

**CONTRACT FOR COMMERCIAL REAL ESTATE BROKERAGE SERVICES**

**BY, BETWEEN AND AMONG  
TEXAS DEPARTMENT OF BANKING,  
DEPARTMENT OF SAVINGS AND MORTGAGE LENDING,  
AND OFFICE OF CONSUMER CREDIT COMMISSIONER**

**AND**

**AQUILA COMMERCIAL, LLC**

**Contract No. \_451-16-143\_**

This Contract for Commercial Real Estate Brokerage Services (**Contract**) is entered into by the following agencies of the State of Texas, the Texas Department of Banking, Department of Savings and Mortgage Lending, and Office of Consumer Credit Commissioner (**the Agencies**), who are under the oversight of the Texas Finance Commission (**Finance Commission**), and Aquila Commercial, LLC (**Aquila**), located at 1717 W. 6<sup>th</sup> Street, Ste. 450, Austin, Texas 78703.

**I. Recitals**

Whereas, on September 15, 2015, the Agencies, acting through the Texas Department of Banking, issued a Request for Proposals (RFP) from qualified, independent individuals or firms to provide commercial real estate brokerage services related to the Agencies' possible sale of their current office property located at 2601 North Lamar Boulevard, Austin, Texas 78705 and purchase of new replacement office property in or around Austin, Texas; and

Whereas, Aquila submitted a proposal (**Proposal**) dated October 15, 2015, in response to the Finance Commission RFP; and

Whereas, the Agencies selected Aquila to serve as real estate broker pursuant to the RFP for the one year period beginning on the date of the last signature of all of the parties to the Contract.

Now therefore, the Agencies and Aquila hereby agree as follows:

**II. Authority**

This Contract is entered into pursuant to Texas Finance Code, §§ 16.006 and 16.007.

**III. Services, Standards of Performance, and Contract Administration**

**3.1** Aquila shall provide the services and the deliverables described herein in the manner required by all of the following documents:

- (a)** This Contract
- (b)** The Award Letter

- (c) The RFP
- (d) Aquila's Proposal and Aquila's Best and Final Offer
- (e) Nondisclosure Agreement to Protect Against Release of Confidential Information.

All of the above are incorporated as part of this Contract for all purposes. All of these documents constitute the "**Standards of Performance**" for this Contract. Definitions stated in the RFP also apply to this Contract.

**3.2** In the case of conflicts between this Contract and any of its exhibits or attachments, such conflicts shall be resolved by reference to the Contract and its exhibits or attachments in the order of their numbered priority in Paragraph 3.1 above. Thus, for example, this Contract shall control over the Award Letter.

**3.3** Aquila shall provide all of the above services and all reasonably related services in accordance with applicable professional standards of a Aquila providing commercial real estate brokerage services. Professional standards shall be determined in accordance with the Texas Real Estate License Act (the Act) and rules promulgated by the Texas Real Estate Commission. Aquila represents and warrants that it has the requisite qualifications, experience, personnel and other resources required by the RFP to perform in the manner required by this Contract. Aquila further represents and warrants that if Aquila or any representative or affiliate of Aquila represents or is otherwise affiliated with or related to any proposed buyer of the Agencies' current property or owner of proposed new property, Aquila must disclose such relationship in writing to the Agencies, and, as to any such dual representation, obtain advance written approval thereof from the Agencies in accordance with the Act.

#### **IV. Personnel**

**4.1** Aquila shall assign only qualified personnel to this Contract. On the effective date of this Contract, the Agencies shall authorize Aquila's key personnel listed in the Authorized Key Personnel List, referenced in Paragraph 3.1, to provide commercial real estate brokerage services under this Contract. If Aquila plans to substitute new key personnel, not identified in Aquila's original Proposal, to accomplish its duties, Aquila must obtain the prior approval of the Agencies of such substituted personnel. The substituted personnel must be equally qualified and skilled in the tasks necessary to accomplish the tasks and services required by the RFP as the members of Aquila's firm originally listed in Aquila's Proposal.

**4.2** Subcontractors providing services under the Contract shall meet the same requirements and level of experience as required of Aquila. No subcontract under the Contract shall relieve Aquila of responsibility for ensuring that the services are provided in full compliance with all terms of the RFP and this Contract. If Aquila uses a subcontractor for any or all of the work required, the following conditions shall apply:

- (a) Aquila shall perform the Contract with its own resources and those subcontractors identified in its Proposal. If Aquila plans, after Contract award, to subcontract all or a portion of the work to be performed to subcontractors not identified in its Proposal, Aquila must provide 30 days' prior notice and obtain the approval of the Agencies of such subcontractors. Aquila shall also transmit to the Agencies for review and prior approval a true copy of the subcontract it proposes to execute with a subcontractor.

(b) Subcontracting shall be solely at Aquila's expense. In subcontracting for any performances specified in the RFP or Contract, Aquila understands and expressly acknowledges that the Agencies will not be liable, in any manner, to any subcontractors of Aquila.

(c) The Agencies retain the right to check subcontractor's background, qualifications, and conflicts and to approve or reject the use of submitted subcontractors.

(d) Aquila shall be the sole contact for the Agencies or shall list or provide a designated point of contact for all inquiries from the Agencies.

**4.3** By entering into this Contract, Aquila certifies and ensures that it utilizes and will continue to utilize, for the term of this Contract, the U.S. Department of Homeland Security's E-Verify system to determine the eligibility of:

(a) All persons employed to perform duties within Texas, during the term of the Contract; and

(b) All persons (including subcontractors) assigned by Aquila to perform work pursuant to the Contract, within the United States of America.

Aquila shall provide, upon request of the Agencies, an electronic or hardcopy screenshot of the confirmation or tentative non-confirmation screen containing the E-Verify case verification number for attachment to the Form I-9 for the three most recent hires that match the criteria above, by Aquila, and Aquila's subcontractors, as proof that this provision is being followed.

