- C. Provide access to and make all necessary provisions for the Consultant to access City personnel and to enter public facilities and private property as required for the Consultant to perform its services under this Agreement.
- D. Hire a contractor, in accordance with the state and City procurement laws, for labor and materials for the rebuilding of the Playground. The City will be responsible for the Contractor's compensation in accordance with the construction contract.
- E. Bear all costs incidental to this Article.

III. ADDITIONAL SERVICES AND PROJECT ASSUMPTIONS

- A. The City may direct the Consultant to perform services outside of the scope of the Basic Services described in Section A of this Agreement above. The Consultant will submit a written estimate of fees to the City and obtain the City's authorization before initiating any additional services. Consultant services in connection with the installation of the safety surfacing are specifically considered to be additional services.
- B. Each material change (deletion or addition) in the services to be provided by the Consultant must be authorized by the City on the Authorization of Change in Services form attached to this Agreement as Attachment C. Compensation for additional services will be in addition to that specified for Basic Services in accordance with Section of this Agreement. The approval of the San Marcos City Council is necessary for all additional services the compensation for which exceeds \$50,000.00.
- C. The Consultant understands that time is of the essence and agrees to provide all design work and professional services in the most expedient and efficient manner possible in order to complete the Project construction plans and specifications within 60 calendar days of the first design meeting. The City and the Consultant anticipate that construction of the Project will be complete no later than 90 calendar days from the Project Start Date established in the construction contract.

- D.** Both the City and the Consultant understand and agree that the Consultant is not responsible for the safety surfacing installation. However, the Consultant will assist the City in choosing the appropriate safety surfacing and ensure the proper specifications for this construction element are included in the plans and specifications.
- E.** The Project will be bid as a single bid contract but may include bid alternates as determined by the City and the Consultant. Preparing documents for separate or sequential bids and providing out-of-sequence services requested by the Owner are specifically not included in this scope of services.

IV. BASIS OF COMPENSATION

A. BASIC SERVICES:

The total of all fees and expenses to be paid to the Consultant for the satisfactory performance of Basic Services as described in Section A is a fixed fee of 65,300.00 based on the Consultant's rates and reimbursable expenses as follows:

Design Development, Pre-Construction Management	\$10,500.00
Construction Documents	\$26,000.00
Construction Supervision	\$28,800.00
TOTAL	\$65,300.00

B. ADDITIONAL SERVICE EXPENSES:

Compensation for additional services (all services not shown in the Scope of Services) will be computed based on the Consultant's standard hourly rates as follows and reimbursable expenses at direct cost, if any. Additional services (all services not shown on Scope of Services) will be billed on an hourly basis plus expenses at direct cost in accordance with the following:

Design \$85.00/hr.
Clerical \$65.00/hr.

Construction Administration/Supervision - \$2,100.00/day (includes travel and accommodations)

Attachment B
City of San Marcos, Texas
Terms and Conditions for Architect/Engineer Agreements Involving Construction

1. Standards of Performance

- (a) The performance of all services by the Consultant under this Agreement will be by persons or persons under the supervision of persons appropriately licensed or registered under State, local and Federal laws, as applicable.
- (b) In performing all services under this Agreement, the Consultant will use that degree of care and skill ordinarily exercised for similar projects by professional consulting firms who possess special expertise in the types of services involved under this Agreement in the same or similar locality and under the same or similar circumstances and professional license.
- (c) Any provisions in this Agreement pertaining to the City's review, approval and /or acceptance of written materials prepared by the Consultant and/or its subconsultants in connection with this Agreement will not diminish the Consultant's responsibility for the materials.
- (d) The Consultant will perform all of its services in coordination with the City. The Consultant will advise the City of data and information the Consultant needs to perform its services and the Consultant will meet with City representatives at mutually convenient times to assemble this data and information.
- (e) In performing all services under this Agreement, the Consultant will comply with all local, state and federal laws.

