

TOWN OF ADDISON, TEXAS

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE CITY COUNCIL OF THE TOWN OF ADDISON, TEXAS APPROVING THE AGREEMENT FOR PROFESSIONAL SERVICES BETWEEN THE TOWN OF ADDISON AND GARVER, LLC FOR CONSTRUCTION AND REHABILITATION OF ADDISON ROAD, AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT, AND PROVIDING AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE TOWN OF ADDISON, TEXAS:

**Section 1.** The Agreement for Professional Services between the Town of Addison and Garver, LLC for construction and rehabilitation of Addison Road, a copy of which is attached to this Resolution as **Exhibit A**, is hereby approved. The City Manager is hereby authorized to execute the agreement.

**Section 2.** This Resolution shall take effect from and after its date of adoption.

**PASSED AND APPROVED** by the City Council of the Town of Addison, Texas this the 14<sup>th</sup> day of July, 2015.

\_\_\_\_\_  
Todd Meier, Mayor

ATTEST:

By: \_\_\_\_\_  
Chelsea Gonzalez, City Secretary

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Brenda N. McDonald, City Attorney

# EXHIBIT A



**AGREEMENT FOR PROFESSIONAL SERVICES**  
**Town of Addison**  
**Addison, Texas**  
**Project No. 15087110**

THIS AGREEMENT FOR PROFESSIONAL SERVICES ("Agreement") is made by and between the **Town of Addison, Texas** hereinafter referred to as "Client," and **GARVER, LLC**, an Arkansas limited liability company, hereinafter referred to as "GARVER" (Client and GARVER are sometimes referred to herein together as the "parties" and individually as a "party").

The Client intends to make the following improvements:

*Addison Road Construction –Rehabilitation of Addison Road from its intersection with the north ROW of the DART railroad (located just north of the intersection of Addison Road and Arapaho Road) to the northern Town limit line, approximately two miles (the "project").*

The Client desires to hire GARVER to provide professional construction phase services related to asphalt construction on the project and these improvements as described herein, and GARVER desires to provide such services to the Client.

**Now, therefore**, the Client and GARVER, in consideration of the mutual covenants in this Agreement, do hereby agree as set forth in this Agreement. GARVER shall not begin work on or provide any Services or any other work or services under or in connection with this Agreement until Client directs GARVER in writing to proceed.

## **SECTION 1 - SERVICES OF GARVER**

The Client agrees to engage GARVER to Client, and GARVER agrees to provide to and perform for Client, professional services in connection with the proposed improvements as stated in this Agreement. These Services will conform to the requirements and standards of the Client, and conform to and be conducted in a manner consistent with the standards of practice ordinarily used by, and that level of care and skill ordinarily exercised by, reputable members of the engineering profession currently practicing in Dallas County, Texas under similar conditions. GARVER's Services consist of that work and services performed by GARVER and its owners, directors, officers, employees, agents, contractors, subcontractors, representatives, and consultants. For having rendered such Services, the Client agrees to pay GARVER compensation as stated in and in accordance with the sections to follow.

In connection with this Agreement:

A. GARVER represents and warrants that it is authorized by the State of Texas, as may be required by applicable law, rule, or regulation, to practice and provide the Services set forth in this Agreement and that any necessary licenses, permits or other authorization to perform such Services have been acquired as required by such law, rule, or regulation.

B. GARVER and Client agree and acknowledge that Client is entering into this Agreement in reliance on GARVER's professional abilities with respect to performing the Services described herein.

C. GARVER shall perform the Services in accordance with all applicable laws, statutes, ordinances, regulations, codes, standards, policies, orders, and rules of any federal, state or local governmental entity or agency having jurisdiction over any matter related to this Agreement and in accordance with the standard of care set forth herein.

GARVER shall perform all Services in a timely and professional manner, utilizing at all times an economical and expeditious manner for performing such Services consistent with the standards set forth herein and shall cause all subcontracted Services to be similarly undertaken and performed. GARVER shall re-perform and otherwise remedy any Services provided by or for GARVER (including any subcontracted Services) not meeting or satisfying the standard of care set forth herein without additional compensation.

Notwithstanding Client's review, approval or acceptance of any Services, and including documents, materials, reports, records, deliverables, or any other work product prepared by or for GARVER under or in connection with this Agreement (collectively, "Documents"), GARVER represents that such Services, including any Documents: (i) shall be sufficient and adequate for the project and fit for the purposes for which they are intended, and (ii) shall, to the best of GARVER's knowledge, information and belief as an engineer, be free from material error. In accordance with the standard of care set forth herein, GARVER agrees that it shall not recommend unsuitable materials in connection with any Project. If the design delivered by GARVER for a Project should be defective or have errors, GARVER will assume sole responsibility for any damages, losses, claims, or expenses to the extent caused by the same.