**If this certification is falsely made, the Contract may be immediately terminated, at the discretion of the Agencies and at no fault to the Agencies, with no prior notification. Aquila shall also be responsible for the costs of any re-solicitation that the Agencies must undertake to replace the terminated Contract.**

## **V. Payments**

**5.1** Aquila shall be compensated for its services performed hereunder on a commission basis. Aquila shall not be entitled to any fees, commissions, reimbursements or other compensation in connection with any past, present or future services related to this Contract, whether from the Agencies or any other party, except as expressly set forth herein. In consideration of Aquila's performance of the services described in this Contract, and of the exclusive nature of this Contract, Aquila shall receive compensation as follows:

- (a) In the event the Agencies close on the sale of the current property, the Agencies shall pay Aquila a brokerage commission (Sale Commission) equal to a percentage (as reflected in Exhibit I) of the gross sales price of the current property as established by a Sales Contract as defined below. Notwithstanding anything which could be construed to the contrary contained in this Contract, the following matters shall be conditions precedent to the Agencies' obligation to pay such Sale Commission:
- i. Agencies and a buyer shall have executed a valid and binding agreement of sale (a Sales Contract) for the sale and purchase of the current property on

- terms and conditions satisfactory to the Agencies in their sole discretion, prior to the expiration or termination of this Contract;
- ii. Such Sales Contract shall be fully and completely consummated, and the funding of the transaction (including Agencies' receipt of any cash due at closing) shall have occurred; and
  - iii. Aquila's Sale Commission shall be paid on terms paralleling the payment of the sales proceeds of the current property; that is, Aquila's commission hereunder shall be payable out of the sale proceeds if, as and when Agencies shall receive such sale proceeds.
- (b)** In the event the Agencies close on the purchase of a new property procured as a result of Aquila's efforts, Aquila shall be entitled to receive a brokerage commission (Purchase Commission) equal to a percentage (as reflected in Exhibit I) of the gross purchase price of the new property. If the seller of the new property or its agent agrees to pay Aquila the Purchase Commission, the Agencies shall not be obligated to pay Aquila any commission in connection with their purchase of the new property. However, if the seller of the new property or its agent does not agree to pay Aquila the full amount of the Purchase Commission, the Agencies will pay Aquila, upon closing and funding of the new property, the difference between the Purchase Commission and the commission amount that such seller or agent agrees to pay. Notwithstanding anything which could be construed to the contrary contained in this Contract, the following matters shall be conditions precedent to the Agencies' obligation to pay such Purchase Commission or applicable portion thereof:
- i. Agencies and a seller shall have executed a valid and binding agreement of purchase (a Purchase Contract) for the sale and purchase of the new property, on terms and conditions satisfactory to the Agencies in their sole discretion, prior to the expiration or termination of this Contract;
  - ii. Such Purchase Contract shall be fully and completely consummated, and the closing of the transaction (including the unconditional delivery of fee simple title to the new property to Agencies at closing) shall have occurred; and
  - iii. The new property shall have been procured as a result of Aquila's efforts; that is, Aquila shall have either identified the new property and introduced the Agencies to it or assisted in the Agencies' analysis or negotiation of such Purchase Contract.
- (c)** Unless and until the Agencies have reasonably determined that all of such conditions have been satisfied, the Agencies shall not be required to pay any commission to Aquila relative to the sale of the current property or the purchase of the new property, unless the Agencies elect to waive any such unsatisfied condition. The inclusion of commissions to be paid to the buyer's agent (in the case of sale of the current property) or seller's agent (in the case of purchase of the new property) in Exhibit I does not bind or commit the Agencies to pay such commissions, and any change in such commission amounts shall not affect the commissions to be paid to Aquila by the Agencies hereunder.
- (d)** Any commission paid to Aquila by the Agencies hereunder shall be less a rebate amount equal to 11% of such commission payment, which amount shall be withheld from such commission payment and rebated to the Agencies.

**5.2** All payments shall be made in accordance with the Texas Real Estate License Act and rules promulgated by the Texas Real Estate Commission.

**5.3** No advance payments will be made under the Contract. All taxes due shall be the responsibility of Aquila. Subject to the foregoing, each Agency must make all payments in accordance with Government Code Chapter 2251.

**5.4** Under Texas Finance Code, Title 2, Chapter 16, the Agencies are self-directed and semi-independent financial regulatory agencies. The Texas Finance Code requires that state funds collected by each Agency must be approved by the Finance Commission for expenditure as part of each Agency's budget. Aquila acknowledges and agrees that:

**(a)** Payments under this Contract are subject to the availability of state funds approved for expenditure by the Finance Commission;

**(b)** The State of Texas will not be liable for any expense or debt under this Contract, and money from the general revenue fund may not be used to repay the expense or debt under this Contract, if incurred by the Agencies while self-directed, semi-independent financial regulatory agencies; and

**(c)** The Contract creates no personal liability on the part of members of the Finance Commission or employees of the Agencies.

## **VI. Term, Suspension, and Termination**

**6.1 (a)** Original Term. This Contract shall become effective following execution by all parties and as of the date signed by all appropriate officials of the Finance Commission and Agencies, and shall expire one year later, unless terminated earlier as provided in this Contract.

**(b)** Option to Renew Contract. The Agencies reserve the right to renew any Contract resulting from the RFP, at their sole discretion, for up to three one-year renewal terms, at the Contract rate, or rates, as modified during the term of the Contract, to be evidenced in writing prior to the expiration date of the initial term.

**6.2** Suspension. Upon reasonable notice to Aquila, the Agencies may suspend the Contract, withhold further payments, and prohibit Aquila from incurring additional obligations under the Contract. The written notice of suspension must describe the reasons for suspension and the suspension's effective date. A suspension continues until lifted by the Agencies.

**6.3** Termination for the Convenience of the State. The Agencies reserve the right, in their sole discretion and at their sole option, to terminate this Contract, in whole or in part, without penalty, upon 30 days' written notice to Aquila. Such notice may be provided by facsimile or certified mail, return receipt requested, and is effective upon Aquila's receipt. Following such notice, Aquila shall, unless otherwise mutually agreed in writing, cease all services immediately.

**6.4** Termination without Penalty. Aquila acknowledges and agrees that payments under this Contract are subject to termination or cancellation without penalty to the Finance Commission or any of the Agencies, either in whole or in part, subject to the availability of state funds. Each Agency is a state agency whose authority, revenues and expenditures are subject to actions of the Finance Commission. If any of the Agencies becomes subject to a legislative change,

revocation of statutory authority, lack of appropriated funds, or unavailability of funds collected by each Agency, or otherwise becomes subject to a condition that would render Agency's or Aquila's delivery or performance under the Contract impossible or unnecessary, the Contract will be terminated or cancelled and be deemed null and void. In the event of a termination or cancellation under this paragraph, Agency will not be liable to Contactor for any payments, damages or any other amounts which were otherwise due or which may be caused by or associated with such termination or cancellation, and Agency will not be required to give prior notice.

#### **6.5 Termination for Cause/Other Remedies.**

**(a) Termination.** If Aquila fails to provide the services contracted for according to the provisions of the Contract, fails to comply with any of its terms or conditions, or otherwise is found to be in default under any provision of the Contract, the Agencies may, upon 10 days' written notice of default to Aquila, immediately terminate all or any part of this Contract and procure the services of another provider by a new solicitation or award of the Contract to the next best responsive and responsible Respondent under the RFP. Aquila will be responsible for paying damages to the Agencies, including, but not limited to re-procurement costs and any costs over the amount of this Contract for the services of such other provider. Aquila will not be considered in any re-solicitation and may not be considered in future solicitations for the same type of work, unless the specification or scope of work is significantly changed.

