

**DEVELOPER PARTICIPATION CONTRACT
30 PERCENT REIMBURSEMENT**

THIS CONTRACT FOR DEVELOPER PARTICIPATION ("Contract") is made on the Countersignature Date by and between the **CITY OF HOUSTON, TEXAS** ("City"), a municipal corporation and home-rule city of the State of Texas principally situated in Harris County, acting by and through its governing body, the City Council and _____ ("Developer"), doing business in the State of Texas.

The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

<u>City</u>	<u>Developer</u>
Director of Department of Houston Public Works or Designee City of Houston P.O. Box 1562 Houston, Texas 77251	_____ _____ _____ _____

PREAMBLE

WITNESSETH:

WHEREAS, the Developer intends to develop a tract located within the municipal boundaries of the City; and

WHEREAS, the Developer has paid all impact fees required by the City for such development for _____; and

WHEREAS, it is necessary to construct the project described in Exhibit "A" (the "Project"); and

WHEREAS, the City and the Developer have determined that the Developer shall/shall not oversize the Project; and

WHEREAS, the City has agreed to participate in the cost of the Project in an amount not to exceed \$ _____;

NOW, THEREFORE, the City and the Developer hereby agree to the terms and conditions of this Contract. This Contract consists of the following sections:

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EXHIBIT “A” - Attached

All of the above described sections and documents are hereby incorporated into this Contract by this reference for all purposes.

IN WITNESS HEREOF, the City and the Developer have made and executed this Participation Contract in multiple copies, each of which is an original.

ATTEST/SEAL (if a corporation):
WITNESS (if not a corporation):

Developer

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Tax I.D. No. _____

CITY OF HOUSTON
BY:

COUNTERSIGNED
BY:

Director, Department of Houston
Public Works

City Controller

APPROVED AS TO FORM:

DATE COUNTERSIGNED:

Sr. Assistant City Attorney
L.D. File No.

I. DEFINITIONS

"Allowable Costs" includes the full cost of materials and labor for construction of the Project, but excluding costs of surveys, easements, engineering and inspection services.

"Allowable Oversizing Costs" are/are not authorized for this Participation Contract. Allowable Oversizing Costs are the difference in Allowable Costs between the Project as bid for the oversizing requirements of this Participation Contract and the Project as bid without oversizing.

"City" is identified in the Preamble and includes its successors and assigns.

"Closing" is described in Article III.

"Developer" is identified in the Preamble and includes its successors and assigns.

"Participation Contract" means this agreement.

"Director" means the Director of the Department of Houston Public Works or such other person as may be designated by the Director by notice to the Developer to administer this Participation Contract.

"Project" is defined in Exhibit "A".

II. DUTIES OF DEVELOPER

A. Water, Wastewater, and Storm Sewer Capacity; Engineering Drawings

Before executing this contract, Developer shall (i) obtain all necessary water and wastewater and storm drainage capacity for the Project as required by the Director, and (ii) submit to the Director basic engineering drawings showing the location of the water and sewer lines.

B. Construction of the Project

(1) Developer must obtain preliminary plat approval from the City Planning Commission within 120 days of the effective date of this Agreement.

(2) Before the Project may be awarded, (i) the Developer must obtain final plat approval from the City Planning Commission and (ii) must submit to the Director and obtain his or her approval of all plans and drawing for the Project. Any change made by Developer to the final plans must be approved in advance by the Director.

(3) The Developer shall require its construction contractor(s) to construct the Project in a good and workmanlike manner in accordance with the engineering design approved by the Director prior to construction. The Developer shall provide all engineering required for construction of the Project.

(4) The Developer shall require its construction contractor(s) to provide performance and payment bonds in accordance with the requirements of §212.073 of the Texas Local Government Code. The amount of the performance and payment bonds shall be the full cost of Developer's construction contract. The Developer shall also require its contractor(s) to provide one-year maintenance and surface restoration bonds as required by the permit. The Developer and the City shall be dual obligees for the performance and payment bonds (Developer is primary obligee), and the City shall be the obligee for the maintenance and surface restoration bonds. Developer shall submit original duplicates of these bonds on form re-approved by the City Legal Department, to the Office of the City Engineer prior to award of the construction contract for the Project. Provided, if the City does not approve or request corrections to the bonds within ten working days of its receipt of the bonds, the Developer may award the construction contract for the Project.

