

Terms and Conditions of Purchase Orders
El Paso County Water Improvement District No. 1
(Herein after known as “Purchaser”)

Agreement for Sale and Purchase

These terms and conditions are attached to, and made a part of, the Purchase Order from Purchaser to Seller, and the Seller and Purchaser agree to all terms and conditions of Purchase Order which consist of and includes as a part of the following documents:

- a. Notice to Bidders
- b. Instructions to Bidders
- c. Purchase Order Form
- d. Purchase Order Specification
- e. Purchase Order Terms and Conditions

Any provision contained in any form or document submitted by Seller are rejected.

Termination for Convenience of Purchaser

Purchaser reserves the right to terminate the Purchase Order, or any part of it, for Purchaser's sole convenience. In the event of such termination, Seller shall immediately stop all work hereunder, and shall immediately cause any and all suppliers and subcontractors to do the same. Seller shall be paid a reasonable termination charge consisting of a percentage of the Purchase Order price reflecting the percentage of the work performed prior to the notice of termination, plus actual direct costs resulting from termination. Seller shall not be paid for any work done after receipt of the notice of termination, nor for any costs incurred by Seller's suppliers or subcontractors which Seller could reasonably have avoided. Seller shall not unreasonably anticipate the requirements of this Purchase Order.

Termination for Cause

Purchaser may also terminate the Purchase Order, or any part of it, for cause in the event of any default by Seller, or if Seller fails to comply with any of the terms and conditions of this Purchase Order. Late deliveries, deliveries of products which are defective or which do not conform to the Purchase Order, and failure to provide Purchaser, upon request, with adequate assurances of future performance shall all be non-exclusive causes allowing Purchaser to terminate the Purchase Order for cause. In the event of termination for cause, Purchaser shall not be liable to Seller for any amount (except for products and/or services already received and accepted by the Purchaser as satisfactory), and Seller shall be liable to Purchaser for any and all damages sustained by reason of the default which gave rise to the termination. If it should be determined that Purchaser has improperly terminated the Purchase Order for default, such termination shall be deemed a termination for convenience.

Warranty

Seller expressly warrants that all equipment, parts, or materials furnished under the Purchase Order (hereinafter referred to as “goods”) shall conform to all terms, conditions, specifications, and standards contained in the Purchase Order, are new and have never been previously used, and are free from defect in material or workmanship. Seller warrants that all such goods will conform to any statements or representations made to Purchaser, or appearing on the containers or labels or advertisements for such goods and that any goods will be

adequately contained, packaged, marked and labeled. Seller warrants that all goods furnished hereunder will be merchantable, and will be safe and appropriate for the purpose for which goods of that kind are normally used. If Seller knows or has reason to know the particular purpose for which Purchaser intends to use the goods, Seller warrants that such goods will be fit for such particular purpose. Seller warrants that goods furnished will conform in all respect to samples. Inspection, test, acceptance or use of the goods furnished hereunder shall not affect the Seller's obligation under this warranty, and such warranties shall survive inspection, test, acceptance and use. Seller's warranty shall run to Purchaser, its successors, and assigns. Seller agrees to replace or correct defects of any goods not conforming to the foregoing warranty promptly, without expense to Purchaser, when notified to such nonconformity by Purchaser, provided Purchaser elects to provide Seller with the opportunity to do so. If Seller fails to correct defects in or replace nonconforming goods promptly, Purchaser, after reasonable notice to Seller, may make such corrections or replace such goods and charge Seller for the cost incurred by Purchaser in doing so. Seller recognizes that Purchaser's production requirements may require immediate repairs or reworking of defective goods, without notice to the Seller. In such event, Seller shall reimburse Purchaser for the costs, delays, or any other damages which Purchaser has incurred.

Price Warranty

Seller warrants that the prices for the goods sold to Purchaser hereunder are not less favorable than those currently extended to any other customer for the same or similar goods in similar quantities. If Seller reduces its price for such goods during the term of the Purchase Order, Seller agrees to reduce the prices hereof correspondingly. Seller warrants that prices shown on the Purchase Order Form shall be complete, and no additional charges of any type shall be added without Purchaser's written consent. Such additional charges include, but are not limited to, shipping, packaging, labeling, custom duties, taxes, storage, insurance, boxing, and crating.