**(b) Other Remedies.** Termination is not an exclusive remedy, but will be in addition to any other rights and remedies provided in equity, by law, or under this Contract. The Agencies may exercise any other right, remedy, or privilege which may be available to them under applicable law of the state and any other applicable law or may proceed by appropriate court action to enforce the provisions of the Contract. The exercise of any of the foregoing remedies will not constitute a termination of the Contract unless the Agencies notify Aquila in writing prior to the exercise of such remedy. Aquila shall be liable for all costs and expenses, including court costs, incurred by the Agencies with respect to the enforcement of any of the remedies listed herein.

**6.6 Remedies.** Notwithstanding any exercise by the Agencies of their rights of early termination pursuant to this paragraph, Aquila will not be relieved of any liability to the Agencies for damages due to the Agencies by virtue of any breach of this Contract by Aquila or for amounts otherwise due to the Agencies by Aquila.

**6.7 Termination by Aquila.** With cause, Aquila may terminate this contract upon furnishing the Agencies with 90 days' advance written notice of its intent to cancel.

**6.8 Termination Notices.** Termination notices may be provided by facsimile or certified mail, return receipt requested, and will be effective upon receipt by the party receiving notice of termination.

**6.9 No Liability upon Termination.** The Agencies shall not be liable to Aquila for any damages, claims, losses, or any other amounts arising from or related to any early termination by the Agencies of this Contract. However, Aquila may be entitled to the remedies provided in Texas Government Code, Chapter 2260. In the event of early termination of the Contract, Aquila shall nevertheless be entitled to receive any commissions earned and payable pursuant to the terms and conditions in Section V.

**6.10** Rights upon Termination or Expiration; Partially Completed Work. If the Contract is terminated for any reason, or upon its expiration, the Agencies shall retain ownership of all completed, or partially completed, work, and any and all reports, research, materials, documentation, information, intellectual property, and other associated work products produced or generated by, or obtained from, Aquila under the Contract and results of the services (collectively, "Work Product"). Following such expiration or termination, or at the request of the Agencies, Aquila shall immediately transfer all completed or partially completed work to the Agencies. All work performed pursuant to this Contract and all Work Product shall be the exclusive property of the Agencies. The Agencies may copy, modify, publish, display, transfer, distribute, prepare derivative works from, or otherwise use any component of the Work Product or other deliverables made the subject of this Contract, at no additional cost to the Agencies. Failure to timely deliver such Work Product shall be considered a material breach of this Contract. Aquila shall not make or retain any copies of the Work Product without the prior written consent of the Agencies.

**6.11** Survival of Contract Provisions Following Termination or Expiration. Termination of this Contract for any reason shall not release Aquila from liability or obligation set forth in the Contract that is expressly stated to survive any such termination or by its nature would be intended to be applicable following any such termination, including provisions regarding confidentiality, indemnification, transition, records, audit, property rights, dispute resolution, invoice and fees verification, and default. Such provisions shall also survive the expiration of this Contract.

## **VII. Confidentiality and Open Records**

**7.1** Notwithstanding any provisions of this Contract to the contrary, Aquila understands that the Agencies will comply with the Texas Public Information Act, Texas Government Code, Chapter 552, as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. All information, documentation, and other material submitted under the RFP, this Contract, and any reports, analysis, data and other information generated as a result of the performance of the duties required under the Contract may be subject to public disclosure under the Texas Public Information Act. The Agencies agree to notify Aquila in writing within a reasonable time from receipt of a request for information related to Aquila's work under this Contract. Aquila will cooperate with the Agencies in the production of documents responsive to such requests. The Agency which receives a request for information will make a determination whether to submit a Public Information Act request to the Attorney General. Aquila will notify the Agencies within 24 hours of receipt of any third party requests for information that was provided by the State of Texas for use in performing the Contract.

**7.2** Aquila is required to make any information created or exchanged with the Agencies pursuant to this Contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the Agencies.

**7.3** Aquila agrees to maintain the confidentiality of information received from the Agencies during the performance of this Contract, including information which is confidential under the Texas Finance Code, is otherwise confidential by law, or discloses confidential personal information particularly, but not limited to, social security numbers. Aquila will be required to complete a Nondisclosure Agreement to Protect against Release of Confidential Information

related to any and all confidential records and documents that Aquila will receive or access in connection with the Contract.

### **VIII. Insurance and Other Security**

**8.1** Aquila represents and warrants that it will, within five (5) business days of executing this Contract, provide the Agencies with current certificates of insurance or other proof acceptable to the Agencies, of the following insurance coverage, naming each of the Agencies listed individually as additional insureds and loss payees on the policies described in subsections b, c and d below::

- (a)** Standard Workers' Compensation Insurance with statutory limits covering all personnel who will provide services under the contract;
- (b)** Commercial General Liability, occurrence based policy;
- (c)** Professional Liability Insurance with minimum limits of \$500,000 per claim and \$1,000,000 annual aggregate covering Aquila and all personnel who will provide services under this Contract for rendering or the failure to render professional services; and
- (d)** Automobile Liability Insurance for all owned, non-owned, and hired vehicles with combined minimum limits for Bodily Injury and Property Damage limits of \$500,000 per occurrence and \$1,000,000 in aggregate.

**8.2** Aquila represents and warrants that all of the above coverage is with companies licensed in the state of Texas, with "A" rating from A.M. Best, and authorized to provide the corresponding coverage. Aquila also represents and warrants that all policies contain endorsements prohibiting cancellation except upon at least 30 days prior written notice to the Agencies. Aquila represents and warrants that it shall maintain the above insurance coverage during the term of this Contract, and shall provide the Agencies with an executed copy of the policies immediately upon request.

### **IX. Indemnification**

#### **9.1 Acts or Omissions**

Aquila shall indemnify and hold harmless the State of Texas and the Texas Finance Commission, the Texas Department of Banking, the Department of Savings and Mortgage Lending, and the Office Of Consumer Credit Commissioner, and their officers, agents, employees, representatives, Aquila's, assignees, and designees from any and all liability, actions, claims, demands, or suits, and all related costs, attorney fees, and expenses arising out of, or resulting from, any acts or omissions of Aquila or its agents, employees, subcontractor, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. The defense shall be coordinated by Aquila with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and Aquila may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. Aquila and the Finance Commission and Agencies agree to furnish timely written notice to each other of any such claim.



