**LEASEBACK AGREEMENT**

|  |  |  |
| --- | --- | --- |
| **STATE OF TEXAS** | **§** |  |
|  |  |  |
| **COUNTY OF** | **§** | **LEASE NO.** |

**THIS LEASE AGREEMENT** ("Lease") is made and entered into by and between the State of Texas, by and through its Texas Department of Transportation ("Lessor" or the "Department"), and       ("Lessee");

**WHEREAS**, the Department has authority to lease highway assets pursuant to Chapter 202, Subchapter C, Section 202.052, Texas Transportation Code, as amended from time to time, and pursuant to Title 43, Sections 21.600‑21.606 of the Texas Administrative Code as amended from time to time; and

**WHEREAS**, Lessee has submitted a request to lease the property more particularly described on Exhibit "A" attached hereto and incorporated herein for all purposes and is hereinafter referred to as "Premises":

**NOW THEREFORE**, for and in consideration of the foregoing premises, terms, conditions, covenants and performances contained herein, Lessor does hereby lease to Lessee, and Lessee hereby leases from Lessor Lessor's rights in the Premises.

**TO HAVE AND TO HOLD** the Premises, together with all rights, privileges, and appurtenances thereunto unto Lessee, subject to the covenants, agreements, terms, provisions and limitations contained herein.

# ARTICLE 1

**TERM OF LEASE**

**1.01** This Lease is for a term of        commencing on      ,       and terminating on      ,       ("Lease Term"), unless sooner terminated as herein provided. Notwithstanding any provision herein to the contrary, either party hereto may cancel this Lease upon        written notice to the other party.

**ARTICLE 2**

**CONSIDERATION**

**2.01** Lessee agrees to pay Lessor as rental for the use and occupancy of the Premises under this Lease the sum of       ($     ) per , without demand, set off or deduction. Each installment of rent shall be due and payable in advance of the Commencement Date for the first installment and subsequently annually in advance to Lessor, at its District office in      ,       County, Texas, or at such other place as Lessor may from time to time direct by notice delivered to Lessee. Rental payments shall be nonrefundable in the event of default by Lessee in the performance of any covenant, condition or agreement in this Lease.

**2.02 Late Charge.** If rentals are tendered to Lessor more than fifteen (15) days past the due date, Lessee shall pay an administrative late charge of five percent (5%) on the total amount due Lessor.

**ARTICLE 3**

**ACCEPTANCE OF PREMISES/DISCLAIMER**

**3.01 LESSEE ACKNOWLEDGES THAT IT IS LEASING THE PREMISES "AS IS" WITH ALL FAULTS, INCLUDING BUT NOT LIMITED TO ANY AND ALL POLLUTANTS, ASBESTOS, UNDERGROUND STORAGE TANKS AND/OR ANY OTHER HAZARDOUS MATERIALS, AND THAT LESSOR HAS NOT MADE ANY REPRESENTATIONS OR WARRANTIES AS TO THE CONDITION OF SUCH PREMISES. LESSEE HEREBY WAIVES ANY AND ALL CAUSES OF ACTION, CLAIMS, DEMANDS, DAMAGES AND LIENS BASED ON ANY WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF SUITABILITY FOR A PARTICULAR PURPOSE, ANY AND ALL WARRANTIES OF HABITABILITY, AND ANY OTHER IMPLIED WARRANTIES NOT EXPRESSLY SET FORTH IN THIS LEASE. LESSEE ACKNOWLEDGES AND AGREES THAT LESSEE HAS FULLY EXERCISED THE RIGHT TO INSPECT THE PREMISES FOR ANY DEFECTS AS TO THE SUITABILITY OF SUCH PROPERTY FOR THE PURPOSE TO WHICH LESSEE INTENDS TO PUT THE PREMISES. THIS LEASE IS SUBJECT TO ALL COVENANTS, EASEMENTS, RESERVATIONS, RESTRICTIONS AND OTHER MATTERS OF RECORD APPLICABLE TO THE PREMISES.**

**ARTICLE 4**

**USE OF PREMISES**

**4.01 Permitted Use.** Subject to the terms and provisions hereof, Lessee shall continuously use and occupy the Premises solely for the purpose of      . Any proposed change in the use is subject to written approval of the Lessor.

**4.02 Void Insurance**. Lessee may not use or occupy, permit the Premises to be used or occupied, nor do or permit anything to be done in or on the Premises in a manner that would in any way make void or voidable any insurance then in force with respect thereto, or that would make it impossible to obtain the insurance required to be furnished by Lessee hereunder.

**4.03 Compliance with Laws**. Lessee, at its own expense, will (i) comply with all federal, State, municipal and other laws, codes, ordinances, rules and regulations applicable to the Premises whether same are in existence on the execution date of this Lease or become effective during the term of this Lease; and (ii) comply with such regulations as Lessor may promulgate regarding sanitation, cleanliness and other health and/or environmental matters, including, without limitation, removal of garbage, trash and other waste; and (iii) install, remove and alter such equipment and facilities in, and make such alterations to, the Premises as may be necessary so to comply with the foregoing (i) and (ii); and (iv) use the highest degree of care and all proper safeguards to prevent pollution of air, soil and water in, on and around the Premises. Lessee will not permit any unlawful use of the Premises and will not commit or permit anyone else to commit an act which might in the exclusive judgment of Lessor, appreciably damage Lessor's goodwill or reputation, or tend to injure or depreciate the value of the Premises and/or any Improvements located thereon. In addition to the forgoing, Lessee, at Lessee's expense, shall comply with all laws, rules, orders, ordinances, directions, regulations and requirements of federal, State, county and municipal authorities now in force or which may hereafter be in force, which shall impose any duty upon Lessor or Lessee with respect to the use, occupation or alteration of the Premises, including but not limited to the Americans with Disabilities Act (ADA), (Public Law 101-336, July 26, 1990) and the Texas Architectural Barrier Act (TABA), (Article 9102, Texas Revised Civil Statutes). In addition to the foregoing, Lessee shall furnish to Lessor, within five (5) days of receipt by Lessee, copies of any and all notices and/or correspondence directed to Lessee by any governmental entity or other entity or person indicating violation or possible violation of any laws or other regulations.

