

INTERLOCAL AGREEMENT

Sewer Line Improvements

RECITALS

A. This agreement ("**Agreement**") is by and between the **CITY OF KILLEEN**, a home rule municipal corporation in Bell County, Texas ("**Killeen**" or the "**City**") and the **KILLEEN INDEPENDENT SCHOOL DISTRICT**, an independent school district operating under the Constitution and laws of the State of Texas ("**KISD**" or the "**District**"), acting through their respective authorized representatives. Killeen and KISD are each individually a "**Party**" and collectively the "**Parties**" to this Agreement.

B. KISD is building a middle school to be located at an approximately 33-acre site located on Chaparral Road, Killeen, Texas adjacent to the District's new Chaparral High School ("**School**") and anticipates opening that facility in August 2024. In order to provide adequate utility services to the School, new or improved infrastructure will be required, including extending the City's sewer service to the School.

C. Because the community at large will benefit from the new School, the Parties desire to maximize efficiencies and prudently manage taxpayer resources to facilitate the timely completion of the School with adequate utility services, while avoiding conflict or duplication of effort and expense in designing, bidding, administering and constructing necessary utility improvements.

D. This Agreement is authorized in part by the City's broad and inherent authority as a home-rule municipality under Article 11, Section 5, of the Texas Constitution, to promote the public health, safety, and general welfare of its respective residents. In addition, this Agreement is authorized by Section 791.011 of the Texas Government Code.

E. The purpose of this Agreement is to state the terms and conditions under which the City will administer the construction of certain improvements, and KISD will participate in the cost thereof.

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the Parties agree as follows:

1. **Term and Termination.**

A. Unless otherwise provided herein or by law, this Agreement shall commence when it has been authorized by the governing bodies of the Parties ("**Effective Date**") and continue until the services specified in the Agreement have been fully and completely performed.

B. Continuation of this Agreement is contingent upon appropriation or availability of funds for this Agreement. If the governing body of a Party for any reason does not allocate funds for this Agreement in the annual budget for any given fiscal year, such Party may

terminate this Agreement in whole or in part effective as of the last day in the fiscal year for which sufficient funds were budgeted and appropriated for this Agreement. Termination for non-appropriation is not a default hereunder, and the terminating Party shall not incur any liability or penalty as a result thereof, except as provided herein. Each Party shall endeavor to notify the others in writing of any such non-allocation of funds at least sixty (60) days in advance. In the event of termination resulting from non-appropriation, the non-appropriating Party shall compensate the other Party for all reasonable expenses incurred through the effective date of such non-appropriation, and all expenses, if any, reasonably necessary for winding down or terminating work for any uncompleted portion of the Project, including without limitation covering exposed work, demobilizing, or completing work reasonably necessary to prevent the abandonment of a dangerous condition.

2. **Project.** The Project (herein so-called) consists of the improvement and expansion of a portion of the City's sewer line as more particularly shown and described in Exhibit "A", incorporated by reference for all relevant purposes as if set forth at length herein. The preliminary cost estimate for the Project is \$1,620,700 ("*Cost Estimate*"), which is further detailed in Exhibit "A", incorporated herein by reference. The Cost Estimate shall be updated prior to Construction. Construction of the Project shall begin no later than June 1, 2023, and shall be completed by no later than April 15, 2024.

3. **The City's Obligations.** The City agrees to utilize its best efforts to:

A. Either personally or through its agents and contractors furnish all bidding, contracting, construction, superintendence, administration, licenses, permits, facilities, tools, machinery, equipment, personnel, labor, materials and supplies necessary to complete the Project in the manner set forth herein.

B. Exercise reasonable precautions on behalf of the safety of its own officers, employees, agents, contractors, subcontractors, licensees, and other persons, as well as their personal property, while performing services hereunder.

C. Maintain all records relating to the Project and allow the District to inspect and copy such records at reasonable times, upon advance request.

D. Enforce all applicable rights and remedies of the "owner" under the contract documents as against any person or entity providing services in connection with the Project.

E. Include the District on the distribution list for all notices and correspondence related to material developments on the Project, invite the District to all meetings with engineers or contractors concerning the Project, and give the District reasonable advance notice of all such meetings except when urgent or unexpected developments make it not feasible to do so.