## 9.2 Infringements

**(a)** Aquila shall indemnify and hold harmless the State of Texas and the Texas Finance Commission, The Texas Department of Banking, The Department of Savings and Mortgage Lending, and The Office Of Consumer Credit Commissioner, and their officers, agents, employees, representatives, contractors, assignees, and designees from any and all third party claims involving infringement of United States patents, trademarks, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the performances or actions of Aquila pursuant to this contract. Aquila and the Finance Commission and Agencies agree to furnish timely written notice to each other of any such claim. Aquila shall be liable to pay all costs of defense including attorneys' fees. The defense shall be coordinated by Aquila with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and Aquila may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General.

**(b)** Aquila shall have no liability under this paragraph if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without Aquila's written approval, (iii) any modifications made to the product by Aquila pursuant to the specific instructions of the Agencies, (iv) any intellectual property right owned by or licensed to the Agencies, or (v) any use of the product or service by the Agencies that is not in conformity with the terms of any applicable license agreement.

**(c)** If Aquila becomes aware of an actual or potential claim, or the Agencies provide Aquila with notice of an actual or potential claim, Aquila may (or in the case of an injunction against the Agencies, shall), at Aquila's sole option and expense; (i) procure for the Agencies the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that use by the Agencies is non-infringing.

## 9.3 Taxes/Workers' Compensation/Unemployment Insurance – Including Indemnity

**(a)** Aquila agrees and acknowledges that during the existence of this contract, Aquila shall be entirely responsible for the liability and payment of Aquila's and Aquila's employees' taxes of whatever kind, arising out of the performances in this Contract. Aquila agrees to comply with all state and federal laws applicable to such persons, including laws regarding wages, taxes, insurance, and workers' compensation. The Finance Commission, the Agencies and/or the state shall not be liable to Aquila, its employees, agents, or others for the payment of taxes or the provision of unemployment insurance and/or workers' compensation or any benefit available to a state employee.

**(b)** Aquila agrees to indemnify and hold harmless the State of Texas and the Texas Finance Commission, the Texas Department of Banking, the Department of Savings and Mortgage Lending, and the Office of Consumer Credit Commissioner, and their employees, agents, representatives, contractors and assignees, from any and all liability, actions, claims, demands, or suits, and all related costs, attorneys' fees, and expenses relating to tax liability, unemployment insurance and/or workers' compensation in its performance under this Contract. Aquila shall be liable to pay all costs of defense

including attorneys' fees. The defense shall be coordinated by Aquila with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and Aquila may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. Aquila and the Finance Commission and Agencies agree to furnish timely written notice to each other of any such claim.

## **X. Dispute Resolution/No Waiver of Immunities**

**10.1** Chapter 2260 Process. The dispute resolution process provided for in Texas Government Code, Chapter 2260 shall be used by Aquila and the Agencies to resolve any dispute arising under this Contract. Any Aquila claims for breach of this Contract that the parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260, Subchapter B. To initiate the process, Aquila shall submit written notice, as required by Subchapter B, to each Agency, specifically stating that the provisions of Subchapter B, Chapter 2260, are being invoked. Compliance by Aquila with Subchapter B is a condition precedent to the filing of a contested case proceeding under Subchapter C.

**10.2** Contested Case Process. The contested case process provided in Government Code, Chapter 2260, Subchapter C is Aquila's sole and exclusive process for seeking a remedy for any alleged breach of Contract by the Agencies if the parties are unable to resolve their disputes under the negotiation process provided in Paragraph 10.1. Compliance with the contested case process provided in Subchapter C is a condition precedent to seeking consent to sue from the Legislature under Texas Civil Practices and Remedies Code, Chapter 107.

**10.3** Governing Rules. The submission, processing, and resolution of Aquila's claim is governed by the published rules (7 T.A.C. §§ 10.1 et seq.) adopted by the Finance Commission to govern the mediation and negotiation of breach of contract claims against the Agencies pursuant to Texas Government Code, Chapter 2260.

**10.4** No Waiver of Immunities or Rights.

**(a)** Nothing in this Contract shall be considered as a waiver of the State's sovereign immunity. This Contract shall not constitute or be construed as a waiver of the State's sovereign immunity or of any of the privileges, rights, defenses, remedies, or immunities available to the State of Texas the Finance Commission or the Agencies. The Finance Commission and the Agencies do not waive any privileges, rights, defenses, or immunities available to them by entering into this Contract or by their conduct prior to or subsequent to entering into this Contract.

**(b)** Participation by the Agencies in, or the results of, the dispute resolution process provided for in Texas Government Code, Chapter 2260, or in mediation or negotiation of breach of contract claims against the Agencies under 7 T.A.C. §§ 10.1 et seq., or otherwise under this paragraph, shall not be construed as a waiver by the Agencies of (1) any rights, privileges, defenses, remedies or immunities available to any of the Agencies as an agency of the State of Texas or otherwise available to the Agencies; (2) the termination rights of the Agencies; or (3) other termination provisions or expiration dates of the Contract.

**(c)** The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to the State of Texas, the Finance Commission, or the Agencies under this Contract or under applicable law, shall not

constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel.

**(d)** Notwithstanding any other provision of the Contract to the contrary, unless otherwise requested or approved in writing by the Agencies, Aquila shall continue performance and shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes; however, Aquila may suspend performance during the pendency of such claim or dispute if Aquila has complied with all provisions of Government Code, § 2251.051, and such suspension of performance is expressly applicable and authorized under that law.

## **XI. Representations, Warranties, and General Provisions**

**11.1** Certifications. Aquila hereby represents and warrants that all Aquila's certifications in Aquila's Execution of Proposal remain current, complete, and accurate.

**11.2** Liability for Taxes. Aquila represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, but not limited to, any federal, State, or local income, sales or excise taxes of Aquila or its employees. The Agencies shall not be liable for any taxes, including state sales tax and federal excise tax, resulting from this Contract. Excise exemption certifications are available upon request.

**11.3** Historically Underutilized Businesses. Aquila represents and warrants that it shall comply with the Historically Underutilized Business requirements pursuant to Texas Government Code, Chapter 2161, and the rules adopted by the Texas Comptroller at 34 T.A.C. §§ 20.10-20.28. Aquila agrees to report, on a monthly basis, to the Agencies the information required regarding any HUB subcontractors, as required by Paragraph 2.9 of the RFP.

**11.4** Deceptive Trade Practices; Unfair Business Practices. Aquila represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Texas Business & Commerce Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit, and that Aquila has not been found to be liable for such practices in such proceedings. Aquila certifies that it has no officers who have served as officers of other entities who have been found to be liable for Deceptive Trade Practices violations or any unfair business practices in an administrative hearing or court suit or who have themselves been found to be individually liable for such practices in such proceedings.

**11.5** Equal Opportunity. Aquila represents and warrants that it shall not discriminate against any person on the basis of race, color, national origin, creed, religion, political belief, sex, sexual orientation, age, or disability in the performance of this Contract.