2. City's Responsibilities

- (a) The City will provide information to the Consultant regarding the City's requirements for the Consultant's services under this Agreement. The City will furnish the Consultant with copies of official City design standards and construction standards, and other data and information in the City's possession needed by the Consultant, at the Consultant's request. The City will provide this information and render decisions expeditiously for the orderly progress of the Consultant's services.
- (b) The City will designate an authorized representative to act on the City's behalf with respect to this Agreement. The City will examine documents and information submitted by the Consultant, and promptly render responses to the Consultant on issues requiring a decision by the City.
- (c) The City will be responsible for any other item listed specifically as the City's under Attachment A, Scope of Work.

3. Bidding Services

- (a) Assist the City in the distribution of the bid documents to prospective bidders and the issuance of addenda (if any) following City's prior approval.
- (b) Assist the City in obtaining bids, tabulating bids, preparing bid tabulation forms, and in awarding the contract for construction following the City's approval of the construction contract documents and of the latest detailed final cost estimate of the Project.
- (c) Assist the City in conducting the pre-bid conference with potential bidders. During the pre-bid conference, the Consultant will describe the scope of work; answer pertinent questions of potential bidders and City staff address

requests for additional information and make all necessary clarifications and interpretations of the construction contract documents.

(d) Assist the City in reviewing all bids including the analysis of bid alternates/substitutions, the Statement of Bidder's Qualifications, financial statements of bidders, lists of bidders' proposed subcontractors, and all other documents required to be submitted with the bids for responsiveness and for bid amount. Consultant will also verify through reasonable investigation the financial and performance history documentation submitted by the low bidder and second low bidder, and their references. The City will provide copies of all of the bid documents to the Consultant within one day from the date of receipt of bids. Within ten calendar days of receiving the bid documents from the City, the Consultant will prepare a report of its review and evaluation, and include a written recommendation to the City for award of the contract for construction, or other action as may be appropriate. The City will make the final decision on the award of the construction contract and the acceptance or rejection of bids. The Consultant will provide technical (but not legal) advice in bid protest situations. Both the City and the Consultant assume that this Project will be bid as one Project and neither party anticipates that it will be necessary to re-bid the Project.

(e) Have no authority to issue a Notice to Proceed to any Contractor.

(f) Provide the City with two half size and two full size sets of conformed construction plans. Provide the Contractor with three half size and two full size sets of conformed construction plans at no additional cost to the City.

4. Construction Administration Services

During the construction phase of this project, the Consultant will:

(a) Administer the construction contract as set forth in the construction documents unless otherwise provided in this Agreement and incorporated in the construction contract documents. Consultant will not pursue a course of conduct, which might jeopardize any of the City's rights hereunder. Minor deviations from the construction contract documents that do not affect the validity of performance bond(s) are permitted.

(b) Be a representative but not an agent of the City during the construction phase, and advise and consult with the City and provide progress reports and advice to the City in writing; serve as the City's direct contact with the Contractor and forward the City's instructions to the Contractor unless (1) Consultant is unavailable by telephonic communication or otherwise to issue instructions necessary for the proper progress and acceptance of work; (2) jeopardy to life and/or property exists; and/or (3) lack of instructions and/or unavailability of Consultant will result in, in City's opinion, harm to City, in which case instructions may be forwarded directly to the Contractor by the City; have authority to act on behalf of the City only to the extent provided herein and in the construction contract documents unless otherwise modified by written instrument in accordance with the Consultant's agreement with the City. The City will promptly advise the Consultant of any instructions issued directly by City to the construction Contractor if the Consultant was unavailable at the time of issuance of instructions.

(c) Assist the City in ensuring that all applicable permits and approvals have been obtained from the appropriate agencies prior to construction in accordance with the scope of work

(d) Assist the City in conducting a pre-construction conference with the Contractor, members of City's staff, representatives of affected utility providers, and federal and state agencies having jurisdiction over the Project (including City inspectors) in order to establish construction schedules and to identify key representatives of the parties and lines of communication. The Consultant will be responsible for providing an agenda and for keeping accurate minutes of this meeting. The Consultant will distribute minutes to the interested parties within five calendar days of the conference. The City will arrange for the location of the meeting.