**4.04 Prevention of Pollution.** Lessee will prevent pollution of air, soil and water in, on, under and around the Premises. Lessee, at its sole cost and expense, shall take any and all corrective action deemed necessary or desirable by the Department, and as required by any applicable federal, State, municipal and other laws, codes, ordinances, rules and regulations to cleanup, remove and abate any and all soil contamination, groundwater contamination or any other contamination of the Premises caused directly or indirectly by any release or discharge of any hazardous, toxic or otherwise harmful substances in, on, under and around the Premises by Lessee and/or Lessee's employees, agents, representatives, contractors, permittees, invitees or any other persons occupying the Premises or any portion thereof by, through, or under Lessee. In the event Lessee, Lessee's employees, agents, representatives, contractors, permittees, invitees or any other person occupying the Premises or any portion thereof by, through or under Lessee, brings or dispose's of any hazardous, toxic or otherwise harmful substances onto or within the Premises, **LESSEE AGREES TO INDEMNIFY LESSOR FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, COSTS, CAUSES OF ACTION, LOSSES AND ALL OTHER DAMAGE AND EXPENSE (INCLUDING THE COST OF DEFENDING AGAINST ALL OF THE AFORESAID) WHETHER THE AFORESAID ARE MADE BY LESSEE, LESSEE'S EMPLOYEES, AGENTS, REPRESENTATIVES OR BY THIRD PARTIES, WITHOUT LIMIT AND WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF OR THE NEGLIGENCE OF ANY PARTY OR PARTIES, AND REGARDLESS OF WHETHER SUCH CLAIMS ARE CAUSED DIRECTLY OR INDIRECTLY BY THE NEGLIGENCE OF LESSOR, ON ACCOUNT OF CLEANUP ABATEMENT AND/OR DISPOSAL COSTS, FINES AND/OR PENALTIES INCURRED OR CHARGED DUE TO THE PRESENCE OF SUCH, HAZARDOUS TOXIC OR OTHERWISE HARMFUL SUBSTANCES, PROPERTY DAMAGE AND/OR PERSONAL INJURY SUSTAINED OR ALLEGED TO HAVE BEEN SUSTAINED BY ANY PERSON OR PERSONS AND THE COST OF REMOVNG ANY LIEN PLACED ON THE PREMISES. LESSEE'S INDEMNITY HEREUNDER INCLUDES, BUT IS NOT LIMITED TO, ANY NEGLIGENT ACT OR OMISSION OF LESSEE, LESSEE'S EMPLOYEES, AGENTS AND/OR REPRESENTATIVES, OR ANY OTHER PERSON OCCUPYING THE PREMISES, OR ANY PORTION THEREOF, BY, THROUGH OR UNDER LESSEE. LESSEE'S INDEMNITY HEREUNDER SHALL SURVIVE ANY TERMINATION OF THIS LEASE, WHETHER BY EXPIRATION OF THE LEASE TERM OR OTHERWISE.**

**ARTICLE 5**

**IMPOSITIONS, UTILITIES, NET LEASE**

**5.01 Impositions Defined**. The term "Impositions" means all taxes, assessments, use and occupancy taxes, water and sewer charges, rates and rents, charges for public utilities, excises, levies, license, franchise and permit fees, personal property taxes, ad valorem taxes and other charges by any public authority, general and special, ordinary and extraordinary, foreseen and unforeseen, of any kind and/or nature whatsoever, that are assessed, levied, charged, confirmed or imposed during the Lease Term by any public authority upon or accrue on the Premises and/or any improvements or other property thereon whether belonging to Lessor or Lessee, or accrue on the rent and income received by or for the account of Lessee from any sublessee or for any use or occupation of the Premises. The term "Impositions" shall also include all penalties, interest and other charges payable by reason of any delay or failure or refusal of Lessee to make timely payments as required hereinafter.

**5.02 Lessee Obligation for Impositions**. During the Lease Term, Lessee will pay all Impositions as and when they become due. Lessee will, if so requested, promptly deliver to Lessor evidence of payment. At its sole expense, Lessee may contest the validity or amount of any Imposition, in which event payment may be deferred only as permitted by law; however, in no event may Lessee defer payment in a manner that would allow a lien to be placed upon the Premises or any part thereof.

**5.03 Utilities**. Lessee will pay all charges for gas, electricity, light, heat, air conditioning, power, telephone and all other utilities and similar services rendered or supplied to the Premises, and also all water rents, sewer service charges or other similar charges, including, but not limited to connection fees, transfer fees and deposits levied or charged against or in connection with the Premises. **IN NO EVENT WILL LESSOR BE LIABLE FOR ANY INTERRUPTION OR FAILURE IN THE SUPPLYING OF ANY UTILITIES TO THE PREMISES.**

**5.04 Lessor not Obligated**.  **LESSOR WILL NOT HAVE TO MAKE ANY EXPENDITURE, INCUR ANY OBLIGATION, OR INCUR ANY LIABILITY OF ANY KIND WHATSOEVER IN CONNECTION WITH THIS LEASE OR THE FINANCING, OWNERSHIP, CONSTRUCTION, MAINTENANCE, OPERATION OR REPAIR OF THE PREMISES. ANY ATTEMPT BY LESSEE TO BIND LESSOR FOR ANY OF THE ABOVE OBLIGATIONS SHALL BE NULL AND VOID AND LESSOR EXPRESSLY DISCLAIMS ANY SUCH LIABILITY.**