Approval or acceptance by Client of any Services provided by or for GARVER, and including any Documents, shall not constitute nor be deemed a release of the responsibility and liability of GARVER, its owners, officers, managers, employees, subcontractors, and consultants for the accuracy and competency of the same (and GARVER shall be and remain liable to Client for all damage caused by GARVER's negligent or intentionally wrongful performance, acts or omissions, or willful misconduct, under this Agreement), nor shall such approval or acceptance be deemed to be an assumption of or an indemnification for such responsibility or liability by Client for any defect, error or omission in the same, it being understood that Client at all times is relying on GARVER's skill and knowledge in preparing and providing the Services, including Documents.

GARVER shall be wholly and solely responsible for the Services provided by any owner, officer, manager, employee, representative, contractor or subcontractor of GARVER.

#### **SECTION 2 - SCOPE OF SERVICES**

GARVER's scope of services to be provided and performed under this Agreement is described in attached Appendix A (the "Services"), which Appendix is incorporated into and made a part of this Agreement.

#### **SECTION 3 – PAYMENT**

For the performance and provision of the Services, the Client will pay GARVER on an Hourly Rate Not-To-Exceed basis for construction management and part-time resident construction observation (asphalt construction only) services work, plus non-labor, non-subconsultant expenses at direct rates. The Client represents that funding sources are in place with the available funds necessary to pay GARVER.

If any payment due GARVER under this Agreement that is not in dispute is not sent by Client to GARVER within 60 days from date of Client's receipt of invoice from GARVER, GARVER may elect to suspend Services under this Agreement without penalty or liquidated damages assessed from the Client.

The table below presents a summary of the fee amounts and fee types for this contract.

WORK DESCRIPTION	FEE AMOUNT	FEE TYPE
Construction Management	\$34,840.00	Hourly-NTE
Resident Project Representative (Asphalt Construction only)	\$47,850.00	Hourly-NTE
DIRECT NON-LABOR EXPENSES	\$800.00	Direct Cost
TOTAL FEE	\$83,490.00	

The total amount to be paid under this Agreement shall not exceed \$83,490.00. This total amount includes compensation for all of GARVER's personnel, all of GARVER's costs and expenses. No additional compensation or payment shall be made by Client to GARVER under or in connection with this Agreement unless agreed to by the parties in writing. For informational purposes, a breakdown of GARVER's estimated costs is included in Appendix B with approximate current hourly rates for each employee classification. Any unused fee from one task may be carried over and used to complete the remaining tasks until the total fee is expended.

The Client will pay GARVER on a monthly basis, based upon statements (invoices) submitted by GARVER to the Client indicating the estimated proportion of the Services performed and accomplished during the immediately prior month. Each statement shall be submitted to Client no later than the 10th day of each month, and shall also describe the Services performed, show the sum of all prior payments under this Agreement, and be accompanied by such documentation or information as Client may require to verify the accuracy of the statement. Payments not in dispute that are not received within 60 days of Client's receipt of invoice will be subject to a one percent monthly simple interest charge or such other amount as may be required by State law. GARVER shall not be entitled to any compensation for any work or services not actually performed or for any lost profits as a result of Client's termination of this Agreement or suspension of the Services.

Notwithstanding any provision of this Agreement to the contrary, Client shall not be obligated to make payment to GARVER hereunder if:

1. GARVER is in default of any of its obligations under this Agreement or any other documents in connection with the Services (and payment may be withheld to the extent of any such default);
2. Any part of such payment is attributable to any Services which are not performed in accordance with this Agreement;
3. GARVER has failed to make payment promptly to subcontractors or consultants or other third parties used by GARVER in connection with the Services for which the Client has made payment to GARVER; or
4. If Client, in its good faith judgment and after consultation with GARVER, determines that the portion of the compensation then remaining unpaid will not be sufficient to complete the Services under this Agreement, no additional payments will be due GARVER hereunder unless and until GARVER performs a sufficient portion of the Services so that such portion of the compensation remaining unpaid is determined by Client to be sufficient to complete the Services.

Additional Services (Extra Work). For work not described or included in Section 2 – Scope of Services but requested by the Client in writing, the Client will pay GARVER, for time spent on the work, at the rates shown in Appendix B for each classification of GARVER's personnel (may include contract staff classified at GARVER's discretion) plus reimbursable expenses including but not limited to printing, courier

service, reproduction, and travel at amounts and in accordance with the paragraph below. The rates shown in Appendix A may be increased annually as set forth in this Agreement, with such increase, if any, effective on or about June 1 of the applicable year (and the first such increase, if any, being effective on June 1, 2016).