(e) Make on-site inspections of the Project as often as required to ensure familiarity with the progress and quality of the work, to determine if the work is proceeding in acceptable conformance with the construction contract documents, and to review the work with the City's designated representatives. On the basis of these inspections, by

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the Consultant, the Consultant will keep the City informed of the progress and quality of the work through written status reports and through meetings with the City's representative. The Consultant will also be reasonably available to perform site visitations at the specific request of the City by the next business day after a request is made.

(f) In performing all services, including inspections, not have control or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, for the acts or omissions of the construction contractor, subcontractors or any other persons performing any of the work, or for the failure of any of them to carry out the work in accordance with the construction contract documents, unless such acts or omissions are due to the negligence of the Consultant or are acts or omissions under the Consultant's control. However, the Consultant will exercise its authority on behalf of the City in accordance herewith and particularly during the construction phase so that all work performed by the construction contractor results in a Project completed in accordance with the construction contract documents and during any phase should the Consultant become aware of the Contractor's utilization of means, methods, techniques, sequences and/or procedures of construction which, in the Consultant's opinion, will not result in completion of the Project in accordance with the construction contract documents or which are unsafe, the Consultant will immediately inform the City and will take all necessary action which the Consultant is authorized to take under the construction contract documents to correct the matter.

(g) At all times, have access to the work wherever it is in preparation or progress.

(h) Determine the amounts owing to the construction contractor based on its on-site professional inspections and on evaluations of the Contractor's applications for payment, including comparisons of the construction contractor's monthly cost reports with its applications for payment, and make recommendations for payment in these amounts, as provided in the construction contract documents, or take such other appropriate action which the Consultant deems necessary.

(i) Make recommendations for payment that constitute a representation by the Consultant to the City based on the Consultant's inspections and on the data comprising the Contractor's application for payment, that 1) the work has progressed to the point indicated, 2) the quality of the work is in acceptable conformance with the construction contract documents (subject to an evaluation of the work of conformance with the construction contract documents upon substantial completion, subject to the results of any subsequent tests required by or performed under the construction contract documents, subject to minor variations from the construction contract documents correctable prior to completion, and subject to any specific qualifications stated in the certificate for payment), and 3) the construction contractor is entitled to payment in the amount certified. However, the issuance of a certificate for payment will not be a representation that the Consultant has made any examination to ascertain how and for what purpose the Contractor has used the monies paid by the City.

(j) Have authority to reject work, which does not conform to the construction contract documents. Whenever, in the Consultant's reasonable opinion, it is necessary or advisable for the proper implementation of the intent of the construction contract documents, and with the approval of the City, the Consultant will have authority to require special inspection or testing of the work in accordance with the provisions of the construction contract documents, whether or not such work is then fabricated, installed or completed. The Consultant will review the work and results of all testing laboratories as required by the construction contract documents.

(k) Review and make decisions regarding the approval or taking of other appropriate action upon the Contractor's submittals, including, but not limited to, shop drawings, product data and samples, schedule of values and progress schedule. The Consultant will take such action with reasonable promptness, but generally not to exceed 15 calendar days or such period of time as will not cause delay of the Project.

(l) Prepare minor changes in the plans and specifications as directed by the City; and prepare necessary change orders in triplicate originals for approval by the City and execution in accordance with the construction contract documents. The Consultant will not issue change orders not previously approved in writing by the City, and no course of conduct on the part of the Consultant or the City will amend, waive or alter this provision.

(m) Answer Requests for Information from the Contractor as necessary, which may include technical questions, clarifications and interpretations of the construction contract documents.