F. Promptly notify the District of any actual or potential accident or claim which might reasonably be expected to have a material adverse effect on the Project, including any contractor disputes and any incident involving injury, death, or damage to property.

G. Complete its obligations in accordance with all city, state and federal legal requirements, including, but not limited to, any design and construction requirements of city, state and/or federal authority, as applicable.

H. Complete its construction of the Project by no later than the date set forth above in Section 2, subject to force majeure provisions.

I. The City represents that funds are available for its portion of the full contract amount of the Project.

4. **KISD Obligations.** KISD agrees to:

A. Subject to applicable laws and regulations, promptly respond to any requests for information, guidance, instruction, clarification, or approval required by the District in connection with the Project.

B. Pay to the City fifty percent (50%) of the Project's costs not to exceed Seven Hundred Fifty Thousand and No/100 Dollars (\$750,000.00) for the complete construction of the Project. Notwithstanding any other provision herein, in no event shall KISD owe any payments in excess of the forgoing not-to-exceed amount. During construction, as often as every other week, the City may present KISD with progress payment requests proportionate to the approximate stage of completion, provided that the City shall not request payment from the District for any amount being withheld as retainage by the City with respect to contractors until such retainage is released to said contractors. KISD shall cause such payments to be made to the City within thirty (30) days following the receipt of a progress payment request.

C. Conduct regular review of the Project and promptly notify the City of any objection related to the work.

D. During the course of the Project, not attempt to communicate or contract with any of the City's design professionals, contractors or subcontractors, or suppliers concerning labor or materials to be incorporated into the Project, except with the express written consent of the City.

E. KISD represents that funds are available for its portion of the full contract amount of the Project.

5. **Joint Rights and Obligations.** The Parties mutually agree:

A. To meet regularly throughout the course of the Project to review the status, discuss any concerns that might arise, and coordinate any decisions materially affecting Project design, milestones, construction standards, or cost. Any Party may request a joint meeting for such purposes.

B. To reasonably endeavor to accommodate all reasonable instructions, requests and guidance of the other Party relating to the Project, provided that doing so does not increase the cost or delay the Project.

- C. Not to unreasonably interfere with or delay the Project.
- D. Not to unreasonably withhold, condition or delay any requested approval or consent made by a Party hereto.
- E. To cooperate in defending any legal action instituted by a third party challenging (i) the validity of one or more provisions of this Agreement; (ii) the state and local legislation authorizing the Parties to enter into this Agreement; or (iii) any discretionary action and approvals of either Party regarding permits or other entitlements issued pursuant to this Agreement.
- F. To reasonably coordinate efforts to provide for the timely relocation of any utilities that will be affected by the Project or to mutually agree upon such reasonable actions as are made necessary by such other utilities.
- G. To reasonably coordinate efforts to timely resolve any federal or state mandated environmental and related issues specific to the Project, to include without limitation issues arising under CWA, CAA, CERCLA or the Texas Antiquities Code.
- H. To promptly notify the other Party if at any time the notifying Party anticipates that it will be unable to comply with its obligations hereunder and state the reasons for anticipated noncompliance. Receipt of notification under this paragraph does not constitute a waiver of default by the non-defaulting party.
- I. To promptly execute and deliver any additional documents and instruments and to perform any additional acts reasonably necessary or appropriate to perform the terms, provisions and conditions of this Agreement and all transactions contemplated by this Agreement, or to correct any defect, error or omission that may be discovered in this Agreement or any documents executed incidental to it.
- J. Acknowledge that KISD must commence construction of the School by September 2022 prior to or contemporaneous with the construction and installation of the infrastructure improvements to be made by the City for a scheduled school opening in August 2024. Therefore, time is of the essence regarding completion of the Parties' respective obligations under this Agreement.