**ARTICLE 6**

**MAINTENANCE**

**6.01 Maintenance Requirements**. **LESSOR SHALL HAVE NO DUTY TO REPAIR OR MAINTAIN THE PREMISES OR ANY IMPROVEMENTS AS DEFINED HEREINBELOW. LESSOR SHALL HAVE NO DUTY TO MAKE ANY REPLACEMENT OF ANY IMPROVEMENT.** Lessee shall maintain in good, safe repair and condition, including the aesthetic value, at its sole expense and risk, all of the Improvements and equipment located or to be located on the Premises, and at the expiration or termination of this Lease deliver up the Premises in good repair and condition (reasonable wear and tear excepted). All maintenance, repairs and/or replacement will be accomplished, in the sole and absolute opinion of Lessor, in a manner so as to cause no reduction in the level of service of the Highway Facility, as defined hereinbelow, and no interference with the construction, maintenance and/or operation of the Highway Facility and related improvements thereto nor restrict the use, construction, maintenance and/or operation of the remainder of any of Lessor's property. The term "Highway Facility" when used throughout this Lease means any present or future physical roadway improvements within existing or future right of way, including, but not limited to, bridges, embankments, drainage areas, traffic signals, signs and roadway surfaces and subsurfaces except for Improvements constructed or placed on the Premises by Lessee.

**6.02 Damage to Highway Facility.** Lessee shall, at Lessee’s expense, repair any damage to any portion of the Highway Facility caused by the acts or omissions of Lessee, its employees, agents, representatives, licensees, concessionaires, and invitees. All repairs shall be in compliance with the construction requirements of Article 7. If Lessee fails to repair the Highway Facility as required herein, Lessor may, on ten (10) days prior notice, enter the Premises if necessary, and perform the repair at Lessee’s sole liability, except that no notice is required in case of emergency. Lessee shall pay the cost thereof, including but not limited to, the cost of labor, materials, equipment, plans and administration, within thirty (30) days of receipt of a statement of said cost. **LESSEE EXPRESSLY WAIVES AND RELEASES LESSOR FROM ALL DAMAGES AND CLAIMS THAT MAY RESULT FROM SUCH ENTRY BY LESSOR INCLUDING BUT NOT LIMITED TO ANY DAMAGES AND CLAIMS CAUSED DIRECTLY OR INDIRECTLY BY THE NEGLIGENCE OF LESSOR.**

**6.03 Lessor's Rights**. In the event the District Engineer determines that there is a condition or omission with respect to the Improvements, or any extension thereof located outside of the Premises, which is a hazard to the safety of the traveling public then the District Engineer shall notify Lessee of the condition and shall specify a reasonable time in which such curative action shall be completed; provided however, in the event such condition or omission creates an emergency, as determined by the District Engineer in his/her sole and absolute discretion, Lessor may but is not obligated to enter upon the Premises and Lessee's adjacent property, if any, for the purpose of mitigating such condition in any manner deemed necessary or desirable by Lessor. Should Lessee fail to correct the situation within the time provided for in the notice, Lessor may, but is not obligated to, enter upon the Premises and Lessee's property and make the necessary correction at Lessee's sole liability, and Lessee shall pay the cost thereof, including but not limited to, the cost of labor, materials, equipment, plans and administration, within ten (10) days of receipt of a statement of said cost.  **LESSEE EXPRESSLY WAIVES AND RELEASES LESSOR FROM ALL DAMAGES AND CLAIMS THAT MAY RESULT FROM SUCH ENTRY BY LESSOR INCLUDING BUT NOT LIMITED TO ANY DAMAGES AND CLAIMS CAUSED DIRECTLY OR INDIRECTLY BY THE NEGLIGENCE OF LESSOR.**

**ARTICLE 7**

**IMPROVEMENTS**

**7.01** Lessee covenants and agrees not to make or allow to be made any alterations or physical additions or improvements upon the Premises without the prior written approval of Lessor.

**7.02 Compliance with ADA and TABA.** Lessee shall be wholly responsible for any accommodations or alterations which need to be made to the Premises, whether before or after the execution date of this Lease, to accommodate Lessee's employees or customers. No provision in this Lease should be construed in any manner as permitting, consenting to or authorizing Lessee to violate requirements under the ADA or the TABA and any provision of this Lease which would arguably be construed as authorizing a violation of either statute shall be interpreted in a manner which permits compliance with such statutes and this Lease is hereby amended to permit such compliance.

**ARTICLE 8**

**LIENS AND FINANCING**

**8.01 Mechanics Liens**. It is expressly acknowledged and understood that Lessor does not consent to, and has not by the execution and delivery of this Lease consented to the imposition of any liens upon the Premises by any party whomsoever, excepting such subordinate mortgage lien or liens as are expressly approved in writing by Lessor. Said approval shall be contingent upon the amendment of this Lease to add provisions regarding conditions of the imposition of any liens and obligations of any proposed mortgagee. Lessee covenants and agrees that Lessee shall not suffer or permit any mechanic's liens or other liens to be filed against the fee of the Premises or any portion thereof, nor against Lessee's leasehold interest in the property nor any of the Improvements on the Premises by reason of any work, labor, services or materials supplied or claimed to have been supplied to Lessee or to anyone holding the Premises or any part thereof through or under Lessee. In the case of the filing of any such lien, Lessee shall immediately thereupon discharge the same by payment, bonding or otherwise, but in all events prior to the foreclosure thereof. If default in payment thereof shall continue beyond the expiration of ten (10) days after Lessee's receipt of a notice thereof, Lessor shall have the right but not the obligation, at Lessor's option, to discharge such lien at Lessee's sole cost and expense, and in such event, Lessee shall reimburse Lessor for such costs within ten (10) days of receipt of a statement of said costs from Lessor. In addition to the foregoing, Lessee shall furnish to Lessor within five (5) days of receipt by Lessee copies of any and all notices and/or correspondence directed to Lessee by any person or entity alleging the right to, or notifying Lessee of the filing of any mechanic's, materialman's or other lien against the fee of the Premises. Lessee further covenants and agrees to protect, indemnify, defend and hold harmless Lessor from and against all bills and claims, liens and rights to liens for labor and materials and architect's, engineer's, contractor's and subcontractor's claims, and all fees, claims and expenses incident to the construction and completion of any improvements, including without limitation any reasonable attorneys' fees which may be incurred by Lessor in connection therewith.