(5) Before the Notice to Proceed for the Project may be issued, the Developer shall require the contractor to obtain from the Director each permit (water, wastewater, storm sewer main as applicable) required to construct the Project.

(6) Developer shall acquire all lands and rights-of-way necessary to construct the Project. Developer shall coordinate with the City and other utilities to minimize the possibility of damage to utilities in the Project area. Upon completion of the Project, Developer shall ensure that the Project is free and clear of all liens and encumbrances, including mechanics liens and purchase money security interests.

(7) Developer must award the contract for construction of the Project on the basis of competitive bids. Developer shall follow bidding requirements of Chapter 252 of the Texas Local Government Code (lowest responsible bidder) unless the construction contract (including the unreimbursed amount) is less than \$50,000.

(8) Developer shall keep the Director reasonably informed regarding the progress of the Project as required by the Director. Developer shall notify and provide reasonable documentation for the Director for the following events: (1) advertisement for bids, (2) award of construction contract (including copies of bonds and insurance), (3) Notice to Proceed, (4) default of the contractor (if it occurs), and (5) completion of the Project such that it is ready for inspection by the City. The Project shall not be considered complete, and Developer or its contractor shall not connect the Project to the City's utility system until the Director issues a certificate of final completion.

(9) The Project shall be commenced and completed by the Developer in the time periods required by Article IV. The Director may grant a time extension not to exceed one additional year.

C. INDEMNIFICATION

DEVELOPER COVENANTS AND WARRANTS THAT IT WILL PROTECT, DEFEND, AND HOLD HARMLESS THE CITY, ITS EMPLOYEES, OFFICERS, AND

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LEGAL REPRESENTATIVES (COLLECTIVELY, THE "CITY") FROM ANY AND ALL THIRD PARTY CLAIMS, DEMANDS, AND LIABILITY, INCLUDING DEFENSE COSTS, RELATING IN ANY WAY TO DAMAGES, CLAIMS, OR FINES ARISING BY REASON OF OR IN CONNECTION WITH DEVELOPER'S ACTUAL OR ALLEGED NEGLIGENCE OR OTHER ACTIONABLE PERFORMANCE OR OMISSION OF THE DEVELOPER IN CONNECTION WITH OR DURING THE PERFORMANCE OF THE DUTIES UNDER THIS PARTICIPATION CONTRACT. ALSO, DURING THE PERFORMANCE OF THE WORK AND UP TO A PERIOD OF ONE YEAR AFTER THE DATE OF FINAL ACCEPTANCE OF THE WORK, DEVELOPER FURTHER EXPRESSLY COVENANTS AND AGREES TO PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY FROM ALL CLAIMS, ALLEGATIONS, FINES, DEMANDS, AND DAMAGES RELATING IN ANY WAY TO THE ACTUAL OR ALLEGED JOINT AND/OR CONCURRENT NEGLIGENCE OF THE CITY AND DEVELOPER, WHETHER DEVELOPER IS IMMUNE FROM LIABILITY OR NOT.

IT IS THE EXPRESSED INTENTION OF THE PARTIES HERETO THAT THE INDEMNITY PROVIDED HEREIN IS AN AGREEMENT BY THE DEVELOPER TO INDEMNIFY AND PROTECT THE CITY FROM THE CITY'S OWN NEGLIGENCE WHERE SAID NEGLIGENCE IS AN ALLEGED OR ACTUAL CONCURRING PROXIMATE CAUSE OF ANY ALLEGED THIRD-PARTY HARM.

THE INDEMNITY PROVISION PROVIDED HEREIN SHALL HAVE NO APPLICATION TO ANY CLAIM OR DEMAND WHERE BODILY INJURY, DEATH, OR DAMAGE RESULTS ONLY FROM THE SOLE NEGLIGENCE OF THE CITY UNMIXED WITH ANY FAULT OF THE DEVELOPER.

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NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE LIABILITY OF THE DEVELOPER UNDER THIS INDEMNITY PROVISION SHALL NOT EXCEED \$1,000,000 PER OCCURRENCE.

D. Insurance

Developer shall maintain in effect certain insurance coverage, which is described below. Developer may satisfy this requirement through insured policies in the name of its Contractor.