(n) Conduct professional inspections to determine the dates of substantial completion and final completion for the Project, to evaluate the work for acceptable conformance with the construction contract documents and in light of any subsequent tests performed as referenced in the Section 4(i) to verify that any minor deviations from the construction contract documents as referenced in Section 4(i) have been corrected and that the reasons for any specific qualifications in any and all previous certificates for payment as described in this Agreement are either no longer valid or the condition(s) and/or problem(s) have been corrected. The Consultant will receive and review written warranties and related documents required by the construction contract documents and assembled by the Contractor; will issue final certificates for payment or take other appropriate action, and make a written recommendation to the City regarding the City's acceptance of the project.

(o) Require the submission by the Contractor, and subcontractors performing work on the Project site, of periodic wage rate payment reports and, with the City's assistance, verify compliance with federal and state wage rate requirements for the Project; and notice the City of any noncompliance, or of the failure by the Contractor or subcontractors to make submissions.

(p) Prepare or cause to be prepared, and submit to the City a set of reproducible record drawings showing significant changes in the work made during the construction phase. The Consultant will submit two full-size hard copy record drawings to the City, as well as one CD containing electronic copies in PDF and CAD formats.

(q) Ensure that all notices and signs required and provided by the City are posted in appropriate locations at the Project site by the Contractor.

(r) Conduct a final inspection with the City and prepare a punch list prior to final acceptance by the City.

(s) Prior to the end of the one year warranty period, review the completed Project with the City and the Contractor and have all deficient items corrected. The extent of the duties, responsibilities and limitations of authority of the Consultant as the City's representative during construction will not be modified or extended after the construction contract documents have been authorized by the City to be competitively bid without written consent of the City and the Consultant and with notice to the Contractor.

5. Construction Cost

(a) The construction cost will be the total cost or estimated cost to the City of all elements of the Project designed or specified by the Consultant.

(b) The construction cost will include at current market rates, including a reasonable allowance for overhead and profit, the cost of any equipment that has been designed, specified, selected or specially provided for by the Consultant, except that used materials and equipment will be included as if purchased new for the Project.

(c) Construction cost does not include the compensation of the Consultant and the Consultant's subconsultants, or other costs which are the responsibility of the City as provided in Article 2.

(d) Evaluations of the City's Project budget and detailed cost estimates, if any, prepared by the Consultant, will represent the Consultant's best judgment as a design professional familiar with the construction industry. The City recognizes that the Consultant has no control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices or over competitive bidding or market conditions.

(e) A fixed limit of construction cost for this Project will be established by the City's representative after consulting with the Consultant. The Consultant will be permitted to include contingencies for design, bidding and price escalation, to determine what materials, equipment, and types of construction are to be included in the construction contract documents, to make reasonable adjustments in the scope of the Project and to include in the construction

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contract documents alternate bids to adjust the construction cost to the fixed limit. The fixed limit of construction cost may be increased by the City.

(f) If the lowest bona fide bid exceeds the Consultant's most recent approved cost estimate established as a condition of this Agreement, the City will (1) give written approval of an increase in such fixed limit, (2) authorize re-bidding of the Project within a reasonable time, or (3) cooperate in revising the Project scope and quality to reduce the construction cost. During the development of the Project through the phases described by Article 1 of this Agreement and prior to the City's final approval of construction contract documents, the Consultant will monitor the established probable construction cost in relation to the established fixed limit. If necessary, the Consultant will implement construction cost savings measures or otherwise endeavor to limit probable construction cost to the level of available funds set by the City.

6. Consultant's Records

(a) All expense records of the Consultant related to this Agreement will be kept on a recognized accounting basis acceptable to the City and will be available to the City at mutually convenient times. (applies only if the Consultant is to be reimbursed for any expenses).

(b) The City, its auditors and federal and state agencies that have monitoring or auditing responsibilities for this Agreement will have access to any books, documents, papers and records of the Consultant which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, copying and transcriptions.

(c) The Consultant will furnish to the City at such time and in such form as the City may require, financial statements including audited financial statements, records, reports, data and information, as the City may request pertaining to the matters covered by this Agreement. Information provided pursuant to this subsection will be held in strict confidence to the extent permitted by applicable law.