**8.02 Premises not Mortgaged**. The Premises shall not be deemed in any way pledged, collateralized or mortgaged by this Lease, nor by any other agreement executed in connection with this Lease, and the State of Texas, by execution of this Lease, shall not in any manner lend its credit to any private corporation, association, partnership or other person in connection with the execution of this Lease.

**8.03 Lessor not Bound**. Lessor, by approval of this Lease, does not bind itself or its successors or assigns to accept or assume any liability with respect to any indebtedness which may exist now or arise in the future with respect to any action of Lessee required by this Lease, or by a leasehold mortgagee or contractor.

**8.04 No Liens Upon Termination**. Lessee and its successors hereunder warrant and covenant that at the expiration of this Lease there will be no statutory, contractual or other lien existing as to the improvements constructed on the Premises by Lessee, and that all alterations, additions and improvements made on the Premises will be delivered to Lessor free and clear of any debt or encumbrances. Lessee will, prior to or upon tender of the Premises to Lessor upon termination of this Lease, provide Lessor with documentation sufficient to evidence Lessor's ownership of all such alterations, additions and improvements.

**ARTICLE 9**

**SIGNS**

**9.01 On Premises Signs**. All of Lessee's on‑premise signs, displays or devices must have prior written approval by the District Engineer and shall be restricted to those indicating ownership and type of on‑Premises activities, including traffic control. Any such signs, displays or devices that do not conform to this paragraph may be removed and disposed of by Lessor at Lessee's expense.

**ARTICLE 10**

**INSURANCE AND INDEMNIFICATION**

**10.01 Indemnity**. **EXCEPT FOR THE SOLE NEGLIGENCE OF LESSOR FOR WHICH LESSOR IS LEGALLY LIABLE, LESSEE SHALL INDEMNIFY AND HOLD HARMLESS LESSOR, ITS RESPECTIVE SUCCESSORS AND ASSIGNS AND ITS RESPECTIVE AGENTS, REPRESENTATIVES, MEMBERS OF THE TEXAS TRANSPORTATION COMMISSION, CONTRACTORS AND EMPLOYEES ("INDEMNIFIED PARTIES") FOR, FROM AND AGAINST ANY AND ALL PROCEEDINGS, SUITS, ACTIONS, CLAIMS, DAMAGES, JUDGMENTS, LIABILITIES, LIENS, FINES, PENALTIES, AWARDS AND EXPENSES WHATSOEVER ("CLAIMS"), WHETHER SUCH CLAIMS ARE MADE BY LESSEE, LESSEE'S EMPLOYEES, AGENTS, REPRESENTATIVES OR BY THIRD PARTIES WITHOUT LIMIT AND WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF OR THE NEGLIGENCE OF ANY PARTY OR PARTIES, AND REGARDLESS OF WHETHER SUCH CLAIMS ARE CAUSED DIRECTLY OR INDIRECTLY BY THE NEGLIGENCE OF LESSOR, THAT MAY BE BROUGHT OR INSTITUTED ON ACCOUNT OF OR GROWING OUT OF ANY AND ALL INJURIES OR DAMAGES, INCLUDING DEATH, TO PERSONS OR PROPERTY RELATING DIRECTLY OR INDIRECTLY TO (I) THIS LEASE; (II) THE CONDITION OF THE PREMISES; (III) ANY OCCURRENCE IN, UPON, AT OR FROM THE PREMISES OR ANY PART THEREOF; (IV) THE USE OR OCCUPANCY OF THE PREMISES OR ANY PART THEREOF; AND/OR (V) ANY CONSTRUCTION AND RELATED ACTIVITIES BY LESSEE, AND/OR LESSEE'S LICENSEES, INVITEES, AGENTS, CONTRACTORS, REPRESENTATIVES AND EMPLOYEES; TOGETHER WITH ANY AND ALL LOSSES THERETO, INCLUDING, BUT NOT LIMITED TO, ALL COSTS OF DEFENDING AGAINST, INVESTIGATING AND SETTLING THE CLAIMS. IT IS THE EXPRESSED INTENTION OF THE PARTIES HERETO, BOTH LESSOR AND LESSEE, THAT THE INDEMNITY PROVIDED FOR IN THIS SECTION 10.01 IS INDEMNITY BY LESSEE TO INDEMNIFY AND PROTECT LESSOR FROM THE CONSEQUENCES OF LESSOR'S OWN NEGLIGENCE WHERE THAT NEGLIGENCE IS A CONCURRING CAUSE OF THE CLAIM. FURTHERMORE, THE INDEMNITY PROVIDED FOR IN THIS SECTION 10.01 SHALL HAVE NO APPLICATION TO ANY CLAIM WHERE THE CLAIM RESULTS FROM THE SOLE NEGLIGENCE OF LESSOR. LESSEE SHALL ASSUME ON BEHALF OF THE INDEMNIFIED PARTIES AND CONDUCT WITH DUE DILIGENCE AND IN GOOD FAITH THE DEFENSE WITH COUNSEL SATISFACTORY TO LESSOR, OF ANY AND ALL CLAIMS AGAINST ANY OF THE INDEMNIFIED PARTIES; PROVIDED, HOWEVER, LESSOR MAY, BUT HAS NO OBLIGATION TO, ELECT TO CAUSE THE ATTORNEY GENERAL OF THE STATE OF TEXAS TO INTERVENE OR ASSUME THE DEFENSE FOR LESSOR AT THE SOLE EXPENSE OF LESSEE. MAINTENANCE OF ANY INSURANCE INCLUDING BUT NOT LIMITED TO THE INSURANCE REFERRED TO IN THIS ARTICLE 10 OR BENEFITS PAYABLE UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS DOES NOT AFFECT LESSEE'S OBLIGATIONS OF INDEMNITY. LESSEE WILL HAVE THE RIGHT TO CONTEST THE VALIDITY OF ANY CLAIMS, IN THE NAME OF LESSOR OR LESSEE, AS LESSEE MAY DEEM APPROPRIATE, PROVIDED THAT THE EXPENSES THEREOF ARE PAID BY LESSEE, OR LESSEE CAUSES THE SAME TO BE PAID BY ITS INSURER. NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, LESSEE'S OBLIGATION OF INDEMNITY AS SET FORTH HEREIN WILL CONTINUE BEYOND THE TERM OF THIS LEASE IN THE EVENT LESSEE REMAINS IN POSSESSION OF THE PREMISES FOR ANY REASON, OR IN THE EVENT LESSEE HAS ANY FURTHER OBLIGATIONS UNDER THIS LEASE. LESSEE, AS A MATERIAL PART OF THE CONSIDERATION TO LESSOR, HEREBY ASSUMES ALL RISK OF DAMAGE TO PROPERTY OR INJURY TO OR DEATH OF PERSONS WITHIN THE PREMISES, EXCEPT THAT CAUSED BY LESSOR'S SOLE NEGLIGENCE, AND LESSEE HEREBY WAIVES ALL CLAIMS IN RESPECT THEREOF AGAINST LESSOR, EXCEPT FOR CLAIMS ARISING OUT OF LESSOR'S SOLE NEGLIGENCE. EXCEPT FOR INJURY OR DAMAGE, IF ANY, CAUSED BY LESSOR'S SOLE NEGLIGENCE, LESSEE HEREBY COVENANTS THE INDEMNIFIED PARTIES SHALL NOT BE LIABLE OR RESPONSIBLE FOR ANY LOSS OR DAMAGE WHICH MAY BE SUSTAINED BY THE GOODS, WARES, MERCHANDISE OR PROPERTY OF LESSEE, AND/OR LESSEE'S LICENSEES, INVITEES, AGENTS, CONTRACTORS, REPRESENTATIVES AND EMPLOYEES OR DEATH OR INJURY OF ANY PERSON CAUSED BY OR RESULTING FROM THEFT, FIRE, ACT OF GOD, PUBLIC ENEMY, INJUNCTION, RIOT, STRIKE, INSURRECTION OR ANY OTHER ACTION OF ANY GOVERNMENTAL BODY OR AUTHORITY, OR ANY OTHER MATTER, OR FOR ANY INJURY OR DAMAGE OR INCONVENIENCE WHICH MAY ARISE THROUGH THE REPAIR OR ALTERATION OF ANY PART OF THE PREMISES, OR FROM ANY CAUSE WHATSOEVER, INCLUDING BUT NOT LIMITED TO, CONSEQUENTIAL LOSS OR DAMAGE FROM ANY CAUSE WHATSOEVER BY REASON OF THE CONSTRUCTION, USE, OCCUPANCY OR ENJOYMENT OF THE PREMISES BY LESSEE OR ANY PERSON THEREIN OR HOLDING UNDER LESSEE.**