Expenses other than salary costs that are directly attributable to performance of GARVER's professional services will be billed as follows:

1. Actual direct cost for travel, long distance and wireless communications, outside reproduction and presentation material preparation, and mail/courier expenses (however, no travel outside of Dallas County, Texas shall be eligible for payment or reimbursement unless GARVER has, prior to any such travel, submitted to Client the costs and received the Client's written consent for the same).
2. Actual direct cost plus 15 percent for subcontract/subconsultant fees
3. Charges similar to commercial rates for reports, plan sheets, presentation materials, etc.
4. \$100 per month for each month computer design/modeling software is utilized.
5. The amount allowed by the federal government for mileage with an additional \$0.05 for survey trucks/vans.

#### **SECTION 4 - OWNER'S RESPONSIBILITIES**

In connection with the project for which the Services are being provided and performed by GARVER, the Client's responsibilities shall include, but not be limited to, the following:

1. Review and consideration of all documents presented by GARVER and informing GARVER of all decisions within a reasonable time so as not to delay the work of GARVER.
2. Making provision for the employees of GARVER to enter public (Client owned or controlled) and private lands as required for GARVER to perform necessary preliminary surveys and other investigations; but as to private lands, Client will use its reasonable efforts to make such provision and will not be required to expend any funds in doing so.
3. Furnishing GARVER such plans and records of construction and operation of existing facilities, available aerial photography, reports, surveys, or copies of the same, related to or bearing on the Services as may be in the possession of the Client. Such documents or data will be returned upon completion of the Services or at any other time at the request of the Client.
4. Client will not hire any of GARVER's employees during performance of this Agreement and for a period of one year beyond completion of this Agreement.

#### **SECTION 5 – MISCELLANEOUS**

##### **5.1 Instruments of Service**

All Documents shall be, belong to, and remain the sole property of Client for Client's exclusive use or re-use at any time without further compensation and without any restrictions. Without limiting the foregoing or any other provision of this Agreement, Client shall have the right to use the same for the purpose of completing the project for which the Documents were prepared. Should Client use the same for modifications or extensions of the project for which the Documents were prepared or on any other project without GARVER's written consent to such use, Client does so at its own risk. Upon completion of the Services, at the time of any earlier termination of this Agreement, or at any time at the request of Client, GARVER shall promptly provide all such Documents to Client. Provided, however, GARVER shall not be liable for any errors or omissions contained in any Documents which are incomplete as a result of a suspension or termination where GARVER is unable, because of such suspension or termination, to complete such Documents.

GARVER's Documents consist of the printed hard copy reports and documents, issued pursuant to the provision of its Services; whereas electronic media, including CADD files, are tools for their preparation. As a convenience to the Client, GARVER will furnish to the Client both printed hard copies and electronic media. In the event of a conflict in their content, however, the printed hard copies shall take precedence over the electronic media.

GARVER's electronic media are furnished without guarantee of compatibility with the Client's software or hardware, and GARVER's sole responsibility for the electronic media is to furnish a replacement for defective disks within thirty (30) days after delivery to the Client.

GARVER agrees to and does hereby grant and assign to Client all intellectual property rights (whether copyright or otherwise) in and to all Documents in which GARVER may have a copyright or other intellectual property interest, and to all Documents as to which GARVER may assert any rights or establish any claim under patent, copyright, or other intellectual property laws. Without limiting any other provision of this Agreement, GARVER represents that Client's use of such Documents will not infringe upon any third parties' rights and GARVER will indemnify and protect Client from any infringement claims arising from Client's use of any Documents.

## **5.2 Opinions of Cost**

Since GARVER has no control over the cost of labor, materials, equipment, or services furnished by others, or over the methods of determining prices by the construction contractor for the project ("Contractor"), or over competitive bidding or market conditions, GARVER's estimates of project costs and construction costs provided for herein are to be made on the basis of GARVER's experience and qualifications and represent GARVER's best judgment as an experienced and qualified professional engineer, familiar with the construction industry in Dallas County, Texas; but GARVER cannot and does not guarantee that proposals, bids or actual total project or construction costs will not vary from estimates prepared by GARVER.

The Client understands that the construction cost estimates developed by GARVER do not establish a limit for the construction contract amount. If the actual amount of the low construction bid exceeds the construction budget established by the Client, GARVER will not be required to re-design the project without additional compensation.

## **5.3 Insurance**

At all times in connection with this Agreement, GARVER shall purchase, provide and maintain in a company or companies lawfully authorized to do business in Texas such insurance coverages as set forth below:

- A. Worker's Compensation insurance at statutory limits, including Employers Liability coverage a minimum limits of \$1,000,000 each-occurrence each accident/\$1,000,000 by disease each-occurrence/\$1,000,000 by disease aggregate.
- B. Commercial Automobile Liability at minimum combined single limits of \$500,000.00 per-occurrence for bodily injury and property damage, including owned, non-owned, and hired car coverage.
- C. Commercial General Liability insurance at minimum combined single limits of \$1,000,000.00 per-occurrence and \$1,000,000 general aggregate for bodily injury and property damage, which coverage shall include products/completed operations (\$1,000,000 products/completed operations aggregate) and contractual liability (covering, but not limited to, the indemnity obligations set forth in this Agreement).
- D. Professional Liability coverage at minimum limits of \$2,000,000.00 covering claims

resulting from acts, errors and omissions in the performance of professional services. This coverage must be maintained for at least four (4) years after any project for which professional services are provided is finally completed. If coverage is written on a claims-made basis, a policy retroactive date equivalent to the inception date of this Agreement (or earlier) must be maintained during the full term of this Agreement and during the four year period thereafter described herein.

