

**MINUTES  
OF  
CITY OF WHARTON  
REGULAR CITY COUNCIL MEETING  
JULY 14, 2003**

Mayor Bryce D. Kocian declared a Regular Meeting duly open for the transaction of business at 7:00 p.m. Councilmember Ken Freese led the opening devotion and then Mayor Bryce D. Kocian led the pledge of allegiance.

Councilmembers present were: Mayor Bryce D. Kocian, Councilmembers V. L. Wiley, Jr., Darryl Darnell, Ken Freese, Don Mueller, and Domingo Montalvo, Jr.

Councilmember absent was: None.

Staff members present were: City Manager, Andres Garza, Jr., Finance Director Joyce Vasut, Assistant to City Manager Jackie Jansky, Code Enforcement Officer Jimmy Nickolyn, City Attorney Paul Webb, Fire Chief David Copeland.

Visitors present were: Ron Sanders Wharton Journal-Spectator, WEDCo Executive Director David Schroeder, Carlos Cotton, Shelley Green, Dr. Merrell Barfield, Lewis Fortenberry, J. L. Roberts, I.O.Coleman, Jr., Bertha Edwards, Addie G. Plummer, Ray Linseisen, F. Kocian, Betty Well, McKinley Well, Jr., Ellis Hurd, Bernice Jackson, Karen Herzik, Ervin J. Herzik, Jr., Brent Herzik, Sam Harrell, Richard Arnold, Rivers Glover, I, Tomie Turner, Frank Turner, Curtis W. Evans, Scott Chambers, Carlton Scott, Janice Scott, Eddie L. Brinkley, Sr., Ben Evans, and Billie Jones.

The third item on the agenda was Public Comments. Mr. Ellis Hurd addressed the City Council and stated that he had previously requested streetlights be installed on the side streets off of FM 102. He said that he brought the streetlights to the City Council's attention approximately thirteen weeks ago. Mr. Hurd said that the streetlights have yet to be installed and requested again that the lights be installed. No action was taken.

The forth item on the agenda was Wharton Moment. Mayor Bryce D. Kocian stated that due to Tropical Storm Claudette, he and the City Staff had broadcast a message to the citizens of Wharton at 6:45 p.m. and that the message would be rebroadcast shortly after the City Council meeting. Mayor Kocian also stated that Governor Rick Perry had signed a proclamation regarding Americans with Disabilities (ADA) Awareness and that during the July 28, 2003 regular City Council meeting he would present a proclamation regarding ADA Awareness for the City of Wharton. No action was taken.

The fifth item on the agenda was to review and consider reading of the minutes from the regular meetings held June 9, 2003 and June 26, 2003 and the special meeting held June 30, 2003. After some discussion, Councilmember Donald Mueller made a motion to approve the minutes from the regular meetings held June 9, 2003 and June 26, 2003 and the special meeting held June 30, 2003. Councilmember Ken Freese seconded the motion. All voted in favor.

The sixth item on the agenda was to review and consider the appointment to vacant City Council Position No. 6. City Manager Andres Garza, Jr. stated that during the June 26, 2003 regular City Council meeting, Mayor Bryce D. Kocian requested the City Councilmembers to submit their recommendations for the vacant City Council Position No. 6 in writing. City Manager Garza presented three recommendations, which were as follows:

1. Mr. Gary Nunez recommended by Councilmember Domingo Montalvo, Jr.
2. Mr. Ray Linseisen recommended by Councilmember Donald Mueller.
3. Reverend Rivers Glover recommended by Councilmember Darryl Darnell.

Councilmember Donald Mueller made a motion to appoint Mr. Ray Linseisen to fill the vacant City Council Position No. 6 until the next General Election to be held in May 2004. Councilmember Ken Freese seconded the motion.

Mayor Bryce D. Kocian then opened the table for discussion. Councilmember Darryl Darnell stated that the Councilmembers should be able to talk to the three individuals recommended since he did not know two of them personally to be able to find out their views regarding city government. Councilmember Donald Mueller stated that all three candidates were worthy of the position and that Mr. Linseisen was a good citizen who participated in the Chamber of Commerce and Boy Scouts of America. Councilmember V. L. Wiley, Jr. stated that all three individuals should be voted on.

After some discussion, Mayor Bryce D. Kocian called for a City Council vote on the motion on the table made by Councilmember Donald Mueller. Councilmembers Donald Mueller, Ken Freese, and Domingo Montalvo, Jr. voted for the motion. Councilmembers V. L. Wiley, Jr. and Darryl Darnell voted against the motion. The motion carried.

The seventh item on the agenda was to review and consider an update on the City of Wharton Southern Pacific Railroad Depot Restoration Project. Dr. Merrell Barfield addressed the City Council and presented an update on the Southern Pacific Railroad Depot Restoration Project. He said that the Restoration Committee lacked approximately \$60,000 to fulfill their monetary obligations but they had several grant requests that have not yet been approved. He said that he felt that the grant responses would be positive. He said that the Restoration Committee was ready to go to work on the depot. He said that the main delay in the project was acquiring the property from the Texas Mexican Railway Company who was first notified in March 2003 that the City was ready to receive the donation of the building and property. Dr. Barfield stated that the railroad had changed hands three times since the Restoration Committee had begun the project. Councilmember Donald Mueller asked what the Restoration Committee would do if

they did not receive the 20% matching funds. Dr. Barfield stated that the project would be completed and that they would receive all the funds needed for the project. He said that people were less likely to donate money when they do not see any work being done on the project. After some discussion, no action was taken.

The eighth item on the agenda was to review and consider an update on the Beautification Commission Mural Painting Project. Dr. Merrell Barfield addressed the City Council and presented a report on the murals that have been painted at various locations in the City. He said that the Commission hoped to have more mural's painted in the City and that the next one planned would be located on the old Sol's Building and would include scene's regarding agriculture. He said that with the continued assistance from the Wharton Economic Development Corporation the Beautification Commission would continue to have murals painted in the City of Wharton. After some discussion, no action was taken.

The ninth item on the agenda was to review and consider a resolution approving the submission of an application for funding through the Texas Department of Agriculture/Office of Rural Community Affairs, Texas Capital Fund Real Estate Development / Infrastructure Grant Program for the Jr's Texas Best, LLC Project. City Manager Andres Garza, Jr. stated the City Council Finance Committee met July 10, 2003 and voted to recommend the City of Wharton submit an application to the Texas Department of Agriculture/Office of Rural Community Affairs, Texas Capital Fund Real Estate Development / Infrastructure Grant Program for the Jr's Texas Best, LLC Project. He said that he met with Mr. Scott Chambers and Mr. David Schroeder to discuss the project. He further stated that he and Mr. Schroeder contacted Ms. Kim Lacey of Municipal Development Services to determine if the project would be a viable project that could be considered for the Texas Capital Fund program. City Manager Garza said that Ms. Lacey indicated that this type of project would be a project that the State would consider and that it would compete with other projects. City Manager Garza said the attached draft resolution stated that the City was requesting \$750,000 because that was the maximum amount that could be requested. He said the money received from the grant would be used towards the construction of the building. Mayor Bryce D. Kocian commended Mr. and Mrs. Herzik and Mr. and Mrs. Scott Chambers for their consideration in creating a new business for the City of Wharton. Councilmember Ken Freese stated that the Finance Committee unanimously approved the project and also thanked both families. He said that they were bringing in a lot of their own equity into the project and that they had a lot of good ideas. After some discussion, Councilmember Ken Freese made a motion to approve the City of Wharton Resolution No. 2003-64 as follows:

**CITY OF WHARTON  
RESOLUTION NO. 2003-64**

**A RESOLUTION APPROVING AN APPLICATION FOR FUNDING THROUGH THE TEXAS DEPARTMENT OF AGRICULTURE/OFFICE OF RURAL COMMUNITY AFFAIRS TEXAS CAPITAL FUND REAL ESTATE DEVELOPMENT/INFRASTRUCTURE GRANT PROGRAM FOR THE JR'S TEXAS BEST, LLC PROJECT.**

**BE IT RESOLVED** by the City Council of the City of Wharton, Texas as follows:

SECTION 1.

The City of Wharton, Texas hereby approves an application for:

Real Estate Development Funds to benefit Jr's Texas Best, LLC	\$700,000.00
Administration Grant	<u>\$ 50,000.00</u>
	\$750,000.00

SECTION 2.

The City of Wharton hereby agrees to comply with all assurances executed in connection with the application and, if funded, the award.

SECTION 3.

The Mayor is hereby authorized and directed to act on the City's behalf in all matters pertaining to this application.

SECTION 4.

The City has reviewed and hereby agrees not to participate in program income recapture and will return all program income to the state to be placed in a statewide Revolving Loan Fund to be used by the state to fund future economic development awards. By agreeing to this measure, the City understands that it will be eligible to receive as many Texas Capital Fund awards per program year as it has eligible projects. This determination must be made at the time the original award is made and cannot be changed with subsequent awards for this program year or retroactively in subsequent program years.

PASSED AND ADOPTED at a regular meeting of the City Council on July 14, 2003 by the following vote:

AYES: Five                      NAYES: Zero                      ABSENT: None

CITY OF WHARTON

\_\_\_\_\_  
BRYCE D. KOCIAN, Mayor

ATTEST:

\_\_\_\_\_  
JOYCE VASUT, City Secretary

Councilmember Donald Mueller seconded the motion. All voted in favor.

The tenth item on the agenda was to review and consider the request for variance by Mr. Wortham Smith, The Villages of Wharton, County located at 7100 Highway 59, 32.486 acre tract of land in the A. Jackson Timber League, Abstract 34, Wharton County, Texas, for a 0-foot (zero) front yard setback variance for the placement of a building. City Manager Andres Garza, Jr. stated that during the regular June 26, 2003 Wharton City Council meeting, the City Council tabled Mr. Smith's request pending approval by the Texas Department of Transportation. After some discussion, Councilmember Donald Mueller requested the item to

continue to be tabled until Mr. Smith clarified to the City Council that the building would not be located in the Texas Department of Transportation's right-of-way. No action was taken.

The eleventh item on the agenda was to review and consider the recommendation from the Planning Commission:

- A. Request by Mr. and Mrs. David Clayton for a front yard and interior side yard setback variance for the installation of a 22 x 21 metal carport, located at 511 Lazy Lane, Mayfair, Block 11, Lots 9A and 10.