**11.6** No Conflicts.

**(a)** Actual and Perceived Conflicts. Aquila represents and warrants that Aquila, its employees, and its subcontractors have no actual or potential conflict of interest in entering a Contract with the Agencies that it did not disclose in its Proposal. Aquila also represents and warrants that entering a Contract with the Agencies or the Finance Commission will not create the appearance of impropriety. Aquila represents that no member of the Finance Commission, or officer or employee of the Texas Department of

Banking, the Department of Savings and Mortgage Lending, or the Office of Consumer Credit Commissioner has a direct or indirect interest in the proceeds from a Contract resulting from this RFP. Aquila represents that it is not funded by, affiliated with, or related to any person or entity licensed, chartered, registered or regulated by any of the Agencies, other than entities disclosed in its Proposal.

**(b)** Current and Former Finance Commission and Agency Employees. Except as disclosed in its Proposal, Aquila has no personnel who are current or former officers or employees of the Finance Commission or the Agencies, or who are related, within the third degree by consanguinity (as defined by Texas Government Code, § 573.023) or within the second degree by affinity (as defined by Government Code, § 573.025), to any current or former officers or employees of the Finance Commission or the Agencies. If a member of Aquila's firm, is a former officer, member or employee of the Finance Commission or the Agencies, Aquila and such members, officers or employees agree to fully comply with the requirements of Government Code, § 2252.901.

**(c)** Bar on Future Employment. Within the first 24 months of leaving employment of one of the Agencies, a former employee or retiree shall not become employed by any Respondent.

**11.7** Felony Criminal Convictions. Aquila represents and warrants that Aquila has not, and Aquila's employees have not, been convicted of a felony criminal offense, or that, if such a conviction has occurred, Aquila has fully advised the Finance Commission and the Agencies of the facts and circumstances surrounding the conviction.

**11.8** Prohibited Use of Appropriated or other Funds under Control of State Agency; Lobbying. Aquila represents and warrants that Aquila's receipt of state funds or appropriated funds, if any, under this Contract is not prohibited by Government Code, §§ 556.005 or 556.008.

**11.9** Licenses, Patents, and Permits. Aquila represents that it has determined what licenses, patents and permits are required under this Contract and has acquired all such licenses, patents and permits.

**11.10** Records Access and Retention; Supporting Documents; Right to Audit.

**(a)** Agency Records. All pertinent original records and documents concerning an Agency may be reviewed or inspected by Aquila at 2601 North Lamar Boulevard, Austin, Texas. Subject to providing the Nondisclosure Agreement referenced in Paragraph 3.1, Aquila may copy the records and documents necessary to a specific service performed under this Contract. An original record or document may not be removed without the prior written consent of the affected Agency.

**(b)** Records Access. Aquila's records pertinent to this Contract may be inspected, examined, audited, or copied during normal business hours by any authorized representative of the State Auditor's Office, the Finance Commission, or any of the Agencies. Aquila shall make requested records, including all documents and other information related to "Work Product" as defined in Paragraph 6.10, available on or before the third business day after the date written request for such records is received, at 2601 North Lamar Boulevard, Austin, Texas, or at such other reasonable times and locations as are agreed by the parties to the request. Work Product relating to this

Contract, other than Aquila's working papers, may be used by the State of Texas for any purpose without Aquila's consent.

**(c) Records Retention; Supporting Documents.** Aquila shall maintain all financial records, supporting fiscal documents, statistical records, working papers, and any other documents, records or books relating to the services to be provided under the Contract and to showing that payments under the Contract were expended in accord with the laws and regulations of the State of Texas, including requirements of the Comptroller and the State Auditor's Office (SAO). Aquila must retain all work, records, and other supporting documents pertaining to this Contract, for purposes of inspecting, monitoring, auditing, or evaluating by the Agencies and any authorized agency of the State of Texas, including an audit by the SAO or Comptroller. Aquila shall maintain all such documents and other records relating to this Contract and the State's property, which are not transferred to the Agencies at Contract termination, for a period of seven years after the payment of all brokerage commissions or until a resolution of all billing questions, whichever is later. Aquila's failure to comply with this paragraph shall constitute a material breach of this Contract and shall authorize the Agencies to immediately assess appropriate damages for such failure.

**(d) Right to Audit.** Pursuant to Texas Government Code, § 2262.154, the State Auditor's Office, or successor agency, may conduct an audit or investigation of Aquila or any other entity or person receiving funds from the State directly under the Contract or indirectly through a subcontract under the Contract. Aquila understands that acceptance of state funds under this Contract acts as acceptance of the authority of the State Auditor's Office to conduct an audit or investigation in connection with those funds. Aquila further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit or investigation, including providing all records requested. Aquila will ensure that this clause concerning the State Auditor's Office's authority to audit state funds and the requirement to cooperate fully with the State Auditor's Office is included in any subcontracts it awards. Additionally, the State Auditor's Office shall at any time have access to and the rights to examine, audit, excerpt, and transcribe any pertinent books, documents, audit documentation, and records of Aquila relating to this contract.

**11.11 Force Majeure.** Neither Aquila nor the Agencies shall be liable to the other party for any delay in, or failure of, performance of any requirement included in this Contract caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. "Force majeure" is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three business days of the existence of such force majeure, or otherwise waive this right as a defense.

**11.12 Eligibility/Debts or Delinquencies to State.** The Comptroller is prohibited from issuing any payment to a person or entity that has been reported as having an indebtedness or delinquency to the State. Aquila represents and warrants that Aquila is not delinquent in the payment of any franchise taxes owed the State of Texas. Aquila agrees that, to the extent Aquila owes any debt or delinquent taxes to the State of Texas, any payments or other amounts Aquila is otherwise owed under this Contract shall be applied toward the debt or delinquent taxes until the debt or

delinquent taxes are paid in full. Aquila agrees to comply with all applicable laws regarding satisfaction of debts or delinquencies to the State of Texas.

**11.13 Buy Texas.** In accordance with Texas Government Code, § 2155.4441, the State of Texas requires that during the performance of a contract for services, Aquila shall purchase products and materials produced in the State of Texas when available at a price and time comparable to products and materials produced outside the State.

**11.14 Independent Aquila.** Aquila and each of Aquila's employees, representatives, agents and any subcontractors shall serve as an independent Aquila in providing the services under any Contract resulting from this RFP. Aquila, its employees, its representatives, its agents, and any subcontractors shall not be employees of the Finance Commission or the Agencies.

**11.15 Federal, State, and Local Requirements.** Aquila shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2's to common law employees. Aquila is responsible for both federal and State unemployment insurance coverage and standard worker's compensation insurance coverage. Aquila shall comply with all federal and State tax laws and withholding requirements.