7. Ownership and Use of Documents

(a) All documents prepared by the Consultant in connection with this Agreement are the property of the City whether any project related to this Agreement is executed or not. City agrees such documents are not intended or represented to be suitable for reuse for another project by the City or others. Any such reuse by the City or those who obtained said documents from the City without written verification or adaptation by the Consultant will be without liability or legal exposure to the Consultant.

(b) The Consultant will retain all of its records and supporting documentation relating to this Agreement, and not delivered to the City, for a period of three years, except that in the event the Consultant goes out of business during that period, it will turn over to the City all of its records relating to the Project for retention by the City.

8. Patent Fees and Royalties

(a) If applicable, the Consultant will pay all license fees, royalties, and other costs incident to the use of any invention, design, process, product or device subject to a patent right or copyright held by others in performing the work or in the completed project.

(b) The Consultant will hold harmless, indemnify and defend the City, its officers, agents and employees from and against all claims, damages, losses and expenses, including attorney's and expert witness fees, arising out of any claim of infringement of a patent right or copyright in the performance of the work or the incorporation in the work of any invention, design, process, product or device.

9. Consultant as Independent Contractor

It is expressly agreed that the Consultant is an independent contractor, and not an employee, agent, partner or joint venturer with the City. The Consultant will not pledge or attempt to pledge the credit of the City.

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10. Designation of Consultant's Contact Person

The Consultant agrees to designate in writing a single contact person assigned to coordinate the Consultant's performance of obligations under this Agreement. Any changes to this designation must be made by the Consultant in writing to the City.

11. Breach

The City will have the right to declare the Consultant in breach of this Agreement for cause when the City determines that this Agreement has not been performed in accordance with its written terms and conditions.

12. Term; Termination of Agreement

(a) The term of this Agreement begins on the effective date established on the first page of the Letter Agreement and will end upon the Consultant's completion, and the City's acceptance of all services described in this Agreement unless this Agreement is terminated under subsections (b) or (c) below. The terms of this Agreement will remain in full force and effect and the Consultant is responsible for all work included in this Agreement until the associated construction Project has been completed by the Contractor and accepted by the City except for the work referenced in Section 4(s) of this Agreement. The Consultant's responsibility for work referenced included in Section 4(s) will survive the expiration of this Agreement until such time that the specified warranty period for this Project is complete in accordance with the construction contract.

(b) This Agreement may be terminated by either party upon 15 calendar days prior written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination. The Consultant will provide the City with at least a 30 calendar day period of opportunity to cure before the Consultant initiates termination.

(c) This Agreement may be terminated for convenience and without cause by the City upon at least 15 calendar days prior written notice to the Consultant.

(d) In the event of termination as provided in this Section, the Consultant will immediately discontinue any and all services under this Agreement at the City's request. The Consultant will be compensated for all services performed to the termination date which are deemed by the City to be in accordance with this Agreement. This amount will be paid by the City upon the Consultant's delivering to the City all information and materials developed or accumulated by the Consultant in performing the services described in this Agreement, whether completed or in progress. The expense of the reproduction of these items will be borne by the City.

13. Insurance and Indemnity

(a) The Consultant will hold indemnify, hold harmless, and defend the City and its employees, agents, officers and servants from any and all lawsuits, claims, demands and causes of action of any kind arising solely from the negligent or intentional wrongful acts, errors or omissions of the Consultant, its officers, employees or agents. This will include, but not be limited to, the amounts of judgments, penalties, interest, court costs, reasonable legal fees, and all other expenses incurred by the City arising in favor of any party, including the amounts of any damages or awards resulting from claims, demands and causes of action for personal injuries, death or damages to property alleged or actual infringement of patents, copyrights, and trademarks and without limitation by enumeration, all other claims, demands, or causes of action of every character occurring, resulting, or arising solely from any negligent or intentional wrongful act, error or omission of the Consultant and/or its agents and/or employees. This obligation by the Consultant will not be limited because of the specification of any particular insurance coverage required under this Agreement.