City Manager Andres Garza, Jr. stated that Mr. and Mrs. David Clayton's request was presented to the Planning Commission during their meeting held July 7, 2003 and that the Planning Commission was recommending the City Council to consider approving the request. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion to approve the request by Mr. and Mrs. David Clayton for a front yard and interior side yard setback variance for the installation of a 22 x 21 metal carport, located at 511 Lazy Lane, Mayfair, Block 11, Lots 9A and 10. Councilmember Darryl Darnell seconded the motion. All voted in favor.

- B. Request by Mr. Max L. Brod for a variance to place a 30 x 40 home over the interior property lines located at 2319 North Fulton, Ahldag Addition, Block 12, Lots 12A-1-1 and 12A 1-1A.

City Manager Andres Garza, Jr. stated that Mr. Max L. Brod's request was presented to the Planning Commission during their meeting held July 7, 2003 and that the Planning Commission was recommending the City Council to consider approving the request. He stated that Mr. Brod owned all of the property where the home would be placed. After some discussion, Councilmember Ken Freese made a motion to approve the request by Mr. Max L. Brod for a variance to place a 30 x 40 home over the interior property lines located at 2319 North Fulton, Ahldag Addition, Block 12, Lots 12A-1-1 and 12A 1-1A. Councilmember Domingo Montalvo, Jr. seconded the motion. All voted in favor.

The twelfth item on the agenda was to review and consider the request by Councilmember Darryl Darnell to discuss the City of Wharton Code of Ordinances regarding aboveground and in-ground swimming pools. City Manager Andres Garza, Jr. stated that on July 2, 2003, Councilmember Darryl Darnell requested that he place the City of Wharton Code of Ordinances regarding above-ground and in-ground swimming pools on the agenda for discussion. City Manager Garza stated that he provided in the City Council packets a copy of the City of Wharton Code of Ordinances Chapter 34-58 Public Nuisance which references swimming pools and a copy of the 2000 International Residential Code, Appendix G, Swimming Pools, Spas, and Hot Tubs. Councilmember Darryl Darnell stated that several citizens had contacted him in his district regarding the safety of the manufactured pools and that he had noticed that there were many manufactured pools being placed at citizen's residences in the City. Councilmember Darnell stated that one woman had a concern that a pool had to be four feet deep before requiring a fence or barrier to be placed around the pool. He said her concern was regarding the pools that were 24" to 36" inches deep. Councilmember Ken Freese stated that the City Councilmembers should review the ordinance

and submit their recommendations to the Building Standards Commission for their review. After some discussion, Mayor Bryce D. Kocian requested the City Councilmembers to submit their recommendations on proposed changes regarding the City of Wharton Code of Ordinances regarding above-ground and in-ground swimming pools to City Manager Andres Garza, Jr. to be presented to the Building Standards Commission. No action was taken.

The thirteenth item on the agenda was to review and consider the City of Wharton Streetlight Project. City Manager Andres Garza, Jr. stated that on May 12, 2003, the City Staff presented a streetlight project to the City Council. He said during that meeting, the City Council directed the City Staff to contact Center Point to determine the project cost. City Manager Garza stated that Public Works Director Phil Bush then met with Mr. Clarence Amos of Center Point who, together, conducted a survey of the City to determine where streetlights should be installed. City Manager Garza said that Mr. Bush and Mr. Amos determined that seventy-seven lights could be installed with only incurring a monthly service cost, which was estimated to be approximately \$3,927 annually. He further stated that approximately forty additional streetlights were requested in different locations in the City and that Mr. Amos told the City Staff that he would prepare a cost estimate of the installation of wood poles, transformers, and boring for the additional lights. City Manager Garza said that a meeting had been scheduled with Mr. Amos next week to discuss the additional costs.

City Manager Garza also said that some of the proposed streetlights were some that Mr. Ellis Hurd addressed during the public comments. He also said that on the additional streetlights, the City would need to determine if wood poles would be used or aluminum poles. City Manager Garza said that the wood poles would cost approximately \$450.00 each to install plus a monthly fee of approximately \$4.00 for utility service. He further stated the aluminum poles would cost approximately \$13.00 per month plus \$4.00 for utility service. After some discussion, Councilmember Donald Mueller made a motion to request Center Point to install the seventy-seven streetlights which have no installation cost. Councilmember Domingo Montalvo, Jr. seconded the motion. All voted in favor.

City Manager Andres Garza, Jr. stated that he would bring the cost of the additional streetlights to the City Council for consideration during the next regular City Council meeting.

The fourteenth item on the agenda was to review and consider the resolution authorizing the Mayor of the City of Wharton to execute an agreement with Wal-Mart to comply with Texas Capital Fund requirements. City Manager Andres Garza, Jr. stated that agreement outlined the obligations of the City of Wharton and Wal-Mart to comply with the requirements of the Texas Capital Fund program. He said the agreement had been reviewed by Wal-Mart attorneys, City of Wharton Attorney Paul Webb and representatives of the Texas Department of Agriculture, the agency responsible for the Texas Capital Fund Program. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion to approve the City of Wharton Resolution No. 2003-65 as follows:

**CITY OF WHARTON  
RESOLUTION NO. 2003 - 65**

**A RESOLUTION AUTHORIZING THE MAYOR OF THE CITY OF WHARTON TO EXECUTE AN AGREEMENT WITH WALMART TO COMPLY WITH THE TEXAS CAPITAL FUND REQUIREMENTS.**

**WHEREAS,** the Wharton City Council wishes to authorize the Mayor of the City of Wharton, Texas to execute an agreement with Wal-Mart to comply with the Texas Capital Fund requirements.

**WHEREAS,** the City of Wharton and Wal-Mart Company wishes to be bound by the conditions as set forth in Attached "A".

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WHARTON, TEXAS** as follows:

**Section I.** That the Wharton City Council hereby authorizes the Mayor of the City of Wharton, Texas to execute an agreement with Wal-Mart to comply with the Texas Capital Fund requirements.

**Section II.** That the City of Wharton and Wal-Mart and the City of Wharton are hereby bound by the conditions as set forth in the Attached "A".

**Section III.** That this resolution shall become effective immediately upon its passage.

**Passed, Approved, and Adopted** this the 14<sup>th</sup> day of July 2003.

**CITY OF WHARTON**

By: \_\_\_\_\_  
**BRYCE D. KOCIAN**  
Mayor

**ATTEST:**

\_\_\_\_\_  
**JOYCE VASUT**  
City Secretary

**CONTRACTOR/COMPANY AGREEMENT  
TEXAS CAPITAL FUND**

This **CONTRACTOR/COMPANY AGREEMENT** (this "Agreement") is made and entered into by and between the **City of Wharton, Texas**, a Texas home rule city (the "City") and **Wal-Mart Stores Texas, L.P.**, a Texas limited partnership ("Wal-Mart") effective as of the last date written herein.

W I T N E S S E T H:

WHEREAS, Wal-Mart intends to construct a Wal-Mart SuperCenter (the "Project") on a tract of land containing approximately 18.70 acres located within the city limits of the City of Wharton (the "Property"); and

WHEREAS, the City does not currently provide water and sanitary sewer service to the Property and adequate drainage does not exist to serve the Project; and

WHEREAS, as an inducement to Wal-Mart to construct the Project, the City and Wal-Mart entered into a Utility Construction Agreement executed on March 14, 2003 whereby the City agreed to design and construct water and sewer facilities and drainage channel improvements to serve the Project (the "Infrastructure Project"); and

WHEREAS, the City has applied for a Texas Capital Fund grant to pay the cost of all or a portion of the Infrastructure Project; and

WHEREAS, pursuant to the terms of 10 TAC §255.7, the City and the Texas Department of Agriculture have entered into a Contract for The Texas Capital Fund (the "Grant Contract"); and

WHEREAS, Section 22 of the Grant Contract requires that the City enter into a Contractor/Company Agreement with Wal-Mart as a condition of the receipt of funds pursuant to the Grant Contract;

NOW, THEREFORE, for and in consideration of the mutual promises, covenants and agreements contained herein, the sufficiency of which is hereby acknowledged, the City and Wal-Mart hereby agree as follows:

**JOB CREATION:**

- (a) Wal-Mart and/or an affiliate of Wal-Mart (the “Company”) shall create a minimum of one hundred (105) new permanent jobs at the Project. Of these one hundred (105) jobs, a minimum of fifty-one (51) new full-time permanent jobs shall be filled by persons classified as low and moderate income persons as defined by the current U.S. Department of Housing and Urban Development Section 8 Housing Assistance Program for Existing Housing Income Guidelines for the County of Wharton, Texas. In the event more than one hundred (105) new permanent jobs are created during the term of this Agreement, the Company shall ensure that at least fifty-one percent (51%) of all jobs created are made available to low and moderate income persons. The Company shall submit to the City (i) a copy of the Company’s starting payroll stating the number of persons employed at the Project as of the date of execution of the Grant Contract to establish a benchmark or (ii) a letter stating that the Company has no employees at the Project as of the date of execution of the Grant Contract. At a minimum the payroll shall provide the full name, social security number, and an indication of whether the employee is full or part time. An ending payroll stating the number of persons employed at the Project as of the expiration of the term of this Agreement shall also be submitted to the City to document the number of permanent jobs created and identify the low/moderate income persons.
  
- (b) For purposes of this Agreement, a permanent job is defined as full-time, permanent employment for 1,820 hours or more a year or 35 hours or more per week per person on an annualized basis and a part-time job is defined as part-time permanent employment for at least 1, 040 hours per year or 20 hours or more per week per person on an annualized basis. Two part-time jobs shall equal one full-time job. Employees working less than 20 hours per week may not be counted individually or in combination/aggregate towards meeting the job creation requirements set forth in Section 1(a) of this Agreement. Seasonal jobs are not eligible for consideration as either full-time or part-time jobs.
  
- (c) The jobs required to be created hereunder must be filled prior to the expiration of three (3) years from the date of execution of the Grant Contract. Upon the request of the Company, the City shall request extensions of the time for the completion of the job creation requirements contained in Section 1(a) of this Agreement.

**HIRING:** The Company may utilize the services of either the Houston Galveston Council of Governments and/or the Texas Workforce Commission to assist in locating and training qualified low and moderate-income persons to fill employment positions created as part of the Project. In lieu of using either of the above organizations, the Company may document compliance with the low and moderate income hiring requirements by requiring all employees hired to complete a Family Size/Income Certification form provided by the City.

**EMPLOYEE CERTIFICATION REPORT:** During the term of this Agreement, City shall submit to the Department of Agriculture a completed Employee Certification Report no later than the tenth (10<sup>th</sup>) day of the second month after the end of each calendar quarter.