**11.16 Antitrust.** Aquila represents and warrants that neither Aquila, nor any firm, corporation, partnership, or institution represented by Aquila, or anyone acting for such firm, corporation or institution, has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws, 15 U.S.C. § 1 et seq.; or (2) communicated directly or indirectly its Proposal to any competitor or any other person engaged in such line of business during the procurement process for this Contract.

**11.17 Compliance with Applicable Law; Conforming Amendments.** Aquila must comply with all laws, regulations, requirements and guidelines applicable to a Aquila providing services to the State of Texas as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of this Contract. The Agencies reserve the right, in their sole discretion, to unilaterally amend this Contract throughout its term to incorporate any modifications necessary for compliance by the Agencies or Aquila with all applicable State and federal laws and regulations.

**11.18 Amendments.** Except as provided in Paragraph 11.17 of this Contract, this Contract may be amended only upon written agreement between Aquila and the Agencies; however, any amendment of this Contract that conflicts with the laws of the State of Texas shall be void ab initio.

**11.19 Applicable Law; Venue.** This Contract shall be governed by and construed in accordance with the laws of the State of Texas, except for its provisions regarding conflicts of laws. The exclusive jurisdiction and venue of any suit arising under this Contract is fixed in any court of competent jurisdiction of Travis County, Texas.

**11.20 Strict Compliance.** Time is of the essence in the performance of this Contract. Aquila shall strictly comply with all of the deadlines, requirements, and Standards of Performance for this Contract.

**11.21 Assignments.** Without the prior written consent of the Agencies, Aquila may not assign this Contract, in whole or in part, and may not assign any right or duty required under it.

**11.22 Severability Clause.** In the event that any provision of this Contract is later determined to be invalid, void, or unenforceable, then the remaining terms, provisions, covenants, and conditions of this Contract shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated.

**11.23 Family Code.** Under Texas Family Code, § 231.006(d), regarding child support, Aquila certifies that the individual or business entity named in this Contract is not ineligible to receive the specified payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate. Furthermore, any Aquila subject to § 231.006 must include names and Social Security numbers of each person with at least 25% ownership of the business entity submitting the Proposal under the RFP. This information must be provided prior to Contract award.

**11.24 Financial Interests; Gifts.** Aquila represents and warrants that neither Aquila nor any person or entity that will participate financially in this Contract has received compensation from the Finance Commission, any of the Agencies or any other agency of the State of Texas for participation in preparation of specifications for this Contract. Texas Government Code, § 2155.004 prohibits a person or entity from receiving a state contract if that person or entity received compensation for participating in preparing the solicitation or specifications for the Contract. Under Texas Government Code, § 2155.004, Aquila represents and warrants that Aquila is not ineligible to receive this Contract and acknowledges that this Contract may be terminated and payment withheld if this representation and warranty is inaccurate. Aquila represents and warrants that it has not given, offered to give, and does not intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to any public servant or employee in connection with this Contract.

**11.25 Certification Concerning Hurricane Relief.** Texas Government Code, §§ 2155.006 and 2261.053 prohibit state agencies from awarding a contract to any person who, in the past five years, has been convicted of violating a federal law or assessed a penalty in connection with a contract involving relief for Hurricane Rita, Hurricane Katrina, or any other disaster, as defined by Government Code, § 418.004, occurring after September 24, 2005. Under Government Code, § 2155.006, Aquila certifies that the individual or business entity named in its Proposal is not ineligible to receive the Contract and acknowledges that the Contract may be terminated and payment withheld if this certification is inaccurate.

**11.26 Limitation on Authority; No Other Obligations.** Aquila shall have no authority to act for or on behalf of the Agencies or the State of Texas except as expressly provided for in this Contract; no other authority, power or use is granted or implied. Aquila may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of the State of Texas the Finance Commission or the Agencies.

**11.27** Notices. Any written notices required under this Contract will be by either hand delivery or by U.S. Mail, certified, return receipt requested, to Aquila’s office address specified on Page 1 of this Contract or to Charles G. Cooper, Commissioner, Texas Department of Banking, 2601 North Lamar, Austin, Texas 78705-4294. Notice will be effective on receipt by the affected party. Either party may change the designated notice address in this paragraph by written notification to the other party.

**11.28** False Statements; Breach of Representations. By signature to this Contract, Aquila makes all the representations, warranties, guarantees, certifications and affirmations included in this Contract. If Aquila signed its Proposal with a false statement or signs this Contract with a false statement or it is subsequently determined that Aquila has violated any of the representations, warranties, guarantees, certifications or affirmations included in this Contract, Aquila shall be in default under this Contract and the Agencies may terminate or void this Contract for cause and pursue other remedies available to the Agencies under this Contract and applicable law.

**11.29** Drug Free Workplace Policy. Aquila shall comply with the applicable provisions of the Drug-Free Work Place Act of 1988 (Public Law 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.) and maintain a drug-free work environment; and the final rule, government-wide requirements for drug-free work place (grants), issued by the Office of Management and Budget and the Department of Defense (32 CFR Part 280, Subpart F) to implement the provisions of the Drug-Free Work Place Act of 1988 is incorporated by reference and Aquila shall comply with the relevant provisions thereof, including any amendments to the final rule that may hereafter be issued.

## **XII. Signatories**

The undersigned signatories represent and warrant that they have full authority to enter into this Contract on behalf of the respective parties.

## **XIII. Merger**

This Contract incorporates by reference all the documents listed in Paragraph 3.1 (**collectively, the “Contract Documents”**) and contains the entire agreement between Aquila and the Agencies. The Contract supersedes any prior understandings or oral or written agreements among the Agencies and Aquila on the matters contained in the Contract and the incorporated Contract Documents. Except as provided in Paragraph 11.17, no modification, alteration, or waiver of any term, covenant, or condition of this Contract or any of its exhibits shall be valid unless in writing and executed by the Agencies and Aquila.