With reference to the foregoing insurance, GARVER shall specifically endorse applicable insurance policies as follows:

- A. The Town of Addison, Texas shall be named as an additional insured with respect to General Liability and Automobile Liability.
- B. All liability policies shall contain no cross liability exclusions or insured versus insured restrictions applicable to the claims of the Town of Addison.
- C. A waiver of subrogation in favor of the Town of Addison, Texas shall be contained in the Workers Compensation and all liability policies.
- D. All insurance policies shall be endorsed to require the insurer to notify the Town of Addison Texas at least 30 days prior to any material change in the insurance coverage.
- E. All insurance policies shall be endorsed to the effect that the Town of Addison, Texas will receive at least 30 days notice prior to cancellation or non-renewal of the insurance.
- F. All insurance policies, which name the Town of Addison, Texas as an additional insured, must be endorsed to read as primary coverage regardless of the application of other insurance.
- G. Required limits may be satisfied by any combination of primary and umbrella liability insurances.
- H. Insurance must be purchased from insurers that are financially acceptable to the Town of Addison.

All insurance must be written on forms filed with and approved by the Texas Department of Insurance. Certificates of Insurance, satisfactory to Client, shall be prepared and executed by the insurance company or its authorized agent, delivered to Client simultaneously with the execution of this Agreement (and updated as needed), and shall contain provisions representing and warranting the following:

- A. List each insurance coverage described and required herein. Such certificates will also include a copy of the endorsements necessary to meet the requirements and instructions contained herein.
- B. Shall specifically set forth the notice-of-cancellation and termination provisions to the Town of Addison, Texas.

Upon request, Consultant shall furnish the Client with complete copies of all insurance policies certified to be true and correct by the insurance carrier. Client reserves the right to review the insurance requirements contained herein and to adjust coverages and limits when deemed necessary and prudent by Client.

#### **5.4 Records**

GARVER will retain all pertinent records relating to the Services and the project for a period

of four (4) years beyond completion of the project (and this obligation shall survive the expiration or termination of this Agreement). GARVER shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. Client and Client's representatives may have access to such records during normal business hours at a location within Dallas County, Texas, including to audit or inspect the same.

#### **5.5 GARVER's Indemnity Obligation**

**IN CONSIDERATION OF THE GRANTING OF THIS AGREEMENT AND NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, GARVER AGREES TO FULLY DEFEND, INDEMNIFY AND HOLD HARMLESS CLIENT AND CLIENT'S ELECTED AND APPOINTED OFFICIALS, ITS OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES, AND VOLUNTEERS, INDIVIDUALLY OR COLLECTIVELY, IN BOTH THEIR OFFICIAL AND PRIVATE CAPACITIES (COLLECTIVELY, "CLIENT PERSONS" AND EACH BEING A "CLIENT PERSON"), FROM AND AGAINST ANY AND ALL DAMAGES, INCLUDING BUT NOT LIMITED TO DAMAGES FOR, RELATED TO, OR ARISING OUT OF INJURIES (INCLUDING BUT NOT LIMITED TO DEATH), LOSSES, EXPENSES, LIABILITY, PENALTIES, PROCEEDINGS, JUDGMENTS, ACTIONS, DEMANDS, CAUSES OF ACTION, SUITS, HARM, AND COSTS (INCLUDING REASONABLE ATTORNEYS' FEES AND COSTS OF DEFENSE), OF ANY KIND OR NATURE WHATSOEVER, MADE UPON OR INCURRED BY CLIENT OR BY ANY OTHER CLIENT PERSONS, WHETHER DIRECTLY OR INDIRECTLY, (COLLECTIVELY, "CLAIMS"), THAT ARE CAUSED BY OR RESULT FROM AN ACT OF NEGLIGENCE, INTENTIONAL TORT, INTELLECTUAL PROPERTY INFRINGEMENT, OR FAILURE TO PAY A SUBCONTRACTOR OR SUPPLIER COMMITTED BY GARVER OR BY GARVER'S EMPLOYEE, OR GARVER'S AGENT, CONSULTANT UNDER CONTRACT, OR ANOTHER ENTITY OVER WHICH GARVER EXERCISES CONTROL (GARVER'S EMPLOYEE, AGENT, CONSULTANT UNDER CONTRACT, OR SUCH OTHER ENTITY BEING, COLLECTIVELY, "GARVER PERSONS").**