**OBLIGATIONS OF THE CITY:** THE City agrees to construct the Infrastructure Project in accordance with the Utility Construction Agreement and the Performance Statement, a copy of which is attached hereto as Exhibit B.

**REPAYMENT OF GRANT FUNDS:** In the event the Company does not fulfill its job creation obligations as set forth in Section 1(a), the Company shall pay the City an amount equal to \$9,524.00 for each new permanent job not created and/or filled; provided, however, in no event shall the Company be liable to pay the City in excess of \$1,000,000.00.

**TAXES:** The Company hereby certifies that all taxes related to the Project are current and that all future taxes shall be paid when due during the term of this Agreement; provided, however that the Company shall have the right to contest, protest and/or challenge the amount of or liability for any taxes and shall not be considered to be in default under this Agreement as long as such contest, protest or challenge is pending.

**QUARTERLY ON-SITE VISITS:** The City shall make quarterly on-site visits to the Company at the Project to assess/monitor the Company's progress toward the job creation requirements of this Agreement. The Company shall provide the information regarding job creation at the time of on-site visits. All on-site visits shall be made during normal business hours with at least three- (3) business days advance notice to Company. In addition to the notice given pursuant to Section 11, notice of such visits shall be given to the Store Manager of the Wal-Mart SuperCenter.

**RECORDS:** The Company shall maintain records and provide the reports regarding the documentation of low and moderate-income benefit. The Company shall also be required to submit to the City each Texas Workforce Commission Quarterly Contribution Report Form C-3 filed during the term of this Agreement along with an accounting of the number of employees currently employed at the Project in order that the City may prepare the Employee Certification Report for submission to the Department of Agriculture. This information will be given to City no later than fifteen days after the calendar quarter end.

**CONSTRUCTION OF THE PROJECT:** The Company has commenced construction of the Project and estimates that it will expend at least \$4,000,000.00 million dollars to complete the construction of the Project.

**EVENTS OF DEFAULT:**

- (a) It shall be an event of default hereunder if the Company shall (i) fail to meet the job creation requirements set forth in Section 1 of this Agreement or (ii) fail to comply with or perform any of its other obligations under this Agreement.
- (b) The City shall notify the Company in writing of any event of default. The notice shall specify the basis of the default and the Company shall have ninety (90) days from the date of receipt of such notice to cure any default; provided however, where the cure of any default requires more than ninety (90) days, the cure shall be commenced within ninety (90) days after the receipt of the notice of default and the Company shall diligently proceed to cure the default. If the default involves a failure to meet the job creation requirements of Section 1 and cannot be cured, or if the Company fails to commence and diligently proceed cure such default within the period specified, the Company must pay the City the amount as calculated pursuant to Section 5 of this Agreement. Payment of the amount due to the City pursuant to Section 5 shall be the City's sole remedy for the Company's breach of the terms and conditions of this Agreement relating to a failure to meet the job creation requirements of Section 1.

**NOTICES:** Any notice provided or permitted to be given under this Agreement must be in writing and may be served by (i) depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, registered or certified mail, return receipt requested; or (ii) by delivering the same in person to such party; or (iii) by overnight or messenger service that retains regular records of delivery and receipt. All notices shall be effective on the date of receipt or refusal of service. The initial addresses of the parties for the purpose of notice under this Agreement shall be as follows:

If to the City: City of Wharton  
Attn: Andres Garza, Jr.  
City Manager  
120 East Caney  
Wharton, Texas 77488

If to Wal-Mart: Matt Smith  
Wal-Mart Stores, Inc.  
Real Estate and Construction Legal Division  
2001 S.E. Tenth Street  
Bentonville, Arkansas 72716-0550  
Reference: Store No. 383-01

With a copy to: Bruce Wickline, Esq.  
Wal-Mart Stores, Inc.  
Real Estate and Construction Legal Division  
2001 S.E. Tenth Street  
Bentonville, Arkansas 72716-0550  
Reference: Store No. 383-01

Each party hereto, its successors and assigns, shall have the right from time to time by giving written notice in the manner described above to the other party hereto, to change its address for notices hereunder.

**AMENDMENT:** This Agreement may only be amended by an instrument in writing executed by all the parties hereto.

**WAIVER:** The failure of any party to insist in any one or more instances on the performance of any of the terms, covenants and conditions of this Agreement, or to exercise any of its rights, shall not be construed as a waiver or relinquishment of the performance of such term, covenant, condition or right with respect to future performance.

**MULTIPLE COUNTERPARTS:** This Agreement may be executed in multiple counterparts, each one of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument.

**RECITALS:** The parties agree that the Recitals set forth above in this Agreement are true and correct, and the representations, covenants and recitations set forth therein are made a part hereof for all purposes.

**COOPERATION:** The parties hereto agree to take such actions, including the execution and delivery of such documents, instruments, petitions, estoppels, and certifications, as may be necessary or appropriate, from time to time, to carry out the terms, provisions and intent of this Agreement and to advise third parties of the respective rights and obligations of the parties hereunder.

**CONDITION TO OBLIGATION; EFFECTIVENESS:** The obligations of the parties to this Agreement are conditioned upon the execution and funding of the Grant Contract. This Agreement shall be effective from and after its execution by both the City and Wal-Mart.

**AUTHORITY OF CITY:** The City hereby represents and warrants to Wal-Mart that the City has full lawful right, power and authority, under currently applicable law, to execute, deliver and perform the terms and obligations of this Agreement, and all of the foregoing have been or will be duly and validly authorized and approved by all necessary City proceedings, findings and actions. Accordingly, this Agreement constitutes the legal, valid and binding obligation of the City, is enforceable in accordance with its terms and provisions and does not require the consent of any other governmental authority.

**AUTHORITY OF WAL-MART:** Wal-Mart hereby represents and warrants to the City that Wal-Mart has full lawful right, power and authority to execute and deliver and perform the terms and obligations of this Agreement and all of the foregoing have been or will be duly and validly authorized and approved by all necessary actions of Wal-Mart. Accordingly, this Agreement constitutes the legal, valid and binding obligation of Wal-Mart, and is enforceable in accordance with its terms and provisions.

**INVALIDITY:** In the event that any of the provisions contained in this Agreement shall be held unenforceable in any respect, such unenforceability shall not affect any other provisions

of this Agreement and, to that end, all provisions, covenants, agreements or portions of this Agreement are declared to be severable.

**SUCCESSORS AND ASSIGNS:** No party to this Agreement shall have the right to assign its rights under this Agreement or any interest herein, without the prior written consent of the other party, except that Wal-Mart may assign its rights and responsibilities hereunder without the City's consent to any party which acquires the Project from Wal-Mart in a bona fide arm's length transaction or to any entity owned by, controlled by or affiliated with Wal-Mart.

**EXHIBITS, TITLES OF ARTICLES, SECTIONS AND SUBSECTIONS:** The exhibits attached to this Agreement are incorporated herein and shall be considered a part of this Agreement for the purposes stated herein, except that in the event of any conflict between any of the provisions of such exhibits and the provisions of this Agreement, the provisions of this Agreement shall prevail. All titles or headings are only for convenience of the parties and shall not be construed to have any effect or meaning as to the agreement between the parties hereto. Any reference herein to an exhibit shall be considered a reference to the applicable exhibit attached hereto unless otherwise stated.

**ENTIRE AGREEMENT:** This written agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral or written agreements of the parties. There are no unwritten oral agreements between the parties relating the subject matter hereof. All prior negotiations, writings, discussions, correspondence, and preliminary understandings between the parties hereunder and others relating hereto are superseded by this Agreement.

**INTERPRETATION:** This Agreement has been jointly negotiated by the parties hereunder and shall not be construed against a party hereunder because that party may have assumed primary responsibility for the drafting of this Agreement.

**TERM OF AGREEMENT:** The term of this Agreement shall commence upon the execution of the Grant Contract and shall end upon the expiration of three (3) years from the date of execution of the Grant Contract.

IN WITNESSETH HEREOF; the Wal-Mart and the City have executed this Agreement as of the latest date indicated below.

**WAL-MART STORES TEXAS, LP,**  
A Texas Limited Partnership

By: \_\_\_\_\_

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

**CITY OF WHARTON, TEXAS**

By: \_\_\_\_\_  
Bryce D. Kocian  
Mayor, City of Wharton

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

Councilmember Donald Mueller seconded the motion. All voted in favor.

The fifteenth item on the agenda was to review and consider a resolution authorizing the Mayor of the City of Wharton to execute an agreement with Jones & Carter, Inc. for professional engineering services for the construction phase of the Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter Project. City Manager Andres Garza, Jr. stated that during the June 26, 2003 regular Wharton City Council meeting, the City Council authorized the City Staff to request proposals for professional engineering services for the construction phase of the Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter project. He said on July 7, 2003 the City of Wharton received proposals for the procurement of professional engineering services for the project. City Manager Garza told the City Council that requests for proposals were sent to Mr. Don Naiser of El Campo, Texas, Carter & Burgess, Inc., Anthony Rachunek & Associates, Inc., Jones & Carter, Inc. and Kimley-Horn & Associates. He said that Jones & Carter was the only firm to submit a proposal. City Manager Garza said that the City Council Consultant Selection Committee met July 10, 2003 and voted to recommend the City Council consider contracting with Jones & Carter for professional engineering services for the construction phase of the Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter Project with the contract amount not to exceed \$74,000. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion to approve the City of Wharton Resolution No. 2003-66 which as follows:

**CITY OF WHARTON  
RESOLUTION NO. 2003 - 66**

**A RESOLUTION AUTHORIZING THE MAYOR OF THE CITY OF WHARTON TO EXECUTE AN AGREEMENT JONES AND CARTER, INC. FOR PROFESSIONAL ENGINEERING SERVICES FOR THE CONSTRUCTION PHASE OF THE TEXAS CAPITAL FUND CONTRACT NO. 722202- WAL-MART SUPERCENTER PROJECT.**

**WHEREAS,** on July 7, 2003, requests for proposals were received for professional engineering services for the construction phase of the City of Wharton Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter Project; and

**WHEREAS,** the City of Wharton City Council wishes to award the contract to Jones & Carter, Inc.; and

**WHEREAS,** Jones & Carter, Inc. wishes to accept a contract professional engineering services for the City of Wharton Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter Project for the total cost not to exceed \$74,000; and

**WHEREAS,** the City of Wharton and Jones & Carter, Inc. wish to be bound by the conditions as set forth in the contract for the project.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WHARTON, TEXAS** as follows:

**Section I.** That the City Council of the City of Wharton hereby authorizes the Mayor of the City of Wharton to execute an agreement with Jones & Carter, Inc. for professional engineering services for the construction phase of the City of Wharton Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter Project.