6. Additional Payment Terms.

- A. Within thirty (30) days following final completion of the Project, the City will prepare a final reconciliation of costs and notify the District of same. If the reconciliation reflects a deficiency in the sums owed by KISD hereunder, including any amounts owed for retainage that has subsequently been released to a contractor, the District will pay the deficient amount to the City within thirty (30) days after the City notifies KISD of the deficient amount, subject to the not-to-exceed amount set forth in Section 4(B). If the reconciliation reflects an overpayment in the sums owed by KISD hereunder, the City will immediately refund the excess to KISD. The District shall have the reasonable right to review and audit all records related to the Project as provided in Paragraph 3(C).

B. Each party paying for the performance of governmental functions or services must make those payments from current revenues available to the paying party.

7. **Force Majeure.** No Party shall be required to perform any term, condition or covenant hereunder for so long as performance is delayed or prevented by: acts of God; strikes; lockouts; orders or actions of any governmental or military authority; expropriation or confiscation of facilities; civil riots or disturbances; acts of war, terrorism, the public enemy, rebellion or sabotage; fires, floods, storms, epidemics, earthquakes, drought, explosions or other calamity; unavoidable accidents or breakdowns, or any other cause not reasonably within the control of the Party despite the exercise of due diligence by that Party. If a Party shall be delayed, hindered, or prevented from performance of any of its obligations by reason of force majeure, and such Party is not otherwise in default, the time for performance of such obligation shall be extended for the period of such delay, provided that the affected Party shall: (a) give prompt written notice to the other Party; (b) diligently attempt to remove, resolve, or otherwise eliminate such event, keep the other Party advised with respect thereto; and (c) commence performance of its obligations hereunder immediately upon such removal, resolution, or elimination. However, nothing contained in this paragraph shall be applied so as to: (a) permit any delay or time extension due to shortage of funds; or (b) excuse any nonpayment or delay in payment of sums due to a Party hereunder.

8. **Dispute Resolution.** Any dispute between the Parties related to this Agreement that is not resolved through informal discussion may be submitted to a mutually acceptable mediation service or provider. The Parties shall bear the mediation costs equally. Said mediation shall be non-binding; however, the Parties shall endeavor to resolve their disputes through this process in good faith. This paragraph does not preclude a Party from seeking equitable or other relief from a court of competent jurisdiction.

9. **Default and Remedies.**

A. Each of the following constitutes a material breach of this Agreement and an Event of Default by a Party: (i) failing to fully and timely perform any covenant of such Party under this Agreement; (ii) performing any act prohibited under this Agreement; and (iii) making any representation to another Party found to be materially false, misleading, or erroneous in connection with the Project.

B. If a Party should commit an Event of Default, the Party alleging such default shall give the defaulting Party not less than ten (10) days' notice specifying the nature of the alleged breach and, when appropriate, the manner in which the alleged breach may be satisfactorily cured. Notwithstanding the preceding sentence, if the nature of the alleged failure is such that the giving of ten (10) days' written notice is impractical due to a threat of harm to life or property, then the Party alleging the failure shall give such notice as may be reasonable under the circumstances.

C. In the event of an Event of Default that is not timely cured, the non-defaulting Party may (but shall not be obligated to), without prejudice to any other available right or remedy: (i) terminate this Agreement; (ii) seek recovery of any damage suffered; (iii) cure the default and receive reimbursement from the defaulting Party for all reasonable expenses incurred in doing so; (iv) discontinue payment or performance under this Agreement until

the default is cured; (v) exercise any other remedy granted by this Agreement or by applicable law; or (vi) any combination of the foregoing.

D. It is not a waiver of default if the non-defaulting Party fails to declare immediately a default or delays taking any action with respect to the default.

E. The prevailing Party in any dispute (including legal proceedings and appeals) arising out of this Agreement or the transaction described herein may recover reasonable attorneys' fees, expert witness fees, investigation costs, and other costs incurred in connection therewith from the non-prevailing Party, in addition to any other relief to which such prevailing Party is entitled. The term "prevailing Party" means the party most substantially obtaining the relief or benefit sought in the proceedings, whether by the other party abandoning its claims or defenses, or by final resolution through compromise, settlement, arbitration award or judgment.