**SUCH DEFENSE, INDEMNITY AND HOLD HARMLESS OBLIGATION SHALL AND DOES INCLUDE CLAIMS ALLEGED OR FOUND TO HAVE BEEN CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OR INTENTIONAL TORT OF A CLIENT PERSON. HOWEVER, WHEN CLAIMS ARISE OUT OF THE CO-NEGLIGENCE OR OTHER CO-LIABILITY OF CLIENT OR OTHER CLIENT PERSON AND GARVER OR ANY GARVER PERSONS, GARVER'S LIABILITY UNDER THIS SECTION SHALL BE REDUCED BY THAT PORTION OF THE TOTAL AMOUNT OF THE CLAIMS (EXCLUDING ATTORNEYS' FEES AND COSTS INCURRED IN DEFENSE OF CLAIMS) EQUAL TO CLIENT PERSON OR PERSONS' PROPORTIONATE SHARE OF THE NEGLIGENCE OR OTHER LIABILITY THAT CAUSED THE LOSS ATTRIBUTABLE TO SUCH NEGLIGENCE. LIKEWISE, IN SUCH INSTANCE, GARVER'S LIABILITY, IF ANY, FOR CLIENT PERSON'S DEFENSE COSTS AND ATTORNEYS' FEES SHALL BE REDUCED BY THAT PORTION OF THE DEFENSE COSTS AND ATTORNEYS' FEES EQUAL TO CLIENT PERSON OR PERSONS' PROPORTIONATE SHARE OF THE NEGLIGENCE OR OTHER LIABILITY THAT CAUSED THE LOSS ATTRIBUTABLE TO SUCH NEGLIGENCE.**

**GARVER SHALL PROMPTLY ADVISE CLIENT IN WRITING OF ANY CLAIM OR DEMAND AGAINST CLIENT OR ANY OTHER CLIENT PERSON, GARVER, OR GARVER PERSON RELATED TO OR ARISING OUT OF GARVER'S ACTIVITIES UNDER THIS AGREEMENT AND SHALL SEE TO THE INVESTIGATION AND DEFENSE OF SUCH CLAIM OR DEMAND AT GARVER'S SOLE COST AND EXPENSE. CLIENT PERSONS SHALL HAVE THE RIGHT, AT CLIENT PERSONS' OPTION AND AT OWN EXPENSE, TO PARTICIPATE IN SUCH DEFENSE WITHOUT RELIEVING GARVER OF ANY OF ITS OBLIGATIONS HEREUNDER. THE OBLIGATIONS SET FORTH IN THIS SECTION SHALL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.**

**THE PROVISIONS IN THE FOREGOING DEFENSE, INDEMNITY AND HOLD HARMLESS ARE SEVERABLE, AND IF ANY PORTION, SENTENCE, PHRASE, CLAUSE OR WORD INCLUDED THEREIN SHALL FOR ANY REASON BE HELD BY A COURT OF COMPETENT JURISDICTION TO BE INVALID, ILLEGAL, VOID, OR UNENFORCEABLE IN ANY RESPECT (INCLUDING, WITHOUT LIMITATION, FOR VIOLATING SECTION 271.904(a), TEX. LOC. GOV. CODE, OR**

**SECTION 130.002(b), TEX. CIV. PRAC. & REM. CODE), SUCH INVALIDITY, ILLEGALITY, VOIDNESS, OR UNENFORCEABILITY SHALL NOT AFFECT ANY OTHER PROVISION THEREOF, AND THIS DEFENSE, INDEMNITY AND HOLD HARMLESS PROVISION SHALL BE CONSIDERED AS IF SUCH INVALID, ILLEGAL, VOID, OR UNENFORCEABLE PROVISION HAD NEVER BEEN CONTAINED IN THIS AGREEMENT.**

**THE OBLIGATIONS SET FORTH IN THIS SECTION SHALL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.**

#### **5.6 Hazardous Materials**

Nothing in this Agreement shall be construed or interpreted as requiring GARVER to assume any role in the identification, evaluation, treatment, storage, disposal, or transportation of any hazardous substance or waste. If GARVER, in providing the Services, encounters any hazardous materials or suspected hazardous materials, GARVER will promptly notify Client of the same and discontinue its Services in the affected area in order to permit testing and evaluation.

#### **5.7 Mediation**

In an effort to resolve any conflicts that arise during the design or construction of the project or following the completion of the project, the Client and GARVER agree that all disputes between them arising out of or relating to this Agreement may, by agreement of the parties, be submitted to non-binding mediation.