(b) The Consultant will procure and maintain at its own expense insurance with insurance companies authorized to do business in the State of Texas, covering all operations under this Agreement, whether performed by the

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Consultant or its agents, subcontractors or employees. Before commencing the work the Consultant will furnish to the City a certificate or certificates in a form satisfactory to the City, showing that the Consultant has complied with this paragraph. All certificates will provide that the policies will not be canceled until at least 30 calendar days prior written notice has been given to the City. Failure of the Consultant to demand a certificate or other sufficient evidence of full compliance with these insurance requirements or failure of the Consultant to identify a deficiency from the evidence that is provided as proof of insurance will not be construed as a waiver of the Consultant's obligation to maintain the required insurance coverage specified herein. Commercial general liability and motor vehicle insurance will be written with the City as an additional insured and will be endorsed to provide a waiver of the carrier's right of subrogation against the City. The kinds and amounts of insurance required are as follows:

Workers' Compensation Insurance and/or Employer's Liability: In accordance with the provisions of the Workers' Compensation Act of the State of Texas and/or \$500,000.00/\$500,000.00 for Employer's Liability.

Liability Insurance: (1) Commercial general liability insurance (standard ISO version) with a combined single limit of \$1,000,000 for each occurrence and \$1,000,000 in the aggregate, providing coverage for, but not limited to, bodily injury and property damage, premises /operations, products/completed operations, independent consultants as applicable. (2) Business Motor Vehicle liability insurance (standard ISO version) in an amount not less than \$1,000,000 per occurrence (3) professional liability coverage to cover lawful claims arising in connection with the Project in the combined single limit amount of at least \$1,000,000.00 as applicable. Should the Consultant not own any automobiles, the business auto liability requirement will be amended to allow the Consultant to agree to maintain only Hired and Non-Owned Auto Liability. This amended coverage requirement may be satisfied by way of endorsement to the Commercial General Liability or by separate Business Auto Policy.

(c) The stated limits of insurance required by this Section are **minimum only**--they do not limit the Consultant's indemnity obligation, and it will be the Consultant's responsibility to determine what limits are adequate. These limits may be met by basic policy limits or any combination of basic limits and umbrella limits. The City's acceptance of certificates of insurance that do not comply with these requirements in any respect does not release the Consultant from compliance with these requirements.

14. No Waiver of Immunity

The City's execution of and performance under this Agreement will not act as a waiver by the City of any immunity from suit or liability to which it is entitled under applicable law. The parties acknowledge that the City, in executing and performing this Agreement, is a governmental entity acting in a governmental capacity.

15. Remedies; No Waiver.

In the event of a default or breach of this Agreement by the Consultant, the City reserves the right to choose among the remedies for the default or breach available to the City. These remedies may be used in conjunction with one another or separately, and together with any other statutory or common law remedies available to the City. Any failure by the City to enforce this Agreement with respect to one or more defaults by the Consultant will not waive the City's ability to enforce this Agreement after that time.

16. "Green" Procurement

It is the City's intent to be proactive with regard to the environment. The City encourages "Value Purchasing" of environmentally friendly products. The Consultant is encouraged to identify and utilize green solutions in performing any services under this Agreement, as appropriate.

17. Funding Out

If applicable to this Project, the Consultant understands that funds for the payment for work performed by the Consultant under this Agreement have been provided through the City's budget approved by City Council for the current fiscal year only. State statutes prohibit the obligation and expenditure of public funds beyond the fiscal year

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for which a budget has been approved. The City cannot guarantee the availability of funds, and enters into this Agreement only to the extent such funds are made available. The Consultant acknowledges and agrees that it will have no recourse against the City for its failure to appropriate funds for the purposes of this Agreement in any fiscal year other than the year in which this Agreement was executed. The fiscal year for the City extends from October 1st of each calendar year to September 30th of the following calendar year.