**10.02 Liability Insurance**. At all times during the Lease Term, Lessee, at its sole cost and expense, shall carry commercial general liability insurance coverage in a minimum amount of $1,000,000 each occurrence; $2,000,000 general aggregate, which policy shall insure against bodily injury, death and property damage and shall include (i) coverage for premises and operations; (ii) coverage for Lessor's concurring negligence; and (iii) contractual liability coverage insuring the obligations of Lessee under the terms of this Lease, including but not limited to the indemnity obligations herein. Said insurance limit is subject to review and escalation as deemed necessary by Lessor once every two (2) years from the commencement date of this Lease until its expiration or sooner termination.

**10.03 Insurance Certificates and Endorsements**. All liability insurance policies required herein shall be with companies licensed by the Texas Department of Insurance and shall (i) be endorsed to include Lessor as an additional insured; (ii) contain cross-liability and severability of interest endorsements; (iii) state that this insurance is primary insurance as regards other insurance carried by any Indemnified Party and shall be endorsed to state that such insurance will not be cancelled, materially changed or subject to non-renewal without thirty (30) days prior written notice to Lessor; and (iv) shall include waiver of subrogation endorsements in a form acceptable to Lessor. Lessee shall also include waiver of subrogation endorsements in favor of Lessor on any insurance coverages Lessee may carry in addition to that required herein for the Premises or activities conducted thereon, including but not limited to workers compensation insurance. Lessee shall furnish Lessor with certificates of all coverage required herein and with copies of the required endorsements prior to the commencement of this Lease, and annually thereafter for each renewal policy not less than thirty (30) days prior to the expiration of said policies. Certificates of insurance shall specify the additional insured status mentioned above as well as the waiver of subrogation and shall contain any other endorsements required herein. Lessee shall provide to Lessor a certified copy of any and all applicable insurance policies upon request of Lessor. Lessee's obligation to carry and pay for the insurance described in this Lease will continue beyond the term of this Lease in the event Lessee remains in possession of the Premises for any reason, or in the event Lessee is obligated to remove the Improvements, in which case, Lessee will continue to carry such insurance so long as Lessee remains in possession or until Lessor deems such removal to be complete. If Lessee fails to have a certificate of any required policy of insurance on deposit with Lessor at any time during the Lease Term or subsequent thereto in the event of any continued possession of the Premises, or in the event the certificate fails to comply with the insurance company quality or coverage requirements hereof, such failure may be treated by Lessor as a default by Lessee. In the event of such default, in addition to any other remedy under this Lease, Lessor shall have the right (but not the obligation) to purchase and maintain such policy for the account of Lessee, and if Lessor does so and gives notice thereof to Lessee, then Lessee shall be obligated to pay Lessor the amount of the premium applicable to such policy within ten (10) days following any such notice from Lessor. Any failure of Lessee to make such payment to Lessor, may be treated by Lessor as a default by Lessee in the payment of monetary obligations to be paid by Lessee hereunder. The obligation of Lessee to provide any insurance required herein is a monetary obligation under this Lease.