(1) Risks and Limits of Liability. Developer shall maintain the following coverages and limits of liability:

<u>(Coverage)</u>	<u>(Limit of Liability)</u>
Workers Compensation	Statutory for Worker's Compensation
Employer's Liability accident)	Bodily Injury by accident \$500,000 (each employee)
	Bodily Injury by Disease \$500,000 (policy limit) Bodily Injury by Disease \$500,000 (each employee)

Commercial General Liability:

Including Broad Form Coverage, Contractual Liability, Bodily and Personal Injury, and Completed Operations

Automobile Liability Insurance (for automobiles used by the Developer in the course of its performance under this Agreement, including Employer's Non-Ownership and Hired Auto Coverage)

Bodily Injury and Property

Damage, Combined Limits of \$1,000,000 each Occurrence and \$2,000,000 Aggregate

\$1,000,000 combined single limit per Occurrence

Defense costs are excluded from the face amount of the policy.
Aggregate Limits are per 12-month policy period
unless otherwise indicated.

(2) Form of Policies. The Director may approve the form of the insurance policies, but nothing the Director does or fails to do relieves Developer from its duties to provide the required coverage under this Agreement. The Director's actions or inactions do not waive the City's rights under this Agreement.

(3) Issuers of Policies. The issuer of any policy (i) shall have a Certificate of Authority to transact insurance business in Texas or (ii) shall be an eligible non-admitted insurer in the State of Texas and have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide.

(4) Insured Parties. Each policy, except those for Workers Compensation, Employer's Liability, and Professional Liability, must name the City (and its officers, agents, and employees) as Additional Insured parties on the original policy and all renewals or replacements.

(5) Deductibles. Developer shall be responsible for and pay any claims or losses to the extent of any deductible amounts and waives any claim it may have for the same against the City, its officers, agents, or employees.

(6) Cancellation. Developer must give the Director 30 days' advance written notice of any cancellation, non-renewal or material change to the policy. Developer shall give written notice to the Director within five days of the date on which total claims by any party against Developer reduce the aggregate amount of coverage below the amounts required by this Agreement. In the alternative, the policy may contain an endorsement establishing a policy aggregate for the particular project or location subject to this Agreement.

(7) Subrogation. Each policy except Professional Liability (if required) must contain an endorsement to the effect that the issuer waives any claim or right of subrogation to recover against the City, its officers, agents, or employees.

(8) Endorsement of Primary Insurance. Each policy, except Worker's Compensation and Professional Liability (if any), must contain an endorsement that the policy is primary to any other insurance available to the Additional Insured with respect to claims arising under this Agreement.

(9) Liability for Premium. Developer shall pay all insurance premiums, and the City shall not be obligated to pay any premiums.

(10) Subcontractors. Developer shall require all subcontractors to carry insurance naming the City as an additional insured and meeting all of the above requirements except amount. The amount must be commensurate with the amount of the subcontract, but in no case less than \$500,000 per occurrence.

(11) Proof of Insurance.

(a) Before issuance of the Notice to Proceed for the Project, Developer shall furnish the Director with Certificates of Insurance, along with an Affidavit from Developer confirming that the Certificates accurately reflect the insurance coverage maintained. If requested in writing by the Director, Developer shall furnish the City with certified copies of Developer's actual insurance policies.

(b) Developer shall continuously and without interruption, maintain in force the required insurance coverages specified in this Section. If Developer does not comply with this requirement, the Director, at his or her sole discretion, may

- a. immediately suspend Developer from any further performance under this Agreement and begin procedures to terminate for default, or
- b. purchase the required insurance with City funds and deduct the cost of the premiums from amounts due to Developer under this Agreement.

The City shall never waive or be estopped to assert its right to terminate this Agreement because of its acts or omissions regarding its review of insurance documents.

E. Compliance with Laws

Developer shall comply with all applicable state and federal laws and regulations as well as all provisions of the City of Houston Charter and Code of Ordinances including all applicable provisions of Chapter 47 of the Houston Code of Ordinances.

III. DUTIES OF CITY

A. Payment by City

After completion of the Project, the Director shall schedule the Closing for payment to the Developer at a time and place convenient to the parties.