Force Majeure

Purchaser may delay delivery or acceptance occasioned by causes beyond its control. Seller shall hold such goods at the direction of the Purchaser and shall deliver them when the cause affecting the delay has been removed. Purchaser shall be responsible only for Seller's direct additional costs in holding the goods or delaying the performance of this agreement at Purchaser's request. Seller shall also be excused if delivery is delayed by the occurrence of unforeseen and unforeseeable events, provided Seller notifies Purchaser of such events as soon as they occur, and gives Purchaser its best estimate of revised delivery dates.

Cancellation of Purchase Order by Purchaser

If any delay exceeds 30 days from the original delivery date, Purchaser may cancel the Purchase Order without any liability. If Seller's production is only partially restricted or delayed, Seller shall use its best efforts to accommodate Purchaser's requirements, including giving the Purchase Order preference and priority over those of other customers which were placed after the Purchase Order.

Patents, Copyrights, and Trade Secrets

Seller agrees upon receipt of notification to promptly assume full responsibility for defense of any claim, demand, suit, or proceeding which may be brought against Purchaser or its directors, officers, agents, consultants, or employees for alleged infringement of any patent, copyright, trade secret, or any other intellectual property right, as well as for any alleged unfair competition resulting from similarity in design, trademark or appearance of goods or services furnished hereunder, and Seller further agrees to indemnify Purchaser, its directors, officers, agents, consultants, and employees against any and all expenses, losses,

royalties, profits and damages including court costs and attorney's fees resulting from any such suit or proceeding, including any settlement. Purchaser may be represented by and actively participate through its own counsel in any such suit or proceeding if it so desires, and the costs of such representation shall be paid by Seller. If any good, service, or intellectual property furnished or used under this Purchase Order is adjudged infringing and its use enjoined, Seller shall, at its own expense, secure for Purchaser the right to continue using it, or replace it with a noninfringing equivalent, or modify it so it becomes noninfringing.

Indemnification

Seller agrees to indemnify and hold harmless Purchaser, its directors, officers, agents, consultants, and employees against all suits at law or in equity and from all damages, claims and demands arising out of the death or injury of any person or damage to any property alleged to have resulted from the goods ordered through the Purchase Order, and/or resulting from any act or omission of Seller, its agents, servants, employees and/or subcontractors, and upon the tendering of any suit or claim to seller, to defend the same at seller's expense as to all costs, fees and damages. The foregoing indemnification will apply to the extent that the death, injury, or property damage is caused by the sole or concurrent negligence of Seller and whether Seller or Purchaser defends such suit or claims. To the extent that Seller's agents, servants, employees or subcontractors enter upon premises occupied by or under the control of Purchaser, in the course of the performance of the Purchase Order, Seller shall take all necessary precautions to prevent the occurrence of any injury (including death) to any persons, or of any damage to any property, arising out of acts or omissions of such agents, servants, employees, or subcontractors, and except to the extent that any such damage is due to Purchaser's comparative and direct negligence, and seller shall indemnify, defend and hold Purchaser, its directors, officers, employees, consultants, and agents harmless from any and all costs, losses, expenses, damages, claims, suits, or any liability whatsoever, including attorney's fees arising out of any act or omission of Seller, its agents, servants, employees or subcontractors.

Insurance

Seller shall maintain and require its subcontractors to maintain (1) public liability and property damage insurance including contractual liability (both general and vehicle) in amounts sufficient to cover obligations set forth in paragraph 8 above, and (2) workers' compensation and employer's liability insurance covering all employees engaged in the performance of the Purchase Order for claims arising under applicable workers' compensation and occupation disease acts. Seller shall furnish certificates to the Purchaser evidencing such insurance which expressly provide that no expiration, termination or modification will take place without thirty (30) days prior written notice to Purchaser.

Waste Transportation and Disposal.

Goods, materials, and chemicals supplied hereunder shall be accompanied by a Material Safety Data Sheet (MSDS) if required by applicable federal, state or local law, regulation, rule or ordinance.

Changes

Purchaser shall have the right at any time to make changes in drawings, designs, specifications, materials, packaging, time and place of delivery and method of transportation. If any such changes cause an increase or decrease in the cost, or the time required for the performance, Seller shall send, prior to delivery, a written claim for any adjustment in price due to the change. If a claim for adjustment is not received prior to delivery Seller waives any such claim.

