

**DEVELOPER PARTICIPATION CONTRACT  
70 PERCENT REIMBURSEMENT**

**THIS DEVELOPER PARTICIPATION CONTRACT** ("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"), a \_\_\_\_\_ 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”: Description of Project**

**Exhibit “B”: Request for Reimbursement of Eligible Storm Drainage Costs**

All of the above described sections and exhibits 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: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:  
Tax Identification No. \_\_\_\_\_

ATTEST/SEAL:

CITY OF HOUSTON, TEXAS  
Signed 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

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

"Closing" is described in Article III.

"Code of Ordinances" is the City of Houston Code of Ordinances.

"Construction Date" is described in Article IVA.

"Detention Facility Allocation" means the total cost of a Detention Facility constructed pursuant to a Developer Participation Agreement under §47-164 of the Code of Ordinances divided by the total number of lots projected by the Developer to be served by such facility, regardless of whether the lots were or will be developed in conjunction with this Contract.

"Developer" is identified in the Preamble and is the owner of the Property identified in Exhibit "A". Developer also includes any successor in title to any portion of the Property, except to Retail Purchaser, but any Developer that is not an assignee of this Participation Contract is subject only to the agreement required under Subsection II E (4) below.

"Director" means the Director of Houston Public Works or such person as he and she may designate for the purpose of administering this Contract.

"Eligible Construction Costs" means the full cost of materials, labor and related testing necessary for construction of the Main, as well as cost of construction management performed by independent contractors of Developer and the actual costs of publishing notice of bids for construction of the Project in accordance with Local Government Code Section 252.041 or any successor statute, but excludes all costs of lift stations and applicable permits of all kinds, which shall not be reimbursed by the City under this Contract.

"Eligible Costs" means Eligible Design, Construction, Over Sizing, and where applicable, Storm Drainage Costs.

“Eligible Design Costs” means the full cost of survey, design, and related testing services necessary for the water and wastewater Main, which services are performed by independent contractors to the Developer, but excludes the cost of applicable permits of all kinds, which shall not be reimbursed by the City under this Contract.

"Eligible Over Sizing Costs" means the actual incremental costs of design and construction of water and wastewater Main sized at the request of the Director in excess of the capacity necessary for the residential units to be served by the Project.

"Eligible Storm Sewer Drainage Costs" means, for new low or moderate cost single family homes only, the actual cost, not to exceed \$3,000 per lot including allowable interest, of design, testing, and construction of storm sewer drainage for each lot. It includes either (a) the Detention Facility Allocation for each lot or (b) the portion of any required flood control impact fee attributable to such lot. The cost of applicable permits of all kinds is excluded from Eligible Storm Sewer Drainage Costs and will not be reimbursed under this Contract.

"Interest Rate" means \_\_\_\_ %.

"Low or Moderate Cost" has the meaning set out in Section 47-164 (3) of the City of Houston Code of Ordinances.

“Main” means water, wastewater and storm water facilities eligible for reimbursement under Section 47-164 of the Code of Ordinances.

"Participation Contract" means this contract.

"Project" is defined in Exhibit “A”.

“Property” is the land described in Exhibit “A”.

“Related Entity” means, with respect to any party which has been an Developer hereunder: (i) any spouse, parent, child, grandchild, brother or sister of such Developer; or (ii)

any person or entity (A) that directly or indirectly controls or is controlled by or is under common control with such Developer, (B) that is an officer of, partner in or trustee of, or serves in a similar capacity with respect to, such Developer or of which such Developer is an officer, partner or trustee, or with respect to which such Developer serves in a similar capacity, or (C) that is the beneficial owner, directly or indirectly, of 10% or more of any class of equity securities of such Developer or of which such Developer is directly or indirectly the owner of 10% or more of any class of equity securities.

“Retail Purchaser” is a fee title purchaser of one Single Family Residence within the Property, who actually resides at the Single Family Residence.