At or before the time of the Closing, Developer shall provide the Director:

- (1) An accounting of all Allowable Costs, including records and vouchers for all payments made by the Developer for Allowable Costs. Developer shall provide all documentation of Allowable Costs as required by the Director.
- (2) A certified copy of the subdivision or development plat and all documents necessary and required by the City Attorney to vest title to the Project in the City free and clear of any encumbrances.
- (3) Record drawings of the Project signed by the Project engineer.

(4) Construction contractor's certificate of payment to subcontractors and material suppliers.

(5) Certificate of final completion of the Project executed by the Office of the City Engineer.

(6) Copy of acceptance letter for the Project signed by the Office of the City Engineer.

Upon receipt of the above-referenced items, the City shall pay the Developer. The sum of:

(1) 100% of Allowable Oversizing Costs for the Project, and

(2) 30% of the balance of Allowable Costs for the Project.

However, total reimbursement shall not exceed _____.

IV. TERM AND TERMINATION

A. This Contract is effective on the date of countersignature by the City Controller and shall remain in effect for the combination of the following terms:

(1) From the Effective Date until the actual date on which Developer issues a Notice to Proceed with construction of the Project ("Construction Date"), which term shall not exceed 18 months, and

(2) If the Closing Date is 3 years or less after the Construction Date, then until the City has reimbursed Developer for Allowable Costs and Allowable Oversizing Costs. Provided, however, the Director may grant a time extension not to exceed one additional year.

FAILURE OF THE DEVELOPER TO COMPLETE PERFORMANCE OF ITS APPLICABLE OBLIGATIONS UNDER THIS CONTRACT WITHIN EITHER OF THE TIME PERIODS SET OUT ABOVE SHALL CONSTITUTE A DEFAULT OF THIS CONTRACT BY DEVELOPER AND

SHALL TERMINATE THE CITY'S DUTY TO REIMBURSE DEVELOPER FOR ANY ELIGIBLE COSTS HEREUNDER OR FOR ANY COSTS WHATSOEVER AND SHALL CONSTITUTE A WAIVER BY DEVELOPER OF ANY RIGHT TO CLAIM SUCH REIMBURSEMENT OR ANY OTHER COSTS OR DAMAGES ARISING OUT OF THE CONTRACT OR THE DESIGN AND CONSTRUCTION OF THE PROJECT. DEVELOPER'S FAILURE TO COMPLETE ITS OBLIGATIONS TIMELY AS SET OUT ABOVE SHALL NOT REQUIRE THE CITY TO GIVE NOTICE OF DEFAULT AS DESCRIBED BELOW OR TO GIVE DEVELOPER ANY TIME TO CURE.

B. For any other reason except Developer's failure to complete its obligations timely, either party may terminate its performance under this Contract in the event of default by the other party and a failure by that party to cure such default receiving notice thereof, all as provided in this Section. Default shall occur if a party fails to observe or perform any of its duties under this Participation Contract. Should such a default occur, the injured party shall deliver a written notice to the defaulting party describing such default and the proposed date of termination. Such date may not be sooner than the 30th day following receipt of the notice. The injured party, at its sole option, may extend the proposed date of termination to a later date. If prior to the proposed date of termination, the defaulting party cures such default, then the proposed termination shall be ineffective. If the defaulting party fails to cure such default prior to the proposed date of termination, then the injured party may terminate its performance under this Participation Contract as of such date. The Director may give such notice for the purposes of this Contract.

V. MISCELLANEOUS

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A. Independent Contractor

Developer is engaged as an independent contractor, and all of the services provided for herein shall be accomplished by Developer in such capacity. The City of Houston will have no control or supervisory powers as to the detailed manner or method of the Developer's performance of the subject matter of this Participation Contract. All personnel supplied or used by Developer shall be deemed employees or subcontractors of Developer and will not be considered employees, agents or subcontractors of the City of Houston for any purpose whatsoever. Developer shall be solely responsible for the compensation of all such personnel, for the withholding of income, social security and other payroll taxes and for the coverage of all worker's compensation benefits.

B. Force Majeure

"Force Majeure" includes, but is not limited to, acts of God, acts of the public enemy, war, blockades, insurrection, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, and any other incapacities of either party to carry out its obligations under this Participation Contract, except strikes or labor disputes and breakage or damage to machinery or equipment, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, and which by the exercise of due diligence and care such party could not have avoided.