Inspection and Testing

Payment for the goods delivered hereunder shall not constitute acceptance thereof. Purchaser shall have the right to inspect the goods and to reject any or all goods that are in Purchaser's judgment defective or nonconforming. Goods rejected and goods supplied in excess of quantities called for may be returned to Seller at Seller's expense and in addition to Purchaser's other rights. Purchaser may charge Seller all expenses of unpacking, examining, repacking and reshipping such goods. In the event Purchaser receives goods whose defects or nonconformity is not apparent on examination, Purchaser reserves the right to request replacement, as well as payment of damages. Nothing contained in the Purchase Order shall in any way relieve Seller from the obligation of testing, inspection and quality control.

Shipment

If, in order to comply with Purchaser's required delivery date, it becomes necessary for Seller to ship by a more expensive way than specified in the Purchase Order, any increased transportation costs resulting there from shall be paid for by Seller unless the necessity for such rerouting or expedited handling has been caused by Purchaser. Seller shall bear all risk of loss of all merchandise covered by the Purchase Order until such merchandise has been delivered to the designated location.

Delivery

Time is of the essence of this Purchase Order, and if delivery of items or rendering of services is not completed by the time promised, Purchaser reserves the right without liability in addition to its other rights and remedies to terminate this Purchase Order by notice effective when received by Seller as to items not yet shipped.

Limitation on Purchaser's Liability -- Statute of Limitations

In no event shall Purchaser be liable for any anticipated profits of the Seller or for incidental or consequential damages to the Seller. Purchaser's liability on any claim of any kind for any loss or damage arising out of or in connection with or resulting from the Purchase Order or from the performance or breach thereof shall in no case exceed the price allocable to the goods or unit thereof which gives rise to the claim. Purchaser shall not be liable for penalties of any description. Any action resulting from any breach on the part of Purchaser as to the goods delivered hereunder must be commenced by the Seller within one year after the date of scheduled delivery.

Waiver

Purchaser's failure to insist on performance of any of the terms or conditions of the Purchase Order or to exercise any right or privilege or Purchaser's waiver of any breach hereunder shall not thereafter waive any other terms, conditions, or privileges, whether of the same or similar type.

Sales Tax

Pursuant to Section 151.309 of the Texas Tax Code, Purchaser is exempt from Texas sales and use tax.

Setoff

Purchaser may deduct or setoff any claims for payment against any amounts due Seller by the Purchaser arising out of this or any other transaction with Seller.

Assignments and Subcontracting

No part of the Purchase Order may be assigned or subcontracted by Seller without the prior written approval of Purchaser.

Purchase Order

The Purchase Order consists of the information listed on the Purchase Order Form, these terms and agreements, the requirements and specifications contained in the Purchase Order Specifications, the Instruction to Bidders, and the Notice to Bidders.

Entire Agreement

The Purchase Order constitutes the entire agreement between the Seller and the Purchaser.

Payment for Goods Delivered

All goods meeting the requirements of the Purchase Order and accepted by the Purchaser shall be invoiced by the Seller to the Purchaser no later than the last day of month. The Purchaser shall mail payment to the Seller for all goods meeting the requirements of the Purchase Order and accepted by the Purchaser by the last day of the next month.

CHAPTER 49 – TEXAS WATER CODE
SUBCHAPTER I. CONSTRUCTION, EQUIPMENT, MATERIALS, AND MACHINERY CONTRACTS

§ 49.271. Contracts for Construction Work

- (a) Any contract made by the board for construction work shall conform to the provisions of this chapter.
- (b) The contract shall contain, incorporate by reference, or have attached to it the specifications, plans, and details for work included in the contract. All work shall be done in accordance with these plans and specifications and any authorized change orders under the supervision of the board or its designee.
- (c) The district may adopt minimum criteria for the qualifications of bidders on its construction contracts and for sureties issuing payment and performance bonds. For construction contracts over \$25,000, the district shall require a person who bids to submit a certified or cashier's check on a responsible bank in the state equal to at least two percent of the total amount of the bid, or a bid bond of at least two percent of the total amount of the bid issued by a surety legally authorized to do business in this state, as a good faith deposit to ensure execution of the contract. If the successful bidder fails or refuses to enter into a proper contract with the district, or fails or refuses to furnish the payment and performance bonds required by law, the bidder forfeits the deposit. The payment, performance, and bid bonding requirements of this subsection do not apply to a contract for the purchase of equipment, materials, or machinery not otherwise incorporated into a construction project.
- (d) The district may also require attendance by a principal of each prospective bidder at mandatory pre-bid conferences and may make any reasonable additional requirements regarding the taking of bids the district may deem appropriate in order to obtain competitive bids from responsible contractors and to minimize contract disputes.

Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995.