### **SECTION 6 – GOVERNING LAW; VENUE; TERMINATION; SUSPENSION**

6.1 This is a Texas contract and shall be governed and construed in accordance with the laws of the State of Texas, without reference to choice of laws rules of any jurisdiction. Venue for any action, lawsuit, or proceeding under or in connection with this Agreement shall lie exclusively in the state courts of Dallas County, Texas, and each of the parties submits to the exclusive jurisdiction of such courts for purposes of any action, lawsuit, or proceeding.

6.2 This Agreement may be terminated by either party (the "non-breaching party") in the event the other party (the "breaching party") fails to perform in accordance with the terms hereof through no fault of the non-breaching party and (i) such failure remains uncured for a period of seven (7) days after written notice thereof (which notice shall specifically identify the failure) is received by the breaching party, or (ii) if the failure cannot with diligence be cured within the said seven (7) day period, if within such seven (7) day period the breaching party provides the non-breaching party written notice of the curative measures which it proposes to undertake which are acceptable to the non-breaching party, and proceeds promptly to initiate such measures to cure such failure, and thereafter prosecutes the curing of such failure with diligence and continuity, the time within which such failure may be cured shall be extended for such period as may be necessary to complete the curing of such failure with diligence and continuity, but in any event not to exceed 14 days following the occurrence of the failure.

This Agreement may also be terminated or suspended for the convenience of (that is, for any reason or for no reason whatsoever) the Client upon Client's delivery of written notice of termination to GARVER.

Upon termination by either party or upon suspension by Client of this Agreement, GARVER shall be paid for the Services performed to the date of termination and that are not dispute as provided in and in accordance with SECTION 3 - PAYMENT; however, GARVER may be required to furnish an accounting of all costs. Upon the termination or suspension of this Agreement, GARVER shall cause to be promptly delivered to Client a copy of all of Documents (whether completed or partially completed) prepared by or for GARVER in connection with this Agreement. Upon termination or suspension of this Agreement, if Client has compensated GARVER for any Services not yet performed, GARVER shall promptly return such compensation to Client (and such obligation shall survive termination of this

Agreement).

#### **SECTION 7 - SUCCESSORS AND ASSIGNS; ASSIGNMENT**

This Agreement shall be binding upon and inure to the benefit of the parties, their respective permitted successors and permitted assigns.

Neither the Client nor GARVER shall, and neither has authority to, assign, sell, subcontract, transfer, or otherwise convey in any manner or form whatsoever (including by operation of law, by merger, or otherwise) all or part of their respective rights, duties or obligations under this Agreement without the prior written consent of the other party. Nothing herein shall be construed as creating any personal liability on the part of any officer, official, employee, or agent of Client.

#### **SECTION 7A – MISCELLANEOUS**

7A.1 Notwithstanding anything to the contrary in this Agreement, GARVER shall not be deemed to be an agent of Client for any purpose but shall in all events be an independent contractor exercising control over its work and the manner in which it is performed. This Agreement does not and shall not be construed to make GARVER a partner, agent, or joint venturer of Client for any purpose, and Client shall not be deemed an agent for GARVER, and neither GARVER nor Client shall have the right or authority to assume, create, or enlarge any obligations or commitment on behalf of the other and shall not represent itself as having the authority to bind the other in any manner, except as provided for herein. Nothing in this Agreement is intended nor shall be construed to create an employer-employee relationship, a joint venture, a joint enterprise, or to allow Client to exercise discretion or control over the professional manner in which the GARVER performs the services which are the subject matter of this Agreement; provided always however that the services to be provided by GARVER shall be provided in a manner consistent with all applicable standards and regulations governing such services. The method and manner in which GARVER's Services hereunder shall be performed shall be determined by GARVER in its sole discretion. The employees, agents, and representatives of, and the methods, equipment and facilities used by, the GARVER shall at all times be under the GARVER's exclusive direction and control.

7A.2 Neither party is liable to the other for any damages for delay in performance caused by acts of God, strikes, lockouts, accidents, fire, casualty, labor trouble, failure of power, governmental authority, riots, insurrections, war, acts or threatened of terrorism, or other events or reasons of a like nature which are beyond the control of the party obligated to perform and not avoidable by the diligence of that party ("Event of Force Majeure"); in such event, the party obligated to perform give the other party prompt notice of such delay and the performance of this Agreement shall be excused for the period of such delay.

7A.3 GARVER shall not divulge or release any information concerning its Services, the project or this Agreement to the public without Client's prior written consent.

7A.4 GARVER covenants and represents that GARVER will have no financial interest, direct or indirect, in the purchase or sale of any product, materials or equipment that will be recommended or required for the construction of the project.