"Single Family Residence" has the meaning set out in Section 42-1 of the City of Houston Code of Ordinances.

## **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, wastewater, and if applicable, storm sewer lines. If applying for Eligible Storm Sewer Drainage Costs, Developer shall furnish the Director with pre-qualifying information requested by the Director.

### **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.

### **C. INDEMNIFICATION**

**DEVELOPER COVENANTS AND WARRANTS THAT IT WILL PROTECT, DEFEND, AND HOLD HARMLESS THE CITY, ITS EMPLOYEES, OFFICERS, AND 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 THE ACTUAL OR ALLEGED NEGLIGENCE OR OTHER ACTIONABLE PERFORMANCE OR OMISSION OF THE DEVELOPER (INCLUDING DEVELOPER'S CONTRACTORS AND SUBCONTRACTORS) IN CONNECTION WITH OR DURING THE PERFORMANCE OF THE DUTIES UNDER THIS PARTICIPATION CONTRACT. 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 (INCLUDING DEVELOPER'S CONTRACTORS AND SUBCONTRACTORS) ARISING OUT OF OR RELATED TO THIS CONTRACT, WHETHER DEVELOPER IS IMMUNE FROM LIABILITY OR NOT, FOR A PERIOD OF UP TO 4 YEARS AFTER THE DATE OF CLOSING.**

**IT IS THE EXPRESS INTENTION OF THE PARTIES HERETO THAT THE INDEMNITY PROVIDED HEREIN IS AN CONTRACT 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.**

**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	Bodily Injury by accident \$500,000 (each accident) 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	Bodily Injury and Property Damage, Combined Limits of \$1,000,000 each Occurrence and \$2,000,000 Aggregate
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)	\$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. Sale of Property

Developer shall convey the Property or portions thereof only as follows:

- (1) To Retail Purchasers by fee simple deed;
- (2) To family members within the first degree of consanguinity or affinity by lease.
- (3) To a natural person by a qualified lease. A qualified lease is any rental, lease, lease-purchase or other financial arrangement that does not convey title to the person, but only if such qualified lease is authorized by a City approved lease-purchase program; or

(4) To a purchaser who agrees in writing:

- a. To construct only Single Family Residences on the single family residential lots covered by this Participation Contract;
- b. To abide by the requirements of this Subsection II E; and
- c. That the City as a third-party beneficiary may enforce the provisions of this Section II E in the event the purchaser violates any of such provisions.

Once the purchaser has agreed to these conditions in the written contract, the Developer shall not be held in default on account of actions by such purchases or subsequent purchasers who violate the terms of the contract executed pursuant to (4). (In the event the Developer and purchaser desire to obtain an assignment of the Participation Agreement, such Developer and purchaser must obtain the written approval of the assignment from the Director.)

The Director shall monitor Developer's development and sale of the Property for compliance with the Participation Contract, including this Section II E.

F. 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 substantial completion of the Project and upon inspection and certification by the Director that construction of at least 25 percent of the housing to be served by the Project has been completed, the Director shall schedule the closing for payment to the Developer ("Closing") at a time and place convenient to the parties.

At least 30 days before the date of Closing, Developer shall provide the Director of PW&E:

(1) An accounting of all Eligible Costs, including records and vouchers for all payments made by the Developer for Eligible Costs. Developer shall provide all documentation of Eligible 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.

(7) Certification signed by the Developer that it has complied with the requirements of Section II E, Sale of Property.

Within 30 days after Developer completes the closing requirements, subject to the Limitation of Appropriation set out in Section B below, the City shall pay for water and wastewater Main as follows:

The Sum of:

- (a) 100 percent of the Eligible Over Sizing Costs for the Main,
- (b) 70 percent of the balance of Eligible Construction Costs for the Main,
- (c) 100 percent of the Eligible Design Costs,
- (d) Interest on the reimbursement cost as calculated above at the interest rate described in Article I of this Contract for the period of time between the Developer's loan disbursement and payment by the City.