Amended by Acts 2001, 77th Leg., ch. 1423, § 16, eff. June 17, 2001.

§ 49.272. Reports Furnished to Prospective Bidders

The board shall furnish to any person who desires to bid on construction work, and who makes a request in writing, a copy of the engineer's report or plans and specifications showing the details of the work to be done. The board may charge for each copy of the engineer's report or plans and specifications an amount sufficient to cover the cost of making the copy.

Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995.

§ 49.273. Contract Award

- (a) The board shall contract for construction and repair and renovation of district facilities and for the purchase of equipment, materials, machinery, and all things that constitute or will constitute the plant, works, facilities, or improvements of the district in accordance with this section. The bidding documents, plans, specifications, and other data needed to bid on the project must be available at the time of the first advertisement and the advertisement shall state the location at which these documents may be reviewed.
- (b) A contract may cover all the work to be provided for the district or the various elements of the work may be segregated for the purpose of receiving bids and awarding contracts. A contract may provide that the work will be completed in stages over a period of years.
- (c) A contract may provide for the payment of a total sum that is the completed cost of the work or may be based on bids to cover cost of units of the various elements entering into the work as estimated and approximately specified by the district's engineers, or a contract may be let and awarded in any other form or composite of forms and to any responsible person or persons that, in the board's judgment, will be most advantageous to the district and result in the best and most economical completion of the district's proposed plants, improvements, facilities, works, equipment, and appliances.

(d) For contracts for \$25,000 or more, the board shall advertise the letting of the contract, including the general conditions, time, and place of opening of sealed bids. The notice shall be published in one or more newspapers circulated in each county in which part of the district is located. If one newspaper meets both of these requirements, publication in such newspaper is sufficient. If there are more than four counties in the district, notice may be published in any newspaper with general circulation in the district. The notice shall be published once a week for three consecutive weeks before the date that the bids are opened, and the first publication shall be not later than the 21st day before the date of the opening of the sealed bids.

(e) For contracts for \$15,000 or more but less than \$25,000, the board shall solicit written competitive bids on uniform written specifications from at least three bidders.

(f) For contracts of less than \$15,000, the board is not required to advertise or seek competitive bids.

(g) The board may not subdivide work to avoid the advertising requirements specified in this section.

(h) The board may not accept bids that include substituted items unless the substituted items were included in the original bid proposal and all bidders had the opportunity to bid on the substituted items or unless notice is given to all bidders at a mandatory pre-bid conference.

(i) If changes in plans or specifications are necessary after the performance of the contract is begun, or if it is necessary to decrease or increase the quantity of the work to be performed or of the materials, equipment, or supplies to be furnished, the board may approve change orders making the changes. The aggregate of the change orders may not increase the original contract price by more than 10 percent. Additional change orders may be issued only as a result of unanticipated conditions encountered during construction, repair, or renovation or changes in regulatory criteria or to facilitate project coordination with other political entities.

(j) The board is not required to advertise or seek competitive bids for the repair of district facilities if the scope or extent of the repair work cannot be readily ascertained or if the nature of the repair work does not readily lend itself to competitive bidding.

(k) The board may use the reverse auction procedure, as defined by Section 2155.062(d), Government Code, for purchasing.

Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1070, § 19, eff. Sept. 1, 1997.

Amended by Acts 2001, 77th Leg., ch. 436, § 9, eff. May 28, 2001; Acts 2001, 77th Leg., ch. 1423, § 17, eff. June 17, 2001.

§ 49.274. Emergency Approval of District Projects

If a district experiences an emergency condition that may create a serious health hazard or unreasonable economic loss to the district that requires immediate corrective action, the district may negotiate limited duration contracts to make the necessary repairs. The district shall submit to the executive director details describing the specific serious health hazard or unreasonable economic loss as soon as practicable following the issuance of the contracts. Whenever possible, the district should obtain prior approval of the executive director before authorizing the contract, but failure to obtain prior approval shall not void the contract. This section does not apply to special water authorities.

Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995.

§ 49.275. Contractors

Any person, firm, partnership, or corporation to whom a contract is let must give good and sufficient performance and payment bonds in accordance with Chapter 2253, Government Code, and any minimum criteria for sureties issuing such bonds adopted by a district in accordance with Section 49.271.

Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995

§ 49.276. Payment for Construction Work

- (a) The district shall pay the contract price of construction contracts only as provided in this section.
- (b) The district will make progress payments under construction contracts monthly as the work proceeds, or at more frequent intervals as determined by the board or its designee, on estimates approved by the board or its designee.
- (c) If requested by the district or district engineer, the contractor shall furnish a breakdown of the total contract price showing the amount included for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates, the district engineer may authorize material delivered on the site and preparatory work done to be considered if the consideration is specifically authorized by the contract and if the contractor furnishes satisfactory evidence that he has acquired title to the material and that it will be utilized on the work covered by the contract.
- (d) In making progress payments, 10 percent of the estimated amount shall be retained until final completion and acceptance of the contract work. However, if the board at any time after 50 percent of the work has been completed finds that satisfactory progress is being made, it may authorize any of the remaining progress payments to be made in full. Also, if the work is substantially complete, the board, if it finds the amount retained to be in excess of the amount adequate for the protection of the district, at its discretion may release to the contractor all or a portion of the excess amount. The district is not obligated to pay interest on amounts retained except as provided herein. The district shall not be obligated to pay any interest on the 10 percent retainage held on the first 50 percent of work completed. If the district holds any retainage on the remaining 50 percent of the work completed, the district shall pay interest on such retainage from the date the retainage is withheld to the date of payment to the contractor. The interest rate to be paid on such retainage shall be the rate of interest paid by the district's depository bank on interest bearing accounts of similar amounts during the period of time interest accrues as provided herein.
- (e) On completion and acceptance of each separate project, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made without retention of a percentage.

Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995

§ 49.277. Inspection of and Reports on Construction Work

- (a) The board shall have control of construction work being done for the district under contract to determine whether or not the contract is being fulfilled and shall have the construction work inspected by the district engineer or other designated person.
- (b) During the progress of the construction work, the district engineer or other designated person shall submit to the board detailed written reports showing whether or not the contractor is complying with the contract, and when the work is completed the district engineer shall submit to the board a final detailed report including as-built plans of the facilities showing whether or not the contractor has fully complied with the contract.

Added by Acts 1995, 74th Leg., ch. 715, § 2, eff. Sept. 1, 1995

§ 49.278. Nonapplicability

- (a) This subchapter does not apply to:
 - (1) Equipment, materials, or machinery purchased by the district at an auction that is open to the public;
 - (2) Contracts for personal or professional services or for a utility service operator;
 - (3) Contracts made by a district engaged in the distribution and sale of electric energy to the public;

(4) Contracts for services or property for which there is only one source or for which it is otherwise impracticable to obtain competition; or

(5) High technology procurements

(b) Sections 252.021(a) and 252.042, Local Government Code, apply to high technology procurements.

Added by Acts 1997, 75th Leg., ch. 1070, § 20, eff. Sept. 1, 1997

Amended by Acts 2001, 77th Leg., ch. 1423, § 18, eff. June 17, 2001

§ 49.279. Prevailing Wage Rates

In addition to the alternative procedures provided by Section 2258.022, Government Code:

(1) A district located wholly or partially within one or more municipalities or within the extraterritorial jurisdiction of one or more municipalities may determine its prevailing wage rate for public works by adopting the prevailing wage rate of:

(A) One of the municipalities; or

(B) the county in which the district is located or, if the county in which the district is located has not adopted a wage rate, the prevailing wage rate of a county adjacent to the county in which the district is located; and

(2) a district not located wholly or partially within the extraterritorial jurisdiction of a municipality may determine the district's prevailing wage rate by adopting the prevailing wage rate of the county in which the district is located or, if the county in which the district is located has not adopted a wage rate, the wage rate of a county adjacent to the county in which the district is located.

Added by Acts 2001, 77th Leg., ch. 1423, § 19, eff. June 17, 2001

[Bidder's *letterhead*]

[Date]

[*Name and address*]

Dear :

The undersigned party certifies that [*name of bidding company*] complies with the following criteria:

1. The company nor any of its employees, agents, or officers have not engaged and will not engage in bribery of domestic or foreign officials related to potential or active El Paso County Water Improvement District No. 1 projects.
2. The company has a written policy that clearly prohibit the use of any bribery in any activity.
3. The company nor any of its employees, agents, or officers have neither been convicted of (nor found by a civil judgment to have committed) bribery of domestic officials, fraud, embezzlement, theft, forgery, destruction of records, making false statements to government officials, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, within five years of the date of this certification.
4. The company nor any of its employees, agents, or officers have participated in any form of collusion with regard to other bidder(s) or potential bidders regarding the price or other criteria for the bid to which this letter is attached and made a part of.

Printed name

Signature

Position in bidding company

Date