**TEXAS DEPARTMENT OF BANKING**

**AQUILA COMMERCIAL, LLC**

**By:** \_\_\_\_\_  
**Charles G. Cooper**  
**Commissioner**  
**Texas Department of Banking**  
**2601 North Lamar Boulevard**  
**Austin, Texas 78705-4294**

**By:** \_\_\_\_\_  
**Name:** \_\_\_\_\_  
**Title:** \_\_\_\_\_

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

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



**OFFICE OF CONSUMER CREDIT COMMISSIONER**

**By:** \_\_\_\_\_  
**Leslie L. Pettijohn**  
**Consumer Credit Commissioner**  
**2601 North Lamar Boulevard, 2<sup>nd</sup> Floor**  
**Austin, Texas 78705-4294**

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

**DEPARTMENT OF SAVINGS AND MORTGAGE LENDING**

**By:** \_\_\_\_\_  
**Caroline C. Jones**  
**Department of Savings and Mortgage Lending Commissioner**  
**2601 North Lamar Boulevard, Suite 201**  
**Austin, Texas 78705-4294**

**EXHIBIT I**

**AQUILA Commercial Fee Structure**

**Sale of Current Building**

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<b>AQUILA</b>	<b>Buyer's Agent</b>	<b>Total</b>	<b>Gross Sales Price</b>
3.0%	3.0%	<b>6.0%</b>	Up to \$5 million
2.0%	3.0%	<b>5.0%</b>	For the next \$5 Million
1.0%	3.0%	<b>4.0%</b>	For the next \$5 Million
0.5%	3.0%	<b>3.5%</b>	Of the remainder of the gross sales price

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**Purchase of Building or Land**

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<b>AQUILA</b>	<b>Seller's Agent</b>	<b>Total</b>	<b>Gross Sales Price</b>
3.0%	3.0%	<b>6.0%</b>	Up to \$5 million
2.0%	3.0%	<b>5.0%</b>	For the next \$5 Million
1.0%	3.0%	<b>4.0%</b>	For the next \$5 Million
0.5%	3.0%	<b>3.5%</b>	Of the remainder of the gross sales price

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**REQUEST FOR PROPOSALS  
TO PROVIDE BROKERAGE  
SERVICES**

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**Texas Department of Banking  
2601 North Lamar  
Austin, Texas 78705**

**RFP 451-16-001**

**Proposal Due Date: October 15, 2015  
Proposal Due Time: 5:00 pm (Central Time in Austin, Texas)**

**Posting Date: September 15, 2015**

Pursuant to the Provisions of the Texas Government Code Title 10 Subtitle D Chapter 2156.121 – 2156.127, sealed proposals will be received until the date and time established for receipt. After receipt, names, prices and other proposal details may only be divulged after award of a contract, if a contract is awarded. The award notice will be posted to the electronic state business daily at <http://esbd.cpa.state.tx.us/>.

Pursuant to Chapter 2155.131 of the Texas Government Code and 34 TAC § 20.41, the Texas Department of Banking (TDB) has been delegated requisite authority to conduct this Request for Proposal and to award a contract for the purposes stated herein.

All written requests for information will be communicated to all Respondents known to the agency.

All proposals shall become the property of the TDB upon receipt.

All proposals must be delivered to TDB's purchasing office as required by the instructions within this request. All addenda to or clarification of this solicitation shall be issued in writing by TDB. TDB shall not be legally bound by an addenda or interpretation that is not in writing.

Contractor understands and agrees that no public disclosures or news releases pertaining to this Request for Proposals (RFP), negotiations, subsequent award, or any results or findings based on information provided or obtained to fulfill requirements of this RFP shall be made without prior written approval of TDB.

**NOTE:** Failure to formalize the terms of the proposal by signing the Execution of Offer will result in disqualification of the proposal.

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## REQUEST FOR PROPOSALS TO PERFORM

### COMMERCIAL REAL ESTATE BROKERAGE SERVICES

#### SECTION I GENERAL

**1.1 SCOPE.** The Texas Department of Banking, the Department of Savings and Mortgage Lending, and the Office of Consumer Credit Commissioner (**collectively, the Agencies**) seek proposals from qualified, independent individuals or firms (**Respondents**) to provide commercial real estate brokerage services in accordance with the specifications contained in this Request for Proposal (**RFP**).

**1.2 BACKGROUND.** The Finance Commission (**the Commission**) is an 11 member governing body that supervises the three Agencies. Each Agency is self-directed and semi-independent under Texas Finance Code, Chapter 16. Each Agency has the authority to enter into contracts for administration of the Agency’s affairs and attainment of the Agency’s purposes under Finance Code, § 16.006. In addition, § 16.007 of the Texas Finance Code authorizes the Agencies to acquire and sell real, personal, or mixed property.

**1.3 CONTRACT TERM.**

**(a) Original Term.** The services requested shall be provided for a period of one year, beginning on the date of the last signature of all of the parties to the contract, unless terminated earlier by the terms of the Contract awarded pursuant to this RFP. Such Contract shall be valid from acceptance of the Proposal, or a subsequent Best and Final Offer, by the selected Respondent by an award letter from the Executive Director of the Finance Commission.

**(b) Option to Renew Contract.** The Agencies reserve the right to renew any Contract resulting from this RFP, at their sole discretion, for up to three one-year

renewal terms, at the Contract rate, or rates, as modified during the term of the Contract, to be evidenced in writing prior to the expiration date of the initial term.

**1.4 DEFINITIONS.** For purposes of this RFP, the following definitions apply:

**(a) Addendum.** Any modification of the specifications which is posted on the Electronic State Business Daily, at <http://esbd.cpa.state.tx.us/>, prior to the opening of proposals;

**(b) Best and Final Offer (BAFO).** A revision of the originally submitted Proposal by a Respondent following a formal request for revisions of Proposals made to selected Respondents;

**(c) Contract.** The contract awarded as a result of this RFP, and all exhibits thereto. The Contract will incorporate the contents of this RFP, any Addendum issued in conjunction with this RFP, the Award Letter, the Agencies' purchase orders, the successful Respondent's Proposal, including all exhibits, any BAFO, and any subsequent submission by Respondent, except as specifically provided to the contrary in the Contract and any amendments to the Contract;

**(d) Code.** Where used herein, "Code" refers to Texas statutory codes, such as the Texas Finance Code, Texas Government Code, Texas Business & Commerce Code, Texas Civil Practice & Remedies Code, Texas Family Code, Texas Utilities Code, and other Texas statutory codes, unless explicitly stated otherwise;

**(e) Comptroller.** The Texas Comptroller of Public Accounts;

**(f) Contractor.** Respondent whose Proposal results in a contract with the Agencies;

**(g) Electronic State Business Daily (ESBD).** The Electronic State Business Daily, which is available on-line at <http://esbd.cpa.state.tx.us/>;

**(h) HUB. Historically underutilized business** as defined by Government Code, § 2161.001(2). See *generally*, Government Code, Chapter 2161, and 34 Texas Administrative Code §§ 20.10 – 20.28;

**(i) Proposal.** Proposal to provide commercial real estate brokerage services to the Agencies submitted by a Respondent to this RFP;

**(j) Respondent.** Individual or entity responding to this RFP;

**(k) RFP.** This Request for Proposal for commercial real estate brokerage services issued by the Agencies, including the RFP's Terms and Conditions set forth in the form of the Contract attached as Exhibit A, the Execution of Proposal form attached as Exhibit B, and all other Exhibits attached to this RFP;

**(l) Texas Public Information Act (PIA).** Texas Government Code, Chapter 552, § 552.001 *et seq.*

## SECTION II STATEMENT OF WORK

**2.1 SERVICE REQUIREMENTS.** Services shall include, but not be limited to, the requirements contained in this section and in this RFP. **Services set forth that contain the words "must" or "shall" are mandatory and must be provided as specified with no alteration, modification, or exception.** Services set forth that contain the words "may" or "can" allow Respondents to offer alternatives to the manner in which the services are provided.