7A.5 For purposes of this Agreement, notices and all other communications provided for herein shall be in writing, addressed as provided hereinafter to the party to whom the notice or request is given, and shall be either (i) delivered personally, (ii) sent by United States certified mail, postage prepaid, return receipt requested, or (iii) placed in the custody of Federal Express Corporation or other nationally recognized carrier to be delivered overnight. Notice shall be deemed given when received if delivered personally or if sent by Federal Express or other nationally recognized carrier; or seventy-two (72) hours after deposit if sent by certified mail.

Addresses for notices and communications are as follows:

To Client:

Town of Addison, Texas  
5300 Belt Line Road  
Dallas, Texas 75254

Attn: City Manager

To GARVER:

Garver, LLC  
3010 Gaylord Parkway, Suite 190  
Frisco, Texas 75034

Attn: Frank McIlwain, PE

From time to time either party may designate another address within the 48 contiguous states of the United States of America for all purposes of this Agreement by giving the other party not less than ten (10) days advance notice of such change of address in accordance with the provisions hereof.

7A.6 GARVER will make, without additional cost or expense to Client, such revisions of any Services Product as may be required to meet the needs of Client and the project, but after a definite plan or other Services of GARVER have been approved or accepted by Client, if a decision is subsequently made by Client which requires a modification of such plan or other Services, GARVER shall be compensated for such modifications as extra in accordance with the rates set forth in Appendix B.

7A.7 The terms and provisions of this Agreement are severable, and if any term or provision is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision is not a part hereof, and the remaining provisions hereof shall remain in full force and effect. In lieu of any illegal, invalid or unenforceable provision herein, the parties agree to seek to negotiate the insertion of a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible, with the intent that such added provision is legal, valid and enforceable.

7A.8 The rights and remedies provided by this Agreement are cumulative, and the use of any one right or remedy by either party shall not preclude or waive its right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance, or otherwise. Any rights and remedies either party may have with respect to the other arising out of this Agreement shall survive the cancellation, expiration or termination of this Agreement.

Failure of either party hereto, at any time, to enforce a provision of this Agreement shall in no way or event constitute a waiver of that provision, nor in any way affect the validity of this Agreement, any part hereof, or the right of either party thereafter to enforce each and every provision hereof. No term or provision of this Agreement shall be deemed waived or any breached excused unless the waiver or excusing of the breach shall be in writing and signed by the party claimed to have waived or excused. Further, any consent to or waiver of a breach shall not constitute consent to or waiver of or excuse of any other different or subsequent breach.

7A.9 This Agreement and each of its provisions are solely for the benefit of the parties hereto and do not and are not intended to create or grant any rights, contractual or otherwise, to any third person or entity.

7A.10 The Recitals to this Agreement are incorporated into this Agreement and made a part hereof for all purposes.

7A.11 Notwithstanding any other provision of this Agreement, nothing in this Agreement shall or may be deemed to be, or shall or may be construed to be, a waiver or relinquishment of any immunity, defense, or tort limitation to which the Client, its officials, officers, employees, representatives, and agents are or may be entitled, including, without limitation, any waiver of immunity to suit.

7A.12 This Agreement constitutes the entire and integrated agreement between the parties with respect to the Project and GARVER's Services described herein, supersedes all prior agreements,

negotiations, and/or representations, either written or oral, and may be amended or modified only by written instrument signed by both Client and GARVER.

7A.13 Section and paragraph headings are for convenience only and shall not be used in interpretation of this Agreement. The use of any gender in this Agreement shall be applicable to all genders, and the use of singular number shall include the plural and conversely. For purposes of this Agreement, "includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded; and "day" or "days" means calendar days unless the context clearly indicates otherwise.

7A.14 The undersigned officers and/or agents of the parties hereto are the properly authorized officials or representatives and have the necessary authority to execute this Agreement on behalf of each of the respective parties, and each party hereby certifies to the other that any necessary resolutions or other act extending such authority have been duly passed and are now in full force and effect.

**SECTION 8 – APPENDICES AND EXHIBITS**

- 8.1 The following Appendices and/or Exhibits are attached to and made a part of this Agreement:
  - 8.1.1 Appendix A – Scope of Services
  - 8.1.2 Appendix B

This Agreement may be executed in two (2) or more counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, Client and GARVER have executed this Agreement effective as of the date last written below.

Town of Addison

GARVER, LLC

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

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

Name: \_\_\_\_\_  
*Printed Name*

Name: Frank McIlwain, P.E.  
*Printed Name*

Title: \_\_\_\_\_

Title: Vice President

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

Date: 7/10/15

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

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

## **APPENDIX A – SCOPE OF SERVICES**

### **OVERVIEW**

The Town of Addison requires limited the construction phase services of an engineering firm for the street rehabilitation of Addison Road. The project limits beginning with the DART railroad (located just north of the intersection of Addison Road and Arapaho Road) and end at the northern Town limits. As part of the limited construction phase services, Garver will provide part-time resident construction observation during the installation of the 6” HMA Type B Pavement (Base Course) and 2” HMA Type D Pavement (Surface Course), herein referred to as “asphalt construction”.