**10.04 Release of Claims.** Lessor hereby releases Lessee and Lessee hereby releases the members of the Transportation Commission, Lessor and Lessor's employees and contractors from any and all claims or demands for damages, loss expense or injury to the Premises, to the Improvements, or to any other property of either Lessor or Lessee, as the case may be, which is caused by or result from perils, events or happenings that are the subject of insurance carried by the respective parties and in force at the time of any such loss; provided, however, that such waiver is effective only to the extent permitted by the insurance covering such loss and to the extent such insurance is not prejudiced thereby or the expense of such insurance is not thereby increased.

**ARTICLE 11**

**TRANSFER OF INTERESTS**

**11.01 No Assignment**. Except as otherwise provided herein, Lessee shall not assign this Lease or sublease the Premises or any part thereof or mortgage, pledge or hypothecate its leasehold interest without the prior written approval of Lessor; and any attempt to do any of the foregoing shall be void and of no effect.

**11.02 Collection of Rent from Assignee**. If this Lease is assigned or if the Premises are subleased (whether in whole or in part) or in the event of the mortgage, pledge or hypothecation of the leasehold interest, except as otherwise provided herein, Lessor may nevertheless, but is not obligated to, collect rental from the assignee, sublessee, mortgagee, pledgee or party to whom the leasehold interest was hypothecated, and apply the net amount collected to the rental payable hereunder, but collection of rent or application thereof by Lessor shall not be deemed a waiver of Section 11.01 or a release of Lessee from the further performance by Lessee of its covenants hereunder.

**11.03 Lessee Remains Liable**. In any case where Lessor consents to an assignment or sublease of the leasehold, or if Lessee mortgages Lessee's interest herein, Lessee will remain liable for the performance of all of the covenants, duties and obligations hereunder, including, without limitation, the obligation to pay any sums herein provided to be paid and any indemnity provisions provided herein, and Lessor will have the right to enforce the provisions of this Lease against Lessee and/or any assignee or sublessee without demand upon or proceeding in any way against any other person or entity. Notwithstanding the foregoing, Lessor is under no obligation to consent to any assignment or sublease.

**11.04 Assignee Assumption.** In the event of any assignment or sublease by Lessee hereunder, the permitted assignee or sublessee will by such assignment or sublease automatically assume all obligations, liabilities, covenants and agreements contained herein without further action or evidence of such assumption and the assignee or sublessee is subject to compliance with the additional requirements of the ADA and TABA. Lessee must give a copy of this Lease to all assignees and sublessees of this Lease. Lessee's failure to provide an assignee or sublessee with a copy of this Lease will constitute a default hereunder.

**11.05 Effect of Termination of Lease**. The expiration or sooner termination of this Lease as provided herein automatically and without further action cancels all assignments and subleases of this Lease.

**ARTICLE 12**

**DEFAULT AND REMEDIES**

**12.01 Default**. The Lessor may declare this Lease, and all rights and interest created by it, to be terminated when in the sole and absolute opinion of the Lessor, (i) Lessee defaults in the performance of any monetary covenant, condition or agreement hereunder, including but not limited to insurance premiums for insurance required herein, and has not paid such monetary sum within ten (10) days of the date due, and/or (ii) Lessee defaults in the performance of any nonmonetary covenant, condition or agreement in this Lease, except as otherwise provided in Section 13.04 hereinbelow, and such nonmonetary default is not corrected within thirty (30) days after receipt of written notice from Lessor to Lessee.

**12.02 Abandonment**. If in the sole and absolute opinion of the Lessor, the Premises cease to be used or are abandoned, Lessor shall give Lessee thirty (30) days written notice to reoccupy the Premises. If Lessee fails to reoccupy within said thirty (30) days, this Lease shall terminate.

**12.03 Lessee Remains Liable**. Any termination of this Lease as herein provided will not relieve Lessee from the payment of any sum or sums then due and payable to Lessor hereunder, or any claim for damages then or thereafter accruing against Lessee hereunder, and any such termination will not prevent Lessor from enforcing the payment of any such sum or sums or claim for damages from Lessee for any default hereunder. All money due under the terms of this Lease will bear interest at the rate of ten percent (10%) per annum from the date when due until actually paid, or at the highest rate allowed under applicable usury laws and regulations, whichever is lower.

**12.04 All Rights Cumulative**. All rights, options and remedies in this Lease are cumulative, and the use of any one right or remedy by either party will not preclude or waive its right to use any and all other remedies. Said rights and remedies are given in addition to other rights the parties may have by law, statute, ordinance or otherwise.

**ARTICLE 13**

**GENERAL PROVISIONS**

**13.01 Threat to Traveling Public**. If the Improvements are destroyed, either in whole or in substantial part, or if any other emergency situation exists, and as a result, in the sole and absolute opinion of Lessor, a threat to the safety of the traveling public exists, Lessee agrees to cooperate in any action Lessor deems necessary to remove such a condition and Lessor may, but is not obligated to enter upon the Premises and Lessee's adjacent property, if any, for the purpose of mitigating such condition in any manner deemed necessary or desirable by Lessor. Use of the Premises may by necessity be temporarily curtailed in the event of damage to the Highway Facility caused by fire, flood, accident or other events. Lessor will use all reasonable means to provide for rapid and timely repairs to the Highway Facility under its control. **LESSOR SHALL NOT BE LIABLE TO LESSEE FOR ANY CURTAILMENT OR INTERFERENCE WITH LESSEE'S USE OF THE PREMISES BECAUSE OF FIRE, FLOOD, ACCIDENT OR OTHER EVENTS OR FROM THE MAKING OF ANY SUCH REPAIRS TO THE HIGHWAY FACILITY.**

**13.02 Damage to Premises not to Affect Obligations**. No damage to the Premises or any portion thereof, or damage to or destruction of any Improvements shall in any way alter, affect or modify Lessee's obligations hereunder, including, but not limited to, Lessee's obligations to pay rental, Impositions and other financial obligations hereunder.