18. Safety

The work to be performed under this contract will be performed entirely at the Consultant's risk. The Consultant will be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the work to be performed under this contract. The Consultant will take all reasonable precautions for the safety of and will provide all reasonable protection to prevent damage, injury, or loss to employees, the work, the endangered species, or the property affected by this contract. All damage or loss to any property caused in whole or in part by the Consultant, any subcontractor, or anyone directly or indirectly employed by any of them will be remedied by the Consultant.

19. Notice

As required under this Agreement, notice will be delivered in writing to the parties at the following locations:

To the City:

City of San Marcos
Jared Miller, City Manager
630 E. Hopkins
San Marcos, Texas 78666

To the Consultant:

Leathers and Associates, Inc.
Marc Leathers, President
1771 Hanshaw Road, Ste. B
Ithaca, New York 14850

20. Taxes

The Consultant will not include Federal taxes or State of Texas limited sales excise and use taxes in its invoices or vouchers and statement of costs. The City is exempt from payment of such taxes and the Consultant may retrieve a resale certificate for use on this Project from the State of Texas Comptroller's website.

21. Certificate of Interested Parties.

In the event that this contract reaches an amount greater than \$50,000.00 the Consultant is required to electronically create a Certificate of Interested Parties Form 1295 through the Texas Ethics Commission ("TEC") website (https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm) and submit a signed and notarized copy of the form to the City prior to the award of the contract. A contract, including a City-issued purchase order, will not be enforceable or legally binding until the City receives and acknowledges receipt of the properly completed Form 1295 from the Consultant.

21. Miscellaneous Provisions

(a) This Agreement is governed by the law of the State of Texas. This Agreement is to be performed in Hays County and exclusive venue for any dispute arising under this Agreement is in Hays County, Texas. In the event of

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a dispute in federal court, venue will be in the United States District Court for the Western District of Texas, Austin Division.

(b) As to all acts or failures to act by either party to this Agreement, any applicable statute of limitations will commence to run and any alleged cause of action will be deemed to have accrued when the party commencing the cause of action knew or should have known of the existence of the subject act or failure to act.

(c) The Consultant agrees not to use funds received by it under the terms of this Agreement for any partisan political activity or to further the election or defeat of any candidate for public office.

(d) The Consultant hereby affirms that neither the Consultant, the Consultant's firm nor any of its associates or employees have made or agreed to make any valuable gift whether in the form of service, loan, thing, or promise to any person or any of his/her immediate family, having the duty to recommend, the right to vote upon, or any other direct influence on the selection of consultants to provide professional services to the City within the two years preceding the execution of this Agreement. A campaign contribution, as defined by the Texas Election Code or the San Marcos City Code will not be considered as a valuable gift for the purposes of this Agreement. The Consultant further agrees that none of its paid personnel will be employees of the City or have any contractual relationship with the City. All activities, investigations, and other efforts made by Consultant pursuant to this Agreement will be conducted by employees, associates, or independent contractors of the Consultant.

(e) In performing the services required under this Agreement, the Consultant will not discriminate against any person on the basis of race, color, religion, sex, national origin, age, disability or ancestry. The Consultant agrees not to engage in employment practices which have the purpose or effect of discriminating against employees because of race, color, sex, religion, national origin, age, disability or ancestry. A breach of this covenant may be regarded as a default of the Consultant of this Agreement.

(f) All references in this Agreement to any particular gender are for convenience only and will be construed and interpreted to be of the appropriate gender. The term "will" is mandatory in this Agreement.

(g) Should any provision in this Agreement be found or deemed to be invalid, this Agreement will be construed as not containing the provision and all other provisions which are otherwise lawful will remain in full force and effect, and to this end the provisions of this Agreement are declared to be severable. Paragraph and Section headings included in this Agreement are for convenience only and are not intended to define or limit the scope of any provisions of this Agreement.

(h) All services provided pursuant to this Agreement are for the exclusive use and benefit of the City and this Agreement will not give rise to any rights in third parties.

(i) The City of San Marcos is governed by the Texas Public Information Act (the "Act"), Chapter 552 of the Texas Government Code, as amended. This Agreement and all written information generated under this Agreement may be subject to release under the Act. The Consultant will not make any reports, information, data, etc. generated under this Agreement available to any individual or organization without the written approval of the City.