Tasks will consist primarily of the following:

### **BASIC SERVICES**

During the construction phase of work, Garver will accomplish the following:

1. Attend progress/coordination meetings with the Owner/Contractor.
2. Evaluate and respond to construction material submittals and shop drawings. Corrections or comments made by Garver on the shop drawings during this review will not relieve Contractor from compliance with requirements of the drawings and specifications. The check will only be for review of general conformance with the design concept of the project and general compliance with the information given in the contract documents. The Contractor will be responsible for confirming and correlating all quantities and dimensions, selecting fabrication processes and techniques of construction, coordinating his work with that of all other trades, and performing his work in a safe and satisfactory manner. Garver’s review shall not constitute approval of safety precautions or constitute approval of construction means, methods, techniques, sequences, procedures, or assembly of various components. When certification of performance characteristics of materials, systems or equipment is required by the Contract Documents, either directly or implied for a complete and workable system, Garver shall be entitled to rely upon such submittal or implied certification to establish that the materials, systems or equipment will meet the performance criteria required by the Contract Documents.
3. Issue instructions to the Contractor on behalf of the Owner and issue necessary clarifications (respond to RFIs) regarding the construction contract documents.
4. Provide part-time resident construction observation services for asphalt construction only during the 120-calendar-day construction contract performance time. The Contractor has estimated full depth asphalt replacement to take approximately 28 working days and the final overlay asphalt to take approximately 10 working days. The contractor anticipates placing asphalt during night time hours except where Town ordinance does not allow this work. The proposed fee is based on approximately 12 hours per days for 38 working day, during the 120-calendar-day construction contract performance time. If the construction time extends beyond the time established in this agreement or if the Owner wishes to increase the time or frequency of the observation, the Owner will pay Garver an additional fee agreed to by the Owner and

Town of Addison – Addison Road Construction Phase Services

Garver.

5. When authorized by the Owner, prepare change orders for changes in the work from that originally provided for in the construction contract documents. If redesign or engineering or surveying is required in the preparation of these change order documents, the Owner will pay Garver an additional fee to be agreed upon by the Owner and Garver.
6. Participate in final project inspection and prepare punch list relating to asphalt construction.

Part-time construction observation services for the asphalt construction will be provided by Garver's Resident Project Representative, who will provide or accomplish the following:

- Consult with and advise the Owner during the construction period on asphalt related construction.
- Coordinate with the firm providing construction materials quality assurance testing for asphalt construction under separate contract with the Owner.
- Maintain a file of quantities incorporated into the work, test reports, certifications, shop drawings and submittals, and other appropriate information.
- Maintain a project diary which will contain information pertinent to each site visit.
- Provide information for preparation of record drawings of the completed project.

The proposed fee for Construction Phase Services for asphalt construction is based on the Contractor's estimated full depth asphalt replacement estimate to take approximately 28 working days and the final overlay asphalt to take approximately 10 working days. The contractor anticipates placing asphalt during night time hours except where the Town ordinance does not allow this work. The proposed fee is based on approximately 12 hours per days for 38 working days, during the 120-calendar-day construction contract performance time. If the construction time extends beyond the 38 working day time established in this agreement, and the Owner wants Garver to continue the applicable Construction Phase Services, the Owner will pay Garver an additional fee agreed to by the Owner and Garver.

In performing part-time construction observation services for the asphalt construction, Garver will endeavor to protect the Owner against defects and deficiencies in the work of the Contractor(s); but Garver cannot guarantee the performance of the Contractor(s), nor be responsible for the actual supervision of construction operations or for the safety measures that the Contractor(s) takes or should take. However, if at any time during construction of asphalt Garver observes that the Contractor's work does not comply with the construction contract documents, Garver will notify the Contractor of such non-compliance and instruct him to correct the deficiency and/or stop work, as appropriate for the situation. Garver will also record the observance, the discussion, and the actions taken. If the Contractor continues without satisfactory corrective action, Garver will notify the Owner immediately, so that appropriate action under the Owner's contract with the Contractor can be taken.

**ADDITIONAL SERVICES**

Any services not specifically listed above are not included in the scope. The following specific items are not included under this agreement but will be considered as additional services:

1. Construction observation of any other work other than asphalt construction such as, but not limited to, milling, sub-grade, concrete installation or removal, permanent pavement markings, signing, SWPPP, traffic control.
2. Measuring or field checking quantities or review of pay request.
3. Maintaining a set of working drawings and preparing and furnish record drawings.
4. Review final project closing documents.

Additional Services will be as directed by the Owner in writing for an additional fee as agreed upon by the Owner and Garver. Garver will provide a written scope and fee for each additional service requested in writing by the Owner.