**13.03 Lessor's Right to Enter.** Lessor has the right and Lessee shall permit Lessor and/or Lessor's agents, representatives and/or employees to (i) enter on the Premises and Lessee's property for the purpose of inspection of the Premises and the Improvements, to determine whether Lessee is in compliance with the terms of this Lease; and (ii) enter the Premises for the purpose of inspection, maintenance or reconstruction of the Highway Facility when and as necessary as determined by Lessor in its sole and absolute discretion. In any circumstances where Lessor is permitted to enter upon the Premises in accordance with this Lease or otherwise, whether for the purpose of curing any default of Lessee, repairing damage resulting from fire or other casualty or is otherwise permitted hereunder or by law to go upon the Premises, no such entry shall constitute an eviction or disturbance of Lessee's use and possession of the Premises or a breach by Lessor of any of Lessor's obligations hereunder or otherwise or entitle Lessee to be relieved from any of its obligations hereunder or grant Lessee any right of off-set or recoupment or other remedy; and in connection with any such entry all of the aforesaid provisions shall be applicable notwithstanding that Lessor may elect to take building materials and equipment in, to or upon the Premises that may be required or utilized in connection with such entry by Lessor.

**13.04 Force Majeure.** If the curing of any default (other than failure to pay any sums due, including, but not limited to, insurance premiums or Impositions) or the performance of any other covenant, agreement, obligation or undertaking herein contained is delayed (after the party obligated or permitted under the terms hereof to do or perform the same has made a good‑faith effort to avoid delay) by reason of war, government regulations or government interferences (not including the right of the Lessor to exercise Lessor's rights hereunder), fire or other casualty or any circumstances reasonably beyond such party's control regardless of whether any such circumstance is similar to any of those enumerated or not, each party will be excused from doing or performing the same during such period of delay.

**13.05 Bankruptcy.** This Lease shall terminate upon the occurrence of the filing or execution or occurrence of an involuntary or voluntary petition in bankruptcy or other insolvency proceeding by or against Lessee, or petition or answer seeking relief under any provision of the Bankruptcy Act as may be amended, or any assignment for the benefit of creditors or composition or a petition or other proceeding by or against Lessee for the appointment of a trustee, receiver or liquidation of Lessee or any of Lessee's property, or a proceeding by any governmental authority or by Lessee for the dissolution or liquidation of Lessee.

**13.06 Transfer by Lessor.** **IF LESSOR SELLS OR TRANSFERS THE PREMISES OR THE LEASEHOLD ESTATE OR ANY PART THEREOF AND AS A PART OF SUCH TRANSACTION, ASSIGNS ITS INTEREST AS LESSOR IN AND TO THIS LEASE, THEN FROM AND AFTER THE EFFECTIVE DATE OF SALE, ASSIGNMENT OR TRANSFER, LESSOR WILL HAVE NO FURTHER LIABILITY UNDER THIS LEASE TO LESSEE, IT BEING INTENDED THAT THE COVENANTS AND OBLIGATIONS CONTAINED IN THIS LEASE ON THE PART OF LESSOR WILL BE BINDING ON LESSOR AND ITS SUCCESSORS AND ASSIGNS ONLY DURING AND IN RESPECT OF ITS PERIODS OF OWNERSHIP OF THE FEE.**

**13.07 Waiver.** No waiver of any default or breach of any term, condition or covenant of this Lease may be deemed to be a waiver of any subsequent default or breach of the same or any other term, condition or covenant contained herein.

**13.08 Exhibits.** All exhibits referred to herein are to be considered a part hereof for all purposes with the same force and effect as if copied at full length herein.

**13.09 Successors.** The terms, conditions and covenants contained in this Lease shall apply to, and inure to the benefit of, successors in interest and legal representatives except as otherwise herein expressly provided. No rights, however shall inure to the benefit of any assignee of Lessee unless the assignment to such assignee has been approved by Lessor in writing as provided in Article 11.

**13.10 Attorneys' Fees.** If, on account of any breach or default by Lessee of its obligations under this Lease, Lessor enforces or defends any of Lessor's rights or remedies hereunder, and should Lessor prevail, Lessor shall be entitled to receive from Lessee reimbursement for any and all costs, including, but not limited to attorneys' fees, incurred in such connection.

**13.11 Holdover.** If Lessee holds over and continues in possession of the Premises after expiration of the term of this Lease, Lessee will be deemed to be occupying the Premises on the basis of a month-to-month tenancy subject to all of the terms and conditions of this Lease, except that as liquidated damages by reason of such holding over, the amounts payable by Lessee under this Lease shall be increased such that the annual rental shall equal one hundred twenty-five percent (125%) of the amount paid Lessor pursuant to Article 2 during the year immediately preceding the expiration date of this Lease and Lessee shall continue to pay all Impositions as required herein. The above-described tenancy from month-to-month may be terminated by either party upon thirty (30) days written notice to the other. Any rental due after such notice has been given is to be calculated on a pro rata basis. If upon notice of termination by Lessor, Lessee tenders rental in excess of the amount due and payable and Lessor accepts such payment, the acceptance of such payment will not operate as a waiver by Lessor of the notice of termination unless such waiver is in writing and signed by Lessor. Any such excess amounts tendered and accepted shall be promptly refunded by Lessor after deducting therefrom any amounts owed Lessor.