10. **Notice.** All notices under this Agreement shall be in writing and (a) delivered personally to the person to whom the notice is to be given, (b) given by certified or registered mail, return receipt requested, or (c) given by e-mail or facsimile transmission. Notice given by mail shall be effective three (3) days (exclusive of Saturdays, Sundays and postal holidays) after the same is deposited in the United States Postal Service, properly post-paid and certified and addressed to the Party to be notified. Notice shall be effective only if and when actually delivered to the Party to be notified or at such Party's address for purposes of notice as set forth herein. A change in the notice address of any Party may be affected by serving written notice of such change and of such new address upon the other Party in the manner provided herein. Initially, notices shall be addressed as follows:

To Killeen:

Mr. Steve Kana
805 West Jasper Drive
Killeen, TX 76542
skana@killeentexas.gov

To KISD:

Mr. Adam Rich
P.O. Box 967
Killeen, TX 76540
adam.rich@killeenisd.org

11. **Miscellaneous.**

A. **Assignment of Contract.** No Party may assign this Agreement or any rights under the Agreement without the prior written consent of the other Party, and any attempted or purported assignment in the absence of such consent shall be void. However, nothing herein shall be construed to prevent the City from subcontracting as provided herein.

B. Binding Effect. Subject to the provisions regarding assignment, this Agreement shall be binding on the Parties and their respective representatives, successors and permitted assigns.

C. No Third-Party Beneficiaries. It is expressly understood and agreed that the enforcement of these terms and conditions shall be reserved to the Parties hereto, and nothing contained in this Agreement shall give or allow any claim or right of action whatsoever by any third person. Any person or entity other than the Parties hereto receiving services or benefits under this Agreement shall be deemed an incidental beneficiary only. Nothing herein shall be construed to waive or limit any defense or immunity available to either Party in response to any third-party claim.

D. Governing Law; Venue. The Parties agree that this Agreement has been made in Texas and that it shall be governed by and construed pursuant to the laws of the State of Texas, without regard to choice of law rules of any other jurisdiction. Venue for any action to construe or enforce this Agreement shall be in Bell County, Texas.

E. Severability. The provisions of this Agreement are severable. If a court or government agency of competent jurisdiction finds that any provision of this Agreement is unenforceable, the unenforceable provision shall be replaced, to the extent possible, with a legal, enforceable and valid provision that is as similar in tenor to the unenforceable provision as is legally possible, and the Agreement as so-modified shall be enforced to the greatest extent permitted by law, except when such construction would operate as an undue hardship on a Party, or constitute a substantial deviation from the general intent and purpose of such parties as reflected in this Agreement.

F. Interpretation. Each Party has carefully read this entire Agreement, understands the meaning and effect of each and every provision contained herein, and acknowledges that it has relied on its own judgment in entering into this Agreement. Each Party executes this Agreement only after first having obtained, or having had the opportunity to obtain, competent legal advice. The use of the masculine or neuter genders herein shall include the masculine, feminine and neuter genders. The singular form shall include the plural when the context requires. Headings used throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held to explain, restrict, modify, amplify or aid in the interpretation or construction of the meaning of the provisions of this Agreement. The terms "hereof," "hereunder" and "herein" shall refer to this Agreement as a whole, inclusive of all exhibits, except as otherwise expressly provided. This Agreement represents the result of extensive discussion between the Parties, and, thus, should not be construed strictly for or against any Party.

G. Amendment. The Parties agree that they may amend this Agreement only by a written agreement duly executed by persons authorized to execute agreements on behalf of the Parties.

H. Multiple Counterparts. To facilitate execution, this Agreement may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature or acknowledgment of, or on behalf of, each Party, or that the signature of all

persons required to bind any Party, or the acknowledgment of such Party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. It shall not be necessary in making proof of this Agreement to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, and the respective acknowledgments of, each of the Parties hereto. Any signature or acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures or acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature or acknowledgment pages.

I. Entire Agreement. This Agreement is the complete and exclusive statement of the mutual understanding of the Parties. This Agreement supersedes and cancels all previous written and oral agreements and communications between the Parties relating to the subject matter of this Agreement.

Signature Page Follows

CITY OF KILLEEN

**KILLEEN INDEPENDENT SCHOOL
DISTRICT**

By: _____
Kent Cagle, City Manager

By: _____
Dr. John Craft, Superintendent

Date: _____

Date: _____