**Section II.** That the City of Wharton and Jones & Carter, Inc. are hereby bound by the conditions as set forth in the contract for the project.

**Section III.** That this resolution shall become effective immediately upon its passage.

**Passed, Approved, and Adopted** this 14<sup>th</sup> of July 2003.

**CITY OF WHARTON, TEXAS**

**By:**

\_\_\_\_\_

**BRYCE D. KOCIAN**  
Mayor

**ATTEST:**

\_\_\_\_\_

**JOYCE VASUT**  
City Secretary

**PROFESSIONAL ENGINEERING SERVICES  
PART I – AGREEMENT**

**THIS AGREEMENT, is executed and effective this 15<sup>th</sup> day of July 2003, by and between the CITY OF WHARTON, hereinafter called the "City", acting herein by its Mayor hereunto duly authorized, and JONES & CARTER, INC., an independent contractor, hereinafter called "Firm", acting herein by Carlos P. Cotton, P.E., Chief Operations Officer.**

**WITNESSETH THAT:**

**WHEREAS, the City of Wharton desires to make infrastructure improvements (wastewater, water system, and drainage improvements) for the proposed Wal-Mart Super Center Project located in the City of Wharton, Wharton County, Texas under the Texas Community Development Program (see Project Identification); and Whereas the City desires to engage Jones & Carter, Inc. (Firm) to render certain professional engineering services in connection with the construction phase of its Project.**

NOW THEREFORE, the parties do mutually agree as follows:

1. Scope of Services

Part II, Scope of Services, is hereby incorporated by reference into this Agreement.

2. Time of Performance – The services of Firm shall commence on July 15, 2003. In any event, all of the services required and performed hereunder shall be completed no later than December 6, 2003. (See Attached Part III “Payment Schedule.”)

3. Access to Information – It is agreed that all information, data, reports and records, and maps as are existing, available, and necessary for the carrying out of the work outlined above shall be furnished to Firm by the City and its agencies. No charge will be made to Firm for such information and the City and its agencies will cooperate with Firm in every way possible to facilitate the performance of the work described in the Agreement.

4. Compensation & Method of Payment – The maximum amount of compensation and reimbursement to be paid hereunder shall not exceed \$74,000. Payment to Firm shall be based on satisfactory completion of identified milestones outlined in Part III – Payment Schedule of this Agreement (hereby incorporated into this Agreement by reference), as determined by Wharton in consultation with Firm. Wharton agrees to promptly pay Firm at its office in Harris County, Texas, the full amount of each such invoice upon receipt. A charge of 0.75% per month will be added to the unpaid balance of invoices not paid within thirty (30) days after date of invoice.

5. **Indemnification** – FIRM SHALL INDEMNIFY AND SAVE HARMLESS THE CITY OF WHARTON AND THEIR COUNCIL MEMBERS, OFFICERS, SERVANTS AND EMPLOYEES FROM ALL SUITS, ACTIONS, LOSSES, DAMAGES, CLAIMS, OR LIABILITY OF ANY CHARACTER, TYPE, OR DESCRIPTION, INCLUDING WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, ALL EXPENSES OF LITIGATION, COURT COSTS, AND REASONABLE ATTORNEY'S FEES FOR INJURY OR DEATH TO ANY PERSON, OR INJURY TO ANY PROPERTY, RECEIVED OR SUSTAINED BY ANY PERSON OR PERSONS OR PROPERTY, TO THE EXTENT ARISING OUT OF, OR OCCASIONED BY, THE NEGLIGENT ACTS OF FIRM OR ITS AGENTS OR EMPLOYEES, IN THE EXECUTION OF PERFORMANCE OF THIS AGREEMENT.

**FIRM'S TOTAL LIABILITY TO CITY FOR ANY LOSS OR DAMAGES FROM CLAIMS ARISING OUT OF, OR IN CONNECTION WITH, THIS AGREEMENT FROM ANY CAUSE INCLUDING FIRM'S STRICT LIABILITY, BREACH OF CONTRACT, OR PROFESSIONAL NEGLIGENCE, ERRORS AND OMISSIONS SHALL NOT EXCEED THE RESPECTIVE AND APPROPRIATE LIMITS OF THE FIRM'S VARIOUS LIABILITY INSURANCE COVERAGES AS SPECIFIED**

**HEREIN. CITY HEREBY RELEASES FIRM FROM ANY LIABILITY EXCEEDING SUCH AMOUNTS.**

- 6. Insurance Requirements. Prior to the commencement of any work under this Agreement, Firm shall furnish a completed Certificate of Insurance to Wharton. The Certificate of Insurance shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits and termination provisions shown thereon, and which shall furnish and contain all required information referenced or indicated thereon. Wharton shall have no duty to pay or perform under this Agreement until such certificate shall have been delivered to Wharton and no officer; employee or agent of Wharton shall have the authority to waive this requirement.**

Wharton reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverage and their limits when deemed necessary and prudent by Wharton based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement, but in no instance will Wharton allow modification whereupon Wharton may incur increased risk.

The Firm's financial integrity is an essential consideration for Wharton, therefore, subject to the Firm's right to maintain reasonable deductibles in such amounts as are approved by Wharton, Firm shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Firm's sole expense, certain insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to Wharton, in the following coverage types and in not less than the following amounts:

	TYPE	AMOUNT
a.	Worker's Compensation	Statutory Limits
b.	Employer's Liability	\$500,000 per occurrence
c.	Business Automobile Liability for all vehicles	Bodily injury and property damage – \$500,000 combined single limit each occurrence
d.	Commercial General Liability Insurance to include coverage for the following: (1) Premises operation (2) Independent contractors (3) Products/completed operations (4) Contractual liability	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence.

5. **Firm agrees to maintain professional architectural errors and omissions liability insurance in the amount of not less than one million dollars (\$1,000,000) annual aggregate, on a claims made basis, as long as reasonably available in the marketplace under standard policies.**

**Wharton shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements thereto as they apply to the limits required by Wharton, and may make a reasonable request for deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Upon such request by Wharton, Firm shall exercise reasonable efforts to accomplish such changes and policy coverage, and shall pay the cost thereof.**

**Firm agrees that with respect to the above requirements, all insurance Contracts and Certificate(s) of Insurance will contain the following required provisions.**

- a. Name City of Wharton, and its respective Council members, officers, employees, and representatives as additional insureds with respect to operations and activities of, or on behalf of, the named insured performed under Agreement with the City of Wharton, with the exception of the workers' compensation and any professional liability policies which consultant may carry.
- b. Appropriate insurance coverage shall include coverage for Firm's indemnity obligations contained in the Agreement.
- c. Provide for an endorsement that the "other insurance" clause shall not apply to the City of Wharton, as an additional insured shown on the policy.
- d. Workers' compensation and employers' liability policy will provide a waiver of subrogation in favor of the City of Wharton.

**Firm and/or insurance underwriter shall notify Wharton in the event any notice of cancellation, non-renewal or material change in coverage occurs and shall give such notices not less than thirty (30) days prior to the change, or cancellation due to non-payment of premiums, which notice must be accomplished by a replacement Certificate of Insurance. All notices shall be given to Wharton at the following address:**

- (i) City of Wharton
- (a) *City Manager*
- (b) *120 E. Caney Street*  
Wharton, Texas 77488

**If Firm fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, Wharton may obtain such insurance, and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement; however, procuring of said insurance by Wharton is an alternative to the other remedies Wharton may have, and is not the exclusive remedy for failure of Firm to maintain said insurance or secure such endorsement. In addition to any other remedies, Wharton may have upon Firm's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, Wharton shall have the right to order Firm to stop work hereunder, and/or withhold any payment(s) which become due to Firm hereunder, until Firm demonstrates compliance with the requirements hereof.**

**Nothing herein contained shall be construed as limiting in any way the extent to which Firm may be held responsible for payments of damages to persons or property resulting from Firm's, its employees' or agents' performance of work covered under this Agreement.**

7. Miscellaneous Provisions

- a. This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Wharton County, Texas.
- b. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns where permitted by this Agreement.
- c. In any case where one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision, or portion thereof, had never been contained herein.
- d. If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which such party may be entitled.
- e. This Agreement may be amended by mutual agreement of the parties hereto in a writing to be attached to and incorporated into this Agreement.

8. Terms and Conditions – This Agreement is further subject to the provisions titled, "Part IV Terms and Conditions" and attached hereto and incorporated herein by this reference.

**IN WITNESSETH HEREOF, the parties have hereunto set their hands.**

CITY OF WHARTON

FIRM

BY: \_\_\_\_\_

**Bryce D. Kocian**

**Mayor**

BY: \_\_\_\_\_

**Carlos P. Cotton, P.E.**

**Chief Operations Officer**

**ATTEST:    ATTEST:**

\_\_\_\_\_  
Joyce Vasut  
City Secretary

**PART II**  
**PROFESSIONAL ENGINEERING SCOPE OF SERVICES**

**The Engineering Firm shall render the following professional services necessary for the development of the project.**

**SCOPE OF SERVICES**

1. Attend conferences with the Locality regarding the requirements of the project
2. Provide construction staking for contractor.
3. Provide a Field Project Representative to make regular visits to the site to observe the progress and quality of the work, and to determine in general if the work is proceeding in accordance with the Contract
4. Consult with and advise the Locality during construction; issue to contractors all instructions requested by the Locality; and prepare routine change orders if required, at no charge for engineering services to the Locality when the change order is required to correct errors or omissions by the Engineer, provide price analysis for change orders; process and submit change orders to Texas Department of Agriculture for approval prior to execution by Locality.
5. Review shop and working drawings furnished by contractors for compliance with design concept and with information given in contract documents (contractors will be responsible for dimensions to be confirmed and correlated at job site).
6. Based on the Engineer's on-site observations and review of the contractors applications for payment, determine the amount owing to the contractor in such amounts; such approvals of payment to constitute a representation to the Locality, based on such observations and review, that the work has progressed to the point indicated and that the quality of work is in accordance with the plans, specifications, and contract documents.
7. Require that a 10% retainage be withheld from all payments on construction contracts until final acceptance by the Locality and approval by Texas Community Development Program, unless State or local law provides otherwise.
8. Prepare Certificate of Construction Completion and Clean Lien Certificate.
9. Conduct interim/final inspections.
10. Revise contract drawings to show the work as actually constructed, and furnish the Locality with a set of "as built" plans in paper and electronic format (Auto Cad).