For Projects serving single family housing that is sold at low or moderate cost as defined in Section 47-164 of the Code of Ordinances only, the City shall pay Developer, in addition to the above costs, Eligible Storm Sewer Drainage Costs (including the Detention Facility Allocation as set out in Section IV A and interest calculated at the rate set out in Article I from the date of loan disbursement up to the Date of Closing only) up to a maximum amount of \$3,000 per lot, upon proof furnished to the Director that lot and housing unit have been sold for low or moderate cost and that the Developer has complied with Section II E, Sale of Property. The City shall pay Eligible Storm Sewer Drainage Costs during the period beginning with the date of Closing and ending on the third anniversary of the Construction Date ("the Storm Sewer Reimbursement

Period"). In order to receive payment of such costs, the Developer shall submit to the Director a "Request for Reimbursement of Eligible Storm Drainage Costs" in the form set out in Exhibit "B" in accordance with procedures and including documentation to be established by the Director. The City shall not pay and Developer shall not be entitled to receive reimbursement for Eligible Storm Sewer Drainage Costs for any lots sold after the Storm Sewer Reimbursement Period expires, except as provided for the Detention Facility Allocation in Section IV A (3). The City shall never be obligated to pay Developer any amount in excess of the Appropriated Funds set out for Eligible Storm Sewer Drainage Costs regardless of the number of homes sold.

**B. Limit of Appropriation**

(1) The City's duty to pay money to Developer under this Contract is limited in its entirety by the provisions of this Section.

(2) In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has appropriated (a) the sum of \$\_\_\_\_\_ to pay money due for Eligible Design, Construction, and Over Sizing Costs, including interest, and (b) the sum of \$\_\_\_\_\_ to pay for Eligible Storm Sewer Drainage Costs, including interest, under this Contract (the "Appropriated Funds"). The City Council of the City, in its discretion, may appropriate additional funding for this Contract, but it is not obligated to do so.

**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 Eligible Design, Construction, and Over Sizing 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.**

(3) For Projects serving low or moderate cost single family housing only, from the Closing Date through the end of the Storm Sewer Reimbursement Period, as set out in III A above. Developer shall not be entitled to reimbursement for any Eligible Storm Sewer Drainage Costs if it fails to meet either of the deadlines in (1) and (2) above. Developer shall not be

entitled to receive reimbursement for Eligible Storm Sewer Drainage Costs on any lot not built on and sold at low or moderate cost within the time period specified in this section.

Notwithstanding the foregoing, however, the City shall reimburse the Developer for the Detention Facility Allocation for eligible lots with homes sold for low or moderate cost even if the Detention Facility itself was constructed under a previous Developer Participation Contract. The amount of interest payable on any Detention Facility Allocation shall never exceed the amount of interest payable on the Detention Facility Allocation pursuant to the Developer Participation Contract under which the Detention Facility was constructed.

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 after 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.

If the default is for a violation of Section II E, among other remedies available to the City, the City may recover from the Developer all money paid to the Developer under this

Participant Contract and/or debar the Developer and Related Entities from Participation Contracts.

In the event this Contract is terminated due to default of the Developer or the Developer abandons the Project, either of which event is before the construction contractor finishes the Project, the City reserves the right to continue the construction contract and utilize any unexpended funds for this Contract to reimburse the construction contractor.

## V. MISCELLANEOUS

### A. Independent Contractor

Developer is engaged as an independent contractor, and Developer shall accomplish all of the services provided for herein in such capacity. The City of Houston shall 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 shall 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 workers' 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 inability 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 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 a 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. A 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 neither 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 the Director. 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;
- (2) an original Affidavit of Ownership and Control of the Assignee; and
- (3) all pre-qualifying information requested by the Director.

The Developer shall not delegate any portion of its performance under this Contract without obtaining prior written consent from the 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 Directors 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) and II E (Sale of Property).

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 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.