If, because of Force Majeure any party hereto is rendered unable, wholly or in part, to carry out its obligations under this Participation Contract, then such party shall give to the other party prompt written notice of the Force Majeure with reasonable full details concerning it; thereupon the obligation of the party given the notice, so far as they are affected by the Force Majeure, shall be suspended during, but no longer than, the continuance of the Force Majeure. The affected party shall use all possible diligence to remove the Force Majeure as quickly as possible, but his

obligation shall not be deemed to require the settlement of any strike, lockout, or other labor difficulty contrary to the wishes of the party involved.

C. Severability

In the event any term, covenant or condition herein contained shall be held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, covenant or condition herein contained, provided that such invalidity does not materially prejudice either the Developer or the City in their respective rights and obligations contained in the valid terms, covenants or conditions hereof.

D. Entire Agreement

This Participation Contract merges the prior negotiations and understandings of the parties hereto and embodies the entire agreement of the parties, and there are not other agreements, assurances, conditions, covenants (expressed or implied) or other terms with respect to the Project, whether written or verbal, antecedent or contemporaneous, with the execution hereof.

E. Notices

All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received or, if earlier, on the third day following deposit in a United States Postal Service post office or receptacle with proper postage affixed (certified mail, return receipt requested) addressed to the respective other party at the address prescribed in the preamble of this Participation Contract or at such other address as the receiving party may have theretofore prescribed by notice to the sending party.

F. Acceptance and Approval

An approval by the Director, or by any other instrumentality of the City, of any part of Developer's performance shall not be construed to waive compliance with this Participation

Contract or to establish a standard of performance other than required by this Participation Contract or by law. The Director is not authorized to vary the terms of this Participation Contract.

G. Inspections and Audits

Representatives of the City shall have the right to perform, or cause to be performed, (1) audits of the books and records of the Developer relating to the Project, and (2) inspections of all places where work is undertaken in connection with the Project. The Developer shall be required to keep such books and records available for such purpose for at least three (3) years after the ceasing of its performance under this Participation Contract. Nothing in this provision shall affect the time for bringing a cause of action nor the applicable statute of limitations.

H. Enforcement

The City Attorney or his or her designee shall have the right to enforce all legal rights and obligations under this Participation Contract without further authorization. Developer covenants to provide to the City Attorney all documents and records that the City Attorney deems necessary to assist in determining Developer's compliance with this Participation Contract, with the exception of those documents made confidential by federal or State law or regulation.

I. Risk of Loss

Risk of loss or damage to the Project shall pass from the Developer to the City upon Closing.

J. Non-Waiver

Failure of either party hereto to insist on the strict performance of any of the agreements herein or to exercise any rights or remedies accruing hereunder upon default or failure of performance shall not be considered a waiver of the right to insist on, and to enforce by any appropriate remedy,

strict compliance with any other obligation hereunder or to exercise any right or remedy occurring as a result of any future default or failure of performance.

K. Business Structure and Assignments

The Developer shall not assign this Contract at law or otherwise or dispose of all or substantially all of its assets without the prior written consent of both Directors. If the Developer desires approval of an assignment, the Developer shall immediately furnish the Director:

- (1) proof of the assignment and the name, telephone number, and address of the assignee and a clear identification of the fees to be paid to the Assignee; and
- (2) an original Affidavit of Ownership and Control of the Assignee.

The Developer shall not delegate any portion of its performance under this Contract without obtaining prior written consent from Director.

Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. Provided, however, the Developer must provide the Director the information described in item (1) above.

L. Survival

Developer shall remain obligated to the City under all clauses of this Participation Contract that expressly or by their nature extend beyond the expiration or termination of this Participation Contract, including Sections II C (Indemnity).

M. Developer Debt

IF DEVELOPER, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY

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CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT DEVELOPER HAS INCURRED A DEBT, SHE SHALL IMMEDIATELY NOTIFY DEVELOPER IN WRITING. IF DEVELOPER DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FOR ANY PAYMENTS OWED TO DEVELOPER UNDER THIS AGREEMENT, AND DEVELOPER WAIVES ANY RECOURSE THEREFOR.