## SUBCONTRACTS

1. No work under this Contract shall be subcontracted by Engineer, without prior approval, in writing, from the Locality.
2. The Engineer shall, prior to proceeding with the work, notify Locality in writing of the name of any subcontractors proposed for the work, including the extent and character of the work to be done by each.
3. If any time during progress of the work, the Locality determines that any subcontractor is incompetent or undesirable, the Locality will notify the Engineer who shall take reasonable and immediate steps to satisfactorily cure the problem, substitute performance, or cancel such subcontract. Subletting by subcontractors shall be subject to the same regulations. Nothing contained in this Contract shall create any contractual relation between any subcontractor and Locality.
4. The Engineer will include in all contracts and subcontracts of amounts in excess of \$100,000 a provision which requires compliance with all applicable standards, orders or requirements issued under Section 306 of the Clean Air Act [42 U.S. 1857 (h)], Section 508 of the Clean Water Act (33 U. S. C. 1368d), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR, Part. 15), which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The revisions shall require reporting of violations to Texas Department of Agriculture and to the U.S. Environmental Protection Agency Assistant Administrator for Enforcement.
5. The Engineer will include in all contracts and subcontracts other than for small purchases (less than \$10,000), provisions or conditions which will allow for administrative, contractual or legal remedies in instances which violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.
6. The Engineer will include in all contracts and subcontracts in excess of \$10,000 suitable provisions for termination by the Locality including the manner by which it will be affected and the basis for settlement, In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the Engineer.
7. The Engineer will include in all contracts and subcontracts in excess of \$10,000 provisions requiring compliance with the following;
  - The Engineer will not discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, physical or mental disability, marital status, parenthood, or age.
  - Executive Order 11246 - Equal Employment Opportunity.

- Copeland Anti-Kickback Act
  - (in excess of \$2,000) - Davis-Bacon Act
  - (in excess of \$2,000) - Section 103 and 107 of the Contract Work Hours and Safety Standards Act
  - A provision recognizing mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act.
  - Section 3 of the Housing and Urban Development Act of 1969.
  - Title VI of the Civil Rights Act of 1964
8. The Engineer will include in all negotiated contracts and subcontracts a provision which indicates that funds will not be awarded under this contract to any party which is debarred, suspended, or otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549 and 24 CFR Part 24. A certification shall be provided and received from each proposed subcontractor under this contract and its principals.
  9. The Engineer will include in all negotiated contracts and subcontracts a provision to the effect that the Locality, Texas Department of Agriculture, the Comptroller General of the State of Texas, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the Contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions.
  10. The Engineer will include in all contracts and subcontracts a requirement that the Contractor maintain all relevant project records for three (3) years after the Locality has made final-payment to the Contractor and all other pending matters are closed.

#### STANDARD OF PERFORMANCE AND DEFICIENCIES

1. All services of the Engineer and its independent professional associates, consultants and subcontractors will be performed in a professional, reasonable and prudent manner in accordance with generally accepted professional practice. The Engineer represents that it has the required skills and capacity to perform work and services to be provided under this Contract.
2. The Engineer represents that services provided under this Contract shall be performed within the limits prescribed by the Locality in a manner consistent with that level of care and skill ordinarily exercised by other professional consultants under similar circumstances.

3. Any deficiency in Engineer's work and services performed under this contract shall be subject to the provisions of applicable state and federal law. Any deficiency discovered shall be corrected upon notice from Locality and at the Engineer's expense if the deficiency is due to Engineer's negligence. The Locality shall notify the Engineer in writing of any such deficiency and provide an opportunity for mutual investigation and resolution of the problem prior to pursuit of any judicial remedy. In any case, this provision shall in no way limit the judicial remedies available to the Locality under applicable state or federal law.
4. The Engineer agrees to and shall hold harmless the Locality, its officers, employees, and agents from all claims and liability of whatsoever kind or character due to or arising solely out of the negligent acts or omissions of the Engineer, its officers, agents, employees, subcontractors, and others acting for or under the direction of the Engineer doing the work herein contracted for or by or in consequence of any negligence in the performance of this Contract, or by or on account of any omission in the performance of this Contract.

**NOTE: This document has important legal consequences. Please consult with your legal counsel with respect to its completion or modification.**

**PART III  
PAYMENT SCHEDULE  
PROFESSIONAL ENGINEERING SERVICES**

**1. BASIC SERVICES**

**Wharton shall reimburse Firm for basic engineering construction phase services for a lump sum fee of \$16,000. Payment of the lump sum fee shall be made monthly based on the percent completion of the construction contract. Five percent (5%) will be retained until completion of final inspection and acceptance of project by Wharton.**

**2. SPECIAL SERVICES**

**Special Services shall be reimbursed based on the Hourly Rate Schedule in Part III-A. The fee for all Special Services shall not exceed a total of \$58,000.**

- a. **Material Testing: The Firm shall be reimbursed within thirty (30) days of completion, the actual costs of material testing based on an itemized billing statement from the subconsultant's independent test laboratory plus a ten percent (10%) administration processing charge. Testing fees are estimated to cost \$8,000.**
- b. **Field Project Representation: The Firm shall be reimbursed within thirty (30) days of receiving monthly invoices of the hourly charges for field project representation. Hourly rates shall be based on the Firm's hourly rates (Part III-A). The estimated cost for this service is \$34,000.**
- c. **Construction Staking: The Firm shall be reimbursed within thirty (30) days of receiving monthly invoices of the hourly charges for construction staking. Hourly rates shall be based on the Firm's hourly rates (Part III-A). The estimated cost for this service is \$16,000.**

PART III – A

**SCHEDULE OF HOURLY RATES**  
 Effective January 2003  
 Subject to Annual Revision in January 2004

**ENGINEERS**

Engineer I	\$ 65.00/hr
Engineer II	\$ 72.00/hr
Engineer III	\$ 78.00/hr
Engineer IV	\$ 85.00/hr
Engineer V	\$ 105.00/hr
Engineer VI	\$ 115.00/hr
Staff Engineer	\$ 120.00/hr
Project Engineer	\$ 125.00/hr
Senior Project Engineer	\$ 130.00/hr
Officers, Project Managers	\$ 140.00/hr
Officers-President	\$ 200.00/hr

**PROJECT REPRESENTATIVES**

(includes mileage)	
Project Representative I	\$ 48.00/hr
Project Representative II	\$ 53.00/hr
Project Representative III	\$ 59.00/hr
Project Representative Coordinator	\$ 75.00/hr
Construction Engineer I	\$ 65.00/hr
Construction Engineer II	\$ 72.00/hr
Construction Engineer III	\$ 78.00/hr
Construction Engineer IV	\$ 85.00/hr
Construction Manager	\$ 120.00/hr

**SURVEYING**

Four-Man Field Crew	\$ 125.00/hr
Three-Man Field Crew	\$ 120.00/hr
Two-Man Field Crew	\$ 105.00/hr
Technician I	\$ 63.00/hr
Technician II	\$ 70.00/hr
Technician III	\$ 76.00/hr
Registered Prof. Land Surveyor	\$ 110.00/hr
Survey Manager	\$ 120.00/hr

**DESIGNERS/DRAFTING PERSONNEL**

CAD Operator I	\$ 40.00/hr
CAD Operator II	\$ 47.00/hr
CAD Operator III	\$ 53.00/hr
CAD Operator IV	\$ 60.00/hr
CAD Operator V	\$ 67.00/hr
CAD Manager	\$ 75.00/hr
Designer	\$ 74.00/hr
Chief Designer	\$ 90.00/hr
GIS Operator I	\$ 50.00/hr
GIS Operator II	\$ 60.00/hr
Computer Tech	\$ 36.00/hr
Computer Manager	\$ 85.00/hr

**OFFICE PERSONNEL**

Clerk	\$ 25.00/hr
Engineer's Assistant	\$ 30.00/hr
Secretary I	\$ 37.00/hr
Secretary II	\$ 45.00/hr
Secretary III	\$ 51.00/hr
Bookkeeper	\$ 65.00/hr
Staff Assistant	\$ 67.00/hr
Chief Accountant	\$ 75.00/hr

**EQUIPMENT AND MILEAGE**

GPS System	\$ 300.00/day
Robotic Survey System	\$ 30.00/hr
Mileage	\$ .36 mi
Facsimiles up to 10 pages	\$ 5.00
Each additional page over 10	\$ .50/pg

## PART IV

### TERMS AND CONDITIONS PROFESSIONAL ENGINEERING SERVICES

1. Termination of Contract for Cause. If, through any cause, the Firm shall fail to fulfill in a timely and proper manner his/her obligations under this Contract, or if the Firm shall violate any of the covenants, agreements or stipulations of this Contract, the City/County shall thereupon have the right to terminate this Contract by giving written notice to the Firm of such termination and specifying the effective date thereof, at least five days before the effective date of such termination. In such event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs and reports prepared by the Firm under this Contract shall, at the option of the City/County, become its property and the Firm shall be entitled to receive just and equitable compensation for any work satisfactorily completed hereunder.

Notwithstanding the above, the Firm shall not be relieved of liability to the City/County for damages sustained by the City/County by virtue of any breach of the Contract by the Firm, and the City/County may withhold any payments to the Firm for the purpose of set-off until such time as the exact amount of damages due the City/County from the Firm is determined.

2. Termination for Convenience of the City/County. The City/County may terminate this Contract at any time by giving at least ten (10) days notice in writing to the Firm. If the Contract is terminated by the City/County as provided here in, the Firm will be paid for the time provided and expenses incurred up to the termination date. If this Contract is terminated due to the fault of the Firm, Paragraph I hereof relative to termination shall apply.
3. Changes. The City/County may, from time to time, request changes in the scope of the services of the Firm to be performed hereunder. Such changes, including any increase or decrease in the amount of the Firm's compensation, which are mutually agreed upon by and between the City/County and the Firm, shall be incorporated in written amendments to this Contract.
4. Personnel:
  - a. The Firm represents that he/she has, or will secure at his own expense, all personnel required in performing the services under this Contract. Such personnel shall not be employees of or have any contractual relationship with the City/County.