(j) In the event that the performance by either the City or the Consultant of any of its obligations under this Agreement is interrupted or delayed by events outside of their control such as acts of God, war, riot or civil commotion, then the party is excused from such performance for the period of time reasonably necessary to remedy the effects of such events.

(k) The City and the Consultant, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. The City and the Consultant may not assign, sublet or transfer any of their rights or delegate or subcontract any of their duties under or interest in this Agreement in whole or in part, without the written consent of the other. Any work or services subcontracted under this Agreement will be specified by separate written agreement and will be subject to each provision of this Agreement.

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The Consultant will notify the City, in writing, of any change in its partnership/ownership within 30 calendar days of such change.

(l) The Consultant will perform all services as is prudent considering the ordinary professional skill and care of a competent consultant and in all cases in accordance with the schedule negotiated with the City. The Consultant, has taken into consideration and made allowance for all hindrances and delays incident to such work, whether growing out of delays in securing material, workers, weather or otherwise. No charge will be made by the Consultant for any hindrance or delay from any cause whatever during the progress of any portion of its work contemplated by the specifications, but the City may grant an extension of time for the completion of the work, provided it has satisfied that such delays or hindrances were due to extraordinary causes or to the acts of omission or commission by the City. It is agreed that the granting of such extensions of time will in no instance exceed the time actually lost by Consultant for reason of such causes, provided that the Consultant will give the City immediate notice in writing of the cause of the detention or delay. Any such extension of time will be provided utilizing the City's Authorization of Change in Services form included as Attachment C.

(m) This Agreement including any appendices and referenced attachments or exhibits represents the entire and integrated Agreement between the City and the Consultant and supersedes all prior negotiations, representations or agreements either written or oral. In the event of a dispute between the parties regarding the intent of this Agreement, both parties agree that this Agreement will be construed in a manner consistent with the City's Request for Proposals, the Consultant's Proposal Response, and the public record of the City Council's approval of this Agreement as applicable. This Agreement may be amended only by written instrument, which must be signed by both the City and the Consultant. The San Marcos City Council must approve any such authorization of change in services or amendment if it results in a change, the compensation for which exceeds \$50,000.00.

(n) Any exhibits and/or attachments attached to this Agreement are incorporated by reference into this Agreement as though included verbatim herein. In the event of any conflict between these Terms and Conditions and the provisions of any exhibit or attachment to this Agreement, these Terms and Conditions will govern and control.

(o) The Consultant's attention is called to the fact that pursuant to San Marcos Ordinance No. 2013-57, as amended, all City of San Marcos owned and rented/leased properties are smoke free properties. All Consultants, their subconsultants and employees are prohibited from smoking while on City property. This prohibition includes the enclosed areas of public places and workplaces and within 10 feet of doors and windows of City-owned or rented buildings, all City parks and the grounds outside of any City building. This prohibition includes e-cigarettes and other inhaled vapor devices. The City may terminate this Agreement for noncompliance with this ordinance.

Attachment C

AUTHORIZATION OF CHANGE IN SERVICES CITY OF SAN MARCOS, TEXAS

PROJECT NAME: Reconstruction of the San Marcos Playscape
CONTRACTOR: Leathers and Associates, Inc.
CONTRACT NO: 217-140
AUTHORIZATION NO: _____
CONTRACT EXECUTION DATE: _____
DATE OF THIS CHANGE: _____

WORK TO BE ADDED TO OR DELETED FROM SCOPE OF SERVICES

Previous contract amount: \$ _____
Net increase/decrease in contract amount: \$ _____
Revised contract amount: \$ _____

Leathers and Associates, Inc.

By: _____

Date: _____

Printed name, title

Approved by:

City of San Marcos:

Date: _____

By: _____
Jared Miller, City Manager

City only below this line.

Account Number(s): _____, _____
Previous Changes in Service:
_____; date; amount
_____; date; amount
_____; date; amount