**13.12 Consequential or Special Damages**. **UNDER NO CIRCUMSTANCES WHATSOEVER SHALL LESSOR EVER BE LIABLE HEREUNDER FOR CONSEQUENTIAL DAMAGES OR SPECIAL DAMAGES. NOTWITHSTANDING ANY PROVISION HEREIN TO THE CONTRARY, LESSOR'S GOVERNMENTAL OR SOVEREIGN IMMUNITY IS NOT WAIVED BY ANY PROVISION HEREIN.**

**13.13 Flammable, Explosive or Hazardous Materials.** Notwithstanding anything herein to the contrary, except for the uses permitted hereunder no part of the Premises will be used for the manufacture or storage of flammable, explosive or hazardous materials or for any occupation which would be deemed by Lessor to be hazardous to either the highway or nonhighway user.

**ARTICLE 14**

**MISCELLANEOUS**

**14.01 Notices.** Any notice provided for or permitted to be given hereunder must be in writing and must be given at the address or addresses designated below by (i) depositing same in the United States Mail, postage prepaid, registered or certified, return receipt requested; (ii) personally delivering the same to the party to be notified; or (iii) sending a prepaid telex or telegram. Such notice shall be effective upon receipt, as evidenced by the executed postal receipt or other receipt for delivery:

If to Lessee:

If to Lessor: Texas Department of Transportation

Attn: District Engineer

The parties may change their respective notice addresses to any other location within the United States by giving a notice of the change in accordance with this Section.

**14.02 Governing Law.** This Lease is to 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       County, Texas, unless otherwise provided herein.

**14.03 Relationship Between Lessor and Lessee.** The relationship between Lessor and Lessee is and shall at all times remain solely that of Lessor and Lessee and will not be deemed an agency, a partnership or joint venture.

**14.04 Severability.** In case any one or more of the provisions contained in this Lease are for any reason held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provision hereof, and this Lease will be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

**14.05 Amendments.** The amendment, modification or alteration of the terms hereof will not be binding unless the same be in writing, dated subsequent to the date hereof, and duly executed by the parties hereto.

**14.06 Headings.** The article and section captions contained in this Lease are for convenience only and do not in any way limit or amplify any term or provision hereof.

**14.07 Lessor.** Unless specifically stated otherwise herein, the term "Lessor" as used herein includes Lessor, its successors and assigns, and its authorized agents, representatives, employees and/or contractors.

**14.08 District Engineer.** Any reference in this Lease to the District Engineer means the District Engineer, Texas Department of Transportation,      , Texas, and his/her successor in title or responsibility. When written approval of Lessor is necessary under this Lease said approval is to be obtained from the District Engineer except as otherwise provided herein or otherwise by law.

**14.09 Non-Discrimination.** Lessee, for itself, its successors, and assigns, as a part of the consideration hereof, does hereby covenant and agree, as a covenant running with the land, that no person, on the grounds of race, color, creed, national origin, marital status, age, sex or the presence of any sensory, mental or physical handicap will be excluded from participation in, be denied the benefits of, or be otherwise unlawfully subjected to discrimination in the use of the facility now or hereafter on the Premises, that in connection with the construction of any Improvements on the Premises and the furnishing of services thereon, no such discrimination will be practiced in the selection of employees or contractors, or by contractors in the selection and retention of their subcontractors, and that such discrimination will not be practiced against the public in their access to and use of the facility and services provided for public accommodation constructed or operated on the Premises. Lessee shall use the Premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Non‑Discrimination in Federally‑assisted programs of the Department of Transportation Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended. The breach of any of the above nondiscrimination covenants will be an act of default entitling Lessor to terminate this Lease in accordance with the procedures set forth herein.

**14.10 Time is of the essence of this Lease**.

**14.11 Sole and Absolute Discretion or Opinion.** Notwithstanding anything herein to the contrary, whenever a party to this Lease is entitled to exercise its "sole and absolute discretion" or "sole and absolute opinion" such discretion or opinion may be exercised by that party for any reason or for no reason whether or not such discretion or opinion is arbitrary, uncontrolled or unreasonable. Any parties' exercise of its "sole and absolute discretion" or "sole and absolute opinion" shall be final and shall not be subject to appeal or be subject to adjudication by a court of law, arbitration, mediation or otherwise.

**ARTICLE 15**

**RECORDATION**

**15.01 Memorandum of Lease.** At Lessor's request, Lessee will execute a memorandum of this Lease in recordable form setting forth such provisions of this Lease as Lessor deems desirable and Lessor may record such memorandum in the Real Property Records of the Office of the County Clerk,       County, Texas.

**ARTICLE 16**

**PUBLIC UTILITY AND COMMON CARRIER RIGHTS**

**16.01** Lessee covenants not to interfere with the rights of any public utility company or other common carrier to locate, operate and maintain their facilities within Lessor's right of way. Lessee understands and agrees that its use of the Premises and the Improvements under this Lease is subject to the statutory right of public utilities and common carriers and that such use by Lessee and the relocation or removal of the Improvements subject to this Lease shall be accomplished at Lessee's sole expense at Lessor's request if required to accommodate the location, operation or maintenance of facilities pursuant to those statutory rights.

**ARTICLE 17**

**NO OPTION**

**17.01** The submission of this Lease for examination by Lessee and/or execution thereof by Lessee does not constitute a reservation of or option for the Premises and this Lease shall become effective against any party only upon execution of all parties hereto and delivery of a fully executed counterpart hereof by Lessor to Lessee.

**ARTICLE 18**

**PERSONAL PROPERTY**

**18.01** This Lease does not change, increase, reduce, or otherwise affect Lessee's relocation assistance which may or may not be allowed in accordance with the Department's relocation rules and policies.

To become effective on the date last executed.

|  |  |  |
| --- | --- | --- |
| **LESSOR** |  | **LESSEE** |
|  |  |  |
| **TEXAS DEPARTMENT OF**  **TRANSPORTATION** |  | By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Executed by and approved for the Texas Transportation Commission for the purpose and effect of activating and/or carrying out the orders, |  | Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| established policies, or work programs heretofore approved and authorized by the Texas Transportation Commission |  | Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |  |  |
| By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_    Right of Way Division Director |  | Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |  |  |
| Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |  |  |
|  |  |  |