- b. All of the services required hereunder will be performed by the Firm or under his/her supervision and all personnel engaged in the work shall be fully qualified and shall be authorized or permitted under State and Local law to perform such services.
  - c. None of the work or services covered by this Contract shall be subcontracted without the prior written approval of the City/County. Any work or services subcontracted hereunder shall be specified by written contract or agreement and shall be subject to each provision of this Contract.
5. Assignability. The Firm shall not assign any interest on this Contract and shall not transfer any interest in the same (whether by assignment or novation), without the prior written consent of the City/County thereto: Provided, however, that claims for money by the Firm from the City/County Under this Contract may be assigned to a bank, trust company, or other financial institution without such approval. Written notice of any such assignment or transfer shall be furnished promptly to the City/County.
6. Reports and Information. The Firm, at such times and in such forms as the City/County may require, shall furnish the City/County such periodic reports as it may request pertaining to the work or services undertaken pursuant to this Contract, the costs and obligations incurred or to be incurred in connection therewith, and any other matters covered by this Contract.
7. Records and Audits. The Firm shall insure that the City/County maintains fiscal records and supporting documentation for all expenditures of funds made under this contract in a manner which conforms to ONM Circular A-87, Section 570.490 of the Regulations, and this Contract Such records must include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the funds provided under this Contract, City/County shall retain such records, and any supporting documentation, for the greater of three years from closeout of the Contract or the period required by other applicable laws and regulations.
8. Findings Confidential. All of the reports, information, data, etc., prepared or assembled by the Firm under this contract are confidential and the Firm agrees that they shall not be made available to any individual or organization without the prior written approval of the City/County.
9. Copyright. No report maps, or other documents produced in whole or in part under this Contract shall be the subject of an application for copyright by or on behalf of the Firm.

10. Compliance with Local Laws. The Firm shall comply with all applicable laws, ordinances and codes of the State and local governments, and the Firm shall save the City/County harmless with respect to any damages arising from any tort done in performing any of the work embraced by this Contract.
11. Equal Employment Opportunity. During the performance of this Contract, the Firm agrees as follows:
  - a. The Firm will not discriminate against any employee or applicant for employment because of race, creed, sex, color, handicap or national origin. The Firm will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, sex, color, handicap or national origin. Such action shall include, but not be limited to the Following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Firm agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the City/County setting forth the provisions of this nondiscrimination clause.
  - b. The Firm will, in all solicitation or advertisements for employees placed by or on behalf of the Firm, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, sex, handicap or national original.
  - c. The Firm will cause the foregoing provisions to be inserted in all subcontracts for any work covered by this Contract so that such provisions will be binding upon each subcontractor, provided that the foregoing provisions shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.
  - d. The Firm will include the provisions a. through c. in every subcontract or purchase order unless exempted.
12. Civil Rights Act of 1964. Under Title VI of the Civil Rights Act of 1964, no person shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
13. Section 109 of the Housing and Community Development Act of 1974.
  - a. No person in the United States shall on the ground of race, color, national origin,

or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.

14. "Section 3" Compliance in the Provision of Training, Management, and Business Opportunities.

- a. The work to be Performed under this contract is on a project assisted under a Program providing direct Federal financial assistance from the Department of Housing and Urban Development and is subject to the' requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended. 12 U. S.C. 1701u. Section 3 requires that to the greatest extent feasible opportunities for training and employment be given lower income residents of the project area and contracts for work in connection with the project be awarded to business concerns which are located in, or owned in substantial part by persons residing in the area of the project.
- b. The parties to this contract will comply with the provisions of said Section 3 and the regulations issued pursuant thereto by the Secretary of Housing and Urban Development set forth in 24 C.F.R. 235, and all applicable rules and orders of the Department issued thereunder prior to the execution of this Contract The parties to this Contract certify and agree that they are under no contractual or other disability which would prevent them from complying with these requirements.
- c. The contractor will send to each labor organization or representative of workers with which he/she has a collective bargaining agreement or other contract or understanding, if any, a notice advising the said labor organization or workers' representative of his/her commitments under this Section 3 clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment or training.
- d. The contractor will include this Section 3 clause in every subcontract for work in connection with the project and will, at the direction of the applicant for or recipient of Federal financial assistance, take appropriate action pursuant to the subcontract upon a finding that the subcontractor is in violation of regulations issued by the Secretary of Housing and Urban Development 24 C.F.R. Part 135. The contractor will not subcontract with any subcontractor where it has notice or knowledge that the latter has been found in violation of regulations under 24 C.F.R. Part 135 and will not let any subcontract unless the subcontractor has first provided it with a preliminary statement of ability to comply with the requirements of these regulations.

- e. Compliance with the provisions of Section 3, the regulations set forth in 24 C.F.R. Part 135, and all applicable rules and orders of the Department issued hereunder prior to the execution of the contract, shall be a condition of the federal financial assistance provided to the project binding upon the applicant or recipient for such assistance, its successors and assigns. Failure to fulfill these requirements shall subject the applicant or recipient, its contractors and subcontractors, its successors and assigns to those sanctions specified by the grant or loan agreement or contract through which federal assistance is provided, and to such sanctions as are specified by 24 C.F.R. Part 135.

15. Section 503 Handicapped (if \$2,500 or Over) -Affirmative Action for Handicapped Workers.

- a. The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- b. The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.
- c. In the event of the contractor's non-compliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.
- d. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notices shall state the contractors obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.
- e. The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding,

that the contractor is bound by the terms of Section 503 of Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

- f. The contractor will include the provisions of this clause in every subcontract or purchase order of \$2,500 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to Section 503 of the Act, so that such provisions will be binding upon each subcontractor with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for non-compliance.
16. Interest of Members of a City/County. No member of the governing body of the City/County and no other officer, employee, or agent of the City/County who exercises any functions or responsibilities in connection with the planning and carrying out of the program, shall have any personal financial interest, direct or indirect, in this Contract, and the Firm shall take appropriate steps to assure compliance.
17. Interest of Other Local Public Officials. No member of the governing body of the Locality and no other public official of such Locality, who exercises any functions or responsibilities in connection with the planning and carrying out of the program, shall have any personal financial interest, direct or indirect, in this Contract, and the Firm shall take appropriate steps to assure compliance.
18. Interest of Firm and Employees. The Firm covenants that he/she presently has no interest and shall not acquire interest, direct or indirect, in the study area or any parcels therein or any other interest which would conflict in any manner or degree with the performance of his/her services hereunder. The Firm further covenants that in the performance of this Contract, no person having any such interest shall be employed.

Councilmember Ken Freese seconded the motion. All voted in favor.

The sixteenth item on the agenda was to review and consider a resolution authorizing the Mayor of the City of Wharton to execute an agreement with Panther Pipeline for the Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter Project. City Manager Andres Garza, Jr. presented a draft resolution authorizing the Mayor of the City of Wharton to execute the contract with Panther Pipeline for the Texas Capital Fund Contract No. 722202 – Wal-Mart Supercenter Project. He said that the drainage project for the Wal-Mart project would require Panther Pipeline to lower its natural gas pipeline to accommodate the ditch. He said that Panther Pipeline had agreed to lower the line at an approximate cost of \$20,000 and that approval of the agreement was necessary to proceed with the Contract. City Attorney Paul Webb said that he

had reviewed the contract and that the pipeline runs along FM 102 and it would need to go under the new drainage ditch. Mr. Carlos Cotton, P.E. of Jones & Carter stated that the pipeline would need to be placed approximately eight feet deeper. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion to approve the City of Wharton Resolution No. 2003-67 as follows:

**CITY OF WHARTON  
RESOLUTION NO. 2003 - 67**

**A RESOLUTION AUTHORIZING THE MAYOR OF THE CITY OF WHARTON TO EXECUTE AN AGREEMENT WITH PANTHER PIPELINE FOR THE TEXAS CAPITAL FUND CONTRACT NO. 722202 – WAL-MART SUPERCENTER PROJECT.**

**WHEREAS,** the Wharton City Council wishes to authorize the Mayor of the City of Wharton, Texas to execute an agreement with Panther Pipeline for the Texas Capital Contract No. 722202; and

**WHEREAS,** the City of Wharton and Panther Pipeline wishes to be bound by the conditions as set forth in Attached "A".

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WHARTON, TEXAS** as follows:

**Section I.** That the Wharton City Council hereby authorizes the Mayor of the City of Wharton, Texas to execute an agreement with Panther Pipeline for the Texas Capital Contract No. 722202.

**Section. II.** That the City of Wharton and Panther Pipeline hereby bound by the conditions as set forth in the Attached "A".

**Section III.** That this resolution shall become effective immediately upon its passage.

**Passed, Approved, and Adopted** this the 14<sup>th</sup> day of July 2003.

**CITY OF WHARTON**

**By:** \_\_\_\_\_

**BRYCE D. KOCIAN**

Mayor

**ATTEST:**

\_\_\_\_\_

**JOYCE VASUT**  
City Secretary

### **AID-IN-CONSTRUCTION CONTRIBUTION**

This Agreement is made and entered this 1<sup>st</sup> day of July 2003 by and between **PANTHER PIPELINE, LTD.**, a Texas limited partnership (“Panther”), and **THE CITY OF WHARTON**, a Texas municipality, referred to as (“Wharton”). Both parties are jointly referred to as the “the Parties”).

**WHEREAS**, Wharton is involved in a construction project of a drainage channel from Caney Creek to the Colorado River to service a Wal-Mart Super Center, which project conflicts with the existing six-inch Panther natural gas line located in the north Right of Way of F.M. 102.

**WHEREAS**, notwithstanding Panther’s existing Right of Way, Panther desires to assist Wharton in such project by replacing a portion of and lowering such portion of the existing six-inch line within the current Right of Way.

**NOW, THEREFORE**, for good and valuable consideration, Panther and Wharton agree as follows:

1. Panther agrees to replace and lower a portion of the existing six-inch natural gas pipeline. Such replacement will include all labor, project management costs, equipment, pipe, fittings, x-ray, hydro-test and related expenses such as lost gas and replacement gas costs. Wharton shall contribute an Aid-in-Construction minimum amount equal to Twenty Thousand Dollars (\$20,000). In the event that Panther or its contractor(s) encounter additional costs for the construction and/or lowering of the pipe, Panther may request further reimbursement from the City of Wharton upon proof of additional costs.

2. By execution of this Agreement, Wharton agrees Panther should begin construction and Wharton agrees to pay, in advance, to Panther the Aid-in-Construction minimum cost of Twenty Thousand Dollars (\$20,000) described above.
3. This Agreement is not assignable by either party without the written consent of the other party. The parties waive all punitive, special, exemplary or other extraordinary damages.
4. Panther shall proceed to obtain necessary permits, engineering, and other requirements as determined in Panther's sole discretion, to complete the described project in a timely, reasonable and workmanlike fashion.
5. Wharton agrees to add Panther as an "additional insured" in the required insurance coverage carried by contractors and subcontractors involved in the drainage channel construction to ensure Panther is indemnified for damage caused by such contractors and/or subcontractors to both the newly installed pipe and the existing pipeline.

**AGREED AND ACCEPTED**

this \_\_\_\_ day of July 2003

**THE CITY OF WHARTON**

By: \_\_\_\_\_

Bryce D. Kocian  
Print Name

Mayor  
Title

**AGREED AND ACCEPTED**

this \_\_\_\_ day of July 2003

**PANTHER PIPELINE, LTD.**

By: \_\_\_\_\_

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

The meeting was adjourned at 7:54 p.m.

**CITY OF WHARTON, TEXAS**

By: \_\_\_\_\_  
**BRYCE D. KOCIAN**  
Mayor Pro-Tem

**ATTEST:**

\_\_\_\_\_  
**JOYCE VASUT**  
City Secretary

Councilmember Ken Freese seconded the motion. All voted in favor.

The seventeenth item on the agenda was to review and consider the recommendations from the City Council Financial Committee:

- A. Authorizing the City of Wharton to contract with Stephenson & Trilicek for the City of Wharton's Annual Audit for Fiscal Year 2002-2003.

Finance Director Joyce Vasut addressed the City Council and stated that the proposal submitted by Stephenson & Trilicek in 2001 was for a total of three years. She said that this was the final year the City of Wharton could conduct the audits under the old rules and that in 2003-2004 the City would need to implement GASB 34. She said that during the June 26,

2003 Finance Committee meeting the Committee Members voted to recommend the City Council authorize Stephenson & Trilicek to conduct the City's audit for fiscal year 2002 – 2003 as proposed. After some discussion, Councilmember Darryl Darnell made a motion for the City of Wharton to continue to use the services of Stephenson & Trilicek to conduct the City of Wharton Annual Audit for fiscal year 2002-2003 as was proposed. Councilmember Domingo Montalvo, Jr. seconded the motion. All voted in favor.

B. Authorizing Prudentia, Inc. to report EMS delinquent accounts to a credit bureau.

Finance Director Joyce Vasut stated that on March 1, 2003, Prudentia, Inc. began performing the EMS billing and collection services for the City of Wharton. She said that after over three months of performing these services, Prudentia had reached a point in which some accounts were ready to be reported to a credit bureau. She further stated that during the June 26, 2003 Finance Committee meeting the Finance Committee voted to recommend City Council approval of reporting the delinquent EMS accounts to a credit bureau. Mayor Bryce D. Kocian asked if there would be a cost to the City for these services to be provided. Finance Director Vasut stated that there would be no cost to the City for the delinquent accounts to be reported to a credit bureau. After some discussion, Councilmember Ken Freese made a motion to authorize Prudentia, Inc. to report the EMS delinquent accounts to a credit bureau. Councilmember Domingo Montalvo, Jr. seconded the motion. All voted in favor.

C. Authorizing the purchase of Municipal Court Computer System from the Technology Fund.

Finance Director Joyce Vasut stated that the Finance Committee met June 26, 2003 and voted to recommend the City Council approve the purchase of a Municipal Court Computer System with funds from the Municipal Court Technology Fund. She said that in October of 1998, the City of Wharton Municipal courts purchased computer hardware and software in order to be year 2000 compliant and improve the system. Ms. Vasut stated that Municipal Court staff has had numerous problems with the software and were unable to get adequate support for the system. She stated the Finance Committee recommended that the system be replaced with the same software that the Utility Billing Department and the Finance Department use. She further stated that would allow for the systems to be integrated and electronically transfer information from Municipal Courts to Finance. She also said that the Technology Fund, which includes funds that could only be used for Municipal Court Technology purchases, had accumulated enough funds to pay for the upgrade. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion to approve the purchase of a Municipal Court Computer System using funds from the Technology Fund. Councilmember Ken Freese seconded the motion. All voted in favor.

The eighteenth item on the agenda was to review and consider the City of Wharton Street Sealcoating Project:

A. Bid Tabulation.

B. Resolution: A resolution awarding the bid for the City of Wharton Street Sealcoating Project; Authorizing the Mayor of the City of Wharton to execute the agreement. City Manager Andres Garza, Jr. stated that on July 7, 2003, the City of Wharton received bids for the 2003 Street Sealcoating Project. She said that Public Works Director Phil Bush had

reviewed the bids and was recommending the bid be awarded to Faltisek Paving in the amount of \$1.01 per square yard for single course surface treatment and \$1.39 per gallon for prime coating. Mayor Bryce D. Kocian asked when would the project start. City Manager Garza said that the project would start very soon and that a meeting would be scheduled with the Streets and Drainage Committee to consider additional streets. After some discussion, Councilmember Donald Mueller made a motion to approve the City of Wharton Resolution No. 2003-68 as follows:

**CITY OF WHARTON  
RESOLUTION NO. 2003 - 68**

**A RESOLUTION APPROVING A CONTRACT FALTISEK PAVING PARTNERSHIP, LTD. AND THE CITY OF WHARTON FOR THE 2003 STREET SEAL COATING PROJECT.**

**WHEREAS,** the Wharton City Council wishes to authorize the Mayor of the City of Wharton, Texas to execute an agreement with Faltisek Paving Partnership, LTD. and the City of Wharton for the 2003 Street Seal Coating Project; and

**WHEREAS,** the City of Wharton and Faltisek Paving Partnership, LTD. wishes to be bound by the conditions as set forth in Attached "A".

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WHARTON, TEXAS** as follows:

**Section I.** That the Wharton City Council hereby authorizes the Mayor of the City of Wharton, Texas to execute an agreement Faltisek Paving Partnership, LTD. and the City of Wharton for the 2003 Street Seal Coating Project.

**Section. II.** That Faltisek Paving Partnership, LTD. and the City of Wharton are hereby bound by the conditions as set forth in the Attached "A".

**Section III.** That this resolution shall become effective immediately upon its passage.

**Passed, Approved, and Adopted** this the 14<sup>th</sup> day of July 2003.

**CITY OF WHARTON**

**By:** \_\_\_\_\_  
**BRYCE D. KOCIAN**  
Mayor

**ATTEST:**

\_\_\_\_\_  
**JOYCE VASUT**  
City Secretary

## **AGREEMENT**

THIS AGREEMENT is dated as of the 15<sup>th</sup> day of July 2003 by and between the City of Wharton, Texas (hereinafter called OWNER) and Faltisek Paving, Inc. of El Campo, Texas (hereinafter called CONTRACTOR).

OWNER and CONTRACTOR, in consideration of the mutual covenants hereinafter set forth, agree as follows:

### **Article 1.      WORK.**

CONTRACTOR shall furnish all of the material, supplies, tools, equipment, labor and other services necessary for the construction and completion of the work described herein and complete all the work as specified or indicated in the Contract Documents for 2003 Street Seal Coating Project.

### **Article 2      CONTRACT TIME.**

2.1      The Work shall be substantially completed within 90 consecutive calendar days after the date when the Contract Time commences to run as provided in paragraph 2.3 of the General Conditions, and completed and ready for final payment in accordance with paragraph 14.13 of the General Conditions within 90 consecutive working days after the date when the Contract Time commences to run.

2.2      **Liquidated Damages.** OWNER and CONTRACTOR recognize that time is of the essence of this Agreement and that OWNER will suffer financial loss if the Work is not substantially complete within the time specified in paragraph 2.1 above, plus any extensions thereof allowed in accordance with Article 12 of the General Conditions. They also recognize the delays, expense and difficulties involved in proving in a legal proceeding the actual loss suffered by OWNER if the work is not substantially complete on time. Accordingly, instead of requiring such proof, OWNER and CONTRACTOR hereby mutually agree that as liquidated damages for the delay (but not as a penalty) CONTRACTOR shall pay OWNER \$100.00 for each day that expires after the time specified in paragraph 2.1 for substantial completion until the Work is substantially complete.

### **Article 3.      CONTRACT PRICE.**

3.1      CONTRACTOR shall perform the Work described in the Contract Documents for the amounts shown in the Bid Proposal, and OWNER shall pay CONTRACTOR in current funds based on the Bid Proposal.

### **Article 4.      PAYMENT PROCEDURES.**

Contractor shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by OWNER as provided for in the General Conditions.

4.1 **Final Payment.** Upon final completion and acceptance of the Work in accordance with paragraph 14.13 of the General Conditions, OWNER shall pay the remainder of the Contract Price as provided in said paragraph 14.13.

**Article 5. CONTRACTOR'S REPRESENTATIONS.**

In order to induce OWNER to enter into this Agreement CONTRACTOR makes the following representations:

5.1 CONTRACTOR has familiarized himself with the nature and extent of the Contract Documents, Work, locality, and with all local conditions and federal, state and local laws, ordinances, rules and regulations that in any manner may affect cost, progress or performance of the Work.

5.2 CONTRACTOR has made or caused to be made examinations and investigations of information and the project site as he deems necessary for the performance of the Work at the Contract Price, within the Contract Time and in accordance with the other terms and conditions of the Contract Documents; and no additional examinations, investigations or similar data are or will be required by CONTRACTOR for such purposes.

5.3 CONTRACTOR has given OWNER written notice of all conflicts, errors or discrepancies that he has discovered in the Contract Documents and the written resolution thereof by OWNER is acceptable to CONTRACTOR.

5.4 CONTRACTOR is skilled and experienced in the type of work described in the Contract Documents.

**Article 6. CONTRACT DOCUMENTS.**

The Contract Documents which comprise the entire Agreement between OWNER and CONTRACTOR are attached to this Agreement, made a part hereof and consist of the following:

- 6.1 Advertisement for Bids.
- 6.2 Instructions to Bidders.
- 6.3 Bid Proposal.
- 6.4 Bid Bond.
- 6.5 CONTRACTOR'S and SubCONTRACTOR'S Pre-Bid Disclosure.
- 6.6 Agreement.

- 6.7 Performance Bond. (if applicable).
- 6.8 Payment Bond. (if applicable).
- 6.9 General Conditions.
- 6.10 Supplementary General Conditions.
- 6.11 Standard Specifications.
- 6.12 Addendum number(s).
- 6.13 CONTRACTOR'S Certificate(s) of Insurance.
- 6.14 Notice of Award.
- 6.15 Notice to Proceed.
- 6.16 Any modification, including Change Orders, duly delivered after execution of this Agreement.

There are no Contract Documents other than those listed above in this Article 6. The Contract Documents may only be altered, amended or repealed by a Modification (as defined in Article 1 of the General Conditions).

**Article 7 MISCELLANEOUS.**

7.1 Terms used in this Agreement which are defined in Article 1 of the General Conditions shall have the meanings indicated in the General Conditions.

7.2 No assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound; and specifically, but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

**7.3 OWNER and CONTRACTOR each binds himself, his partners, successors, assigns and legal representatives to the other party hereto, his partners, successors, assigns and legal representatives in respect to all covenants, agreements and obligations contained in the Contract Documents.**

7.4 The invalidity or unenforceability of any provision of the Contract Documents shall not affect the validity or enforceability of any other provision of the Contract Documents.

7.5 This Agreement and the Contract Documents are subject to all applicable laws, statutes, codes, ordinances, rules and regulations.

7.6 In the event of default by CONTRACTOR under the Contract Documents, OWNER shall have all rights and remedies afforded to it at law or in equity to enforce the terms of the Contract Documents. The exercise of any one right or remedy shall be without prejudice to the enforcement of any other right or remedy allowed at law or in equity.

7.7 If any action at law or in equity is necessary by OWNER to enforce or interpret the terms of the Contract Documents, OWNER shall be entitled to reasonable attorneys' fees and costs and any necessary disbursements in addition to any other relief to which the OWNER is entitled.

7.8 The Contract Documents constitute the entire agreement between the parties hereto and supersede all prior agreements, understandings, or oral communications between the parties. The Contract can be modified or amended by written agreement of the parties.

7.9 These Contract Documents are governed by the laws of the State of Texas and the parties agree that venue for all lawsuits arising from these Contract Documents shall be set in Wharton County, Texas.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement in triplicate. One counterpart each has been delivered to OWNER and CONTRACTOR. All portions of the Contract Documents have been signed or identified by OWNER and CONTRACTOR.

This Agreement will be effective on \_\_\_\_\_, 2003.

CITY OF WHARTON

By: \_\_\_\_\_  
Bryce D. Kocian, Mayor

By: \_\_\_\_\_

Attest: \_\_\_\_\_  
Joyce Vasut, City Secretary

Attest: \_\_\_\_\_

ACKNOWLEDGEMENTS

STATE OF TEXAS

COUNTY OF WHARTON

This instrument was acknowledgement before me on this \_\_\_\_ day of \_\_\_\_\_ 2003 by Bryce D. Kocian, Mayor of the City of Wharton, Texas.

\_\_\_\_\_  
Notary Public, State of Texas

This instrument was acknowledgement before me on this \_\_\_\_ day of \_\_\_\_\_ 2003 by \_\_\_\_\_ of \_\_\_\_\_ a Texas corporation on behalf of said corporation.

\_\_\_\_\_  
Notary Public, State of Texas

Address for giving notices:

Address for giving notices:

City of Wharton  
Attn: City Manager Andres Garza, Jr.  
120 E. Caney Street  
Wharton, TX 77488  
Phone: (979) 532-2491  
FAX: (979) 532-0181

Contractor hereby acknowledges and understands that this is a "separated contract" pursuant to recently enacted legislation contained in 34 Texas Administrative Code 3.291. The following amount of money represents that part of the total contract price representative of the value of tangible personal property to be physically incorporated into the project realty:

\$\_\_\_\_\_.

Councilmember Darryl Darnell seconded the motion. All voted in favor.

The nineteenth item on the agenda was to review and consider the request for payments on City Construction Projects:

- A. City of Wharton Wastewater Treatment Plant No. 2 Improvement Project Pay Request No. 7 – JTR Constructors, Inc.

City Manager Andres Garza, Jr. presented a copy of the Pay Request No. 7 submitted by JTR Constructors, Inc. for the City of Wharton Wastewater Treatment Plant No. 2 Improvement project. Mr. Carlos Cotton, P.E. of Jones & Carter addressed the City Council and told them that the project 90% complete. He said that the contract was on schedule and that a change order would be presented to the City Council during the next regular City Council meeting. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion to approve the Pay Request No. 7 in the amount of \$265,133.43 to JTR Constructors, Inc. for the City of Wharton Wastewater Treatment Plant No. 2 Improvement Project. Councilmember Donald Mueller seconded the motion. All voted in favor.

B. City of Wharton Wal-Mart SuperCenter Water & Sanitary Sewer Utility Extension Project – Pay Request No. 1 – Uticon, Inc.

Mr. Carlos Cotton, P.E. addressed the City Council and told them that Uticon, Inc. was requesting payment of \$97,932.00 for the City of Wharton Wal-Mart SuperCenter Water & Sanitary Sewer Utility Extension Project. He said that the project was on schedule. He said that the boring under Caney Creek had been completed. After some discussion, Councilmember Donald Mueller made a motion to approve the Pay Request No. 1 in the amount of \$97,932.00 to Uticon, Inc. for the City of Wharton Wal-Mart SuperCenter Water & Sanitary Sewer Utility Extension Project. Councilmember Ken Freese seconded the motion. All voted in favor.

C. City of Wharton Elevated Water Storage Tank Rehabilitation Project Pay Request No. 5 – N.G. Painting, Inc.

City Manager Andres Garza, Jr. presented a copy of City Attorney Paul Webb's letter dated July 8, 2003 to Mr. Nick Gramatikakis, President of N. G. Painting, L.P. requesting N.G. Painting to provide proof that the outstanding claims against N.G. Painting had been settled by their insurance company. City Attorney Paul Webb stated that he had told the company that if the claims had not been settled that he would request the City Council to pass on approving the pay request until the claims were settled. After some discussion, no action was taken.

The twentieth item on the agenda was to review and consider a resolution of the Wharton City Council accepting the donation of Block 59, Lots 15 and 16, City of Wharton, Wharton County, Texas, by Ms. Dyann Nasso Perez to the City of Wharton. City Manager Andres Garza, Jr. stated that Ms. Dyann Nasso Perez had proposed and signed a deed to donate of Block 59, Lots 15 and 16, City of Wharton, Wharton County, Texas, to the City of Wharton. He said that the land could prove to be valuable as the City addressed floodproofing solutions for the Colorado River. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion for the City of Wharton to release the lien it had on the property and approve the City of Wharton Resolution No. 2003-69 as follows:

**CITY OF WHARTON  
RESOLUTION NO. 2003 - 69**

**A RESOLUTION OF THE WHARTON CITY COUNCIL ACCEPTING THE DONATION OF BLOCK 59, LOTS 15 AND 16, CITY OF WHARTON, WHARTON COUNTY, TEXAS, BY MS. DYANN NASSO PEREZ TO THE CITY OF WHARTON.**

**WHEREAS,** Ms. Dyann Nasso Perez wishes to donate Block 59, Lots 15 and 16, City of Wharton, Wharton County, Texas, to the City of Wharton; and

**WHEREAS,** the City of Wharton City Council wishes to accept the donation donate Block 59, Lots 15 and 16, City of Wharton, Wharton County, Texas; and

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WHARTON, TEXAS** as follows:

**Section I.** That the City Council of the City of Wharton hereby accepts the donation of Block 59, Lots 15 and 16, City of Wharton, Wharton County, Texas from Ms. Dyann Nasso Perez.

**Section II.** That this resolution shall become effective immediately upon its passage.

**Passed, Approved, and Adopted** this 14<sup>th</sup> of July 2003.

**CITY OF WHARTON, TEXAS**

**By:** \_\_\_\_\_

**BRYCE D. KOCIAN**

Mayor

**ATTEST:**

\_\_\_\_\_  
**JOYCE VASUT**

City Secretary

Councilmember Darryl Darnell seconded the motion. All voted in favor.

The twenty-first item on the agenda was to review and consider the request from Wharton County Freedom Festival for 2004 festival costs, reimbursement. Councilmember Domingo Montalvo, Jr., who was the Chairman for the Wharton County Freedom Festival stated that the 2004 Freedom Festival was successful and that the Festival Committee was not going to request City funds for the event. He thanked the City for their assistance in the past. After some discussion, no action was taken.

The twenty-second item on the agenda was to review and consider the City of Wharton Beautification Commission vacant positions. Councilmember V. L. Wiley, Jr. made a motion to appoint Ms. Gilda Harris as a Commissioner on the Beautification Commission. Councilmember Ken Freese seconded the motion. All voted in favor.

The twenty-third item on the agenda was to review and consider Travel Reimbursement for City Manager. City Manager Andres Garza, Jr. presented a request for travel reimbursement in the amount of \$426.70. After some discussion, Councilmember Domingo Montalvo, Jr. made a motion to reimburse City Manager Andres Garza, Jr. in the amount of \$426.70 for travel expenses. Councilmember Ken Freese seconded the motion. All voted in favor.

The twenty-fourth item on the agenda was Executive Session: City Council may adjourn into an Executive Session in accordance with Sections 551.072 and 551.074 of the Government Code, Revised Civil Statutes of Texas. Final action, decision, or vote if any with regard to any matter considered in Executive Session shall be made in Open Meeting.

A. **Discussion:** Acquisition of right-of-way for drainage projects.

B. **Discussion:** Performance of City Manager.

Mayor Bryce D. Kocian adjourned the City Council meeting into Executive Session at 8:13 p.m.

Mayor Bryce D. Kocian returned the City Council meeting into Opening Meeting at 8:55 p.m.

The twenty-fifth item on the agenda was Return to Open Meeting: Action on items discussed in Executive Session:

**A. Review & Consider:** Acquisition of right-of-way for drainage projects.

Mayor Bryce D. Kocian stated that the City Council requested the City Staff pursue the necessary easements for the drainage projects. No action was taken.

**B. Review & Consider:** Performance of City Manager.

No action was taken.

The twenty-sixth item on the agenda was to review and consider the City Council, Committee, Commissions, and Boards reports:

- A. Wharton Economic Development Corporation meeting held June 17, 2003.
- B. Building Standards Commission meeting held June 26, 2003.
- C. City Council Finance Committee meeting held June 26, 2003 and July 10, 2003.
- D. Mayor's Local Committee on People with Disabilities meeting held June 26, 2003.
- E. Planning Commission meeting held July 7, 2003.
- F. Wharton Regional Airport Board meeting held July 8, 2003.
- G. Consultant Selection Committee meeting held July 10, 2003.

City Manager Andres Garza, Jr. presented the City Council, Committee, Commissions, and Boards reports. No action was taken.

The twenty-seventh item on the agenda was adjournment. Councilmember Don Mueller made a motion to adjourn. Councilmember Darryl Darnell seconded the motion. All voted in favor.

The meeting adjourned at 8:57 p.m.

**CITY OF WHARTON, TEXAS**

**By:** \_\_\_\_\_

**BRYCE D. KOCIAN**

Mayor

**ATTEST:**

\_\_\_\_\_  
**JOYCE VASUT**

City Secretary