### **2.2 GENERAL.**

**(a) Current Office Space Considerations.** The Agencies currently own a three-story building situated on 2.17 acres of land located at 2601 North Lamar Blvd. in Austin, Texas, which comprises approximately 38,000 square feet and a parking area with 102 designated spaces. There are 140 employees currently working at this location. On average, the office receives approximately 10 visitors per day, and also hosts average sized meetings a few times each month. While the Agencies do not anticipate any substantial changes to their functions in the foreseeable future, the assumption is the continuation of current program and staffing levels. The Agencies anticipate future growth at 10%, or an additional 15 work spaces, through the end of August 2017.

**(b) Future Office Space Considerations.** In order to make a sound and informed decision regarding its future work space, the Agencies will require an assessment of current commercial real estate conditions in order to determine the most practical and economical solution for their future space needs. A recently completed space programming study, using more current industry space standards, indicates the Agencies' space requirements to be approximately 52,000 square feet and approximately 200 parking spaces.

### **2.3 DESCRIPTION OF SERVICES.**

**(a)** The Contractor will be responsible for providing support to the Agencies' staff in analyzing, negotiating, and closing on the purchase of suitable office space for the Agencies' operations, and on the sale of its current property.

**(b)** The principal responsibilities of the Contractor shall be to identify and qualify potential properties; conduct due diligence on each property; solicit term sheets from selected properties; and negotiate the selected real estate transaction to minimize the Agencies' overall occupancy costs. Additionally the Contractor will be asked to list the Agencies' current property for sale, to respond to submitted offers, and to assist the Agency in the potential due diligence and closing process associated with such a sale transaction.

**(c)** Specific services may include, but are not limited to, the following:

- (1)** Analyze the space programming study of the Agencies' requirements;
- (2)** Review the Agencies' location requirements;

- (3) Prepare a comprehensive market study of available space options, including completed facilities, vacant lots and lots where an existing structure could be demolished, along with an interpretation and assessment of relevant market trends;
- (4) Conduct due diligence investigation of each potential property's specific suitability for the Agencies' requirements including terms of tenant contracts as well as ownership financial strength/liquidity;
- (5) Assist the Agencies in determining appropriate shortlist of candidate properties;
- (6) Prepare and negotiate landlord lease and/or property purchase agreements for existing location and alternatives;
- (7) Analyze initial term sheets received – both financial and non-financial proposed terms, as well as build-out cost and timeframe implications;
- (8) Prepare presentations comparing alternatives to the Agencies;
- (9) Assist the Agencies in selecting primary and alternative properties;
- (10) Solicit draft transaction documents from selected landlords and/or sellers;
- (11) Assist the Agencies and legal counsel with lease and/or purchase negotiation process; Coordinate execution of all transaction documents, evidence of insurance, Non-Disturbance Agreements, etc.;
- (12) Assist the Agencies in the valuation, listing, and sale transaction of its current property;
- (13) Other services as requested.

**2.4 COMPENSATION AND FEE SCHEDULE.** The Agencies will pay for services performed by the Contractor during the effective term and within the scope of the Contract. However, the Agencies will be relieved of any obligation to accept performance or to pay for work performed after the effective date of any termination or for work performed outside the scope of the Contract, or for any sale or purchase that results from negotiations that commenced prior to the execution of the Contract. Compensation for the entire scope of services as indicated in this RFP, including research, marketing and any additional/specialty support services related to potential sale and purchase transactions, shall be through commercial real estate brokerage commissions based on sale price and purchase price, or total, as follows:

- (a) **Sales Commission.** Should the Agencies after Commission approval complete a transaction for the sale of their current property, Contractor will receive a brokerage commission paid by the Agencies, based on a percentage of the selling price of the property, to be paid from the proceeds of the sale at the close of escrow. Respondent's proposal will state its requested commission percentage. The proposed commission will be the total compensation paid by the Agencies, and will include any commission due to

the buyer's broker pursuant to a commission split agreement between Contractor and the buyer's broker. Contractor should cooperate with outside brokers in accordance with standard market practice.

**(b) Purchase Commission.** Should the Agencies after Commission approval complete a transaction for the purchase of any real property, the Agencies expect that Contractor will be entitled to a brokerage commission paid by the seller of the property, pursuant to a commission split agreement between Contractor and seller's broker, in accordance with standard market practice. Respondent's proposal will warrant that this is the case, and/or state other commission scenarios for consideration, if any, that it feels may be relevant.

**(c) Payments.** Payments will be made in compliance with the provisions of Texas Government Code, Chapter 2251.

**(d) Taxes.** All taxes due shall be the responsibility of the Contractor.

**2.5 EXPERIENCE AND QUALIFICATION REQUIREMENTS.** Responses to this RFP are sought only from experienced brokers who can demonstrate their ability to perform and who have personnel with a proven track record of success in providing commercial real estate brokerage services. A proposal should demonstrate that Respondent meets the following qualifications to be eligible for consideration for this project:

**(a)** The lead broker and other key commercial real estate professionals assigned to the contract must be licensed real estate brokers in the state of Texas.

**(b)** The lead broker assigned to the contract and responsible for the coordination and execution of the work should have a minimum of ten (10) years of experience and a proven track record in providing site identification, selection, and acquisition commercial real estate brokerage transactional services.

**2.6 FINANCIAL SOLVENCY AND INSURANCE REQUIREMENTS.**

**(a)** The Proposal must include:

**(1)** Respondent's most current annual financial report or year-end financial statements.

**(2)** Proof of professional liability insurance coverage for Respondent meeting the requirements of Section VIII of the Terms and Conditions of the RFP in Exhibit A attached hereto.

**(b)** If the Respondent's Proposal is selected by the Agencies, Respondent will be required to provide, in a form acceptable to the Agencies, evidence of current workers' compensation insurance with statutory limits covering all personnel who will provide services under the contract.

**2.7 E-VERIFY.** By responding to this proposal, the Respondent certifies and ensures that it utilizes and will continue to utilize, for the term of this Contract, the U.S. Department of Homeland Security's E-Verify system to determine the eligibility of:



- (a) All persons employed to perform duties within Texas, during the term of the Contract; and
- (b) All persons (including subcontractors) assigned by the Respondent to perform work pursuant to the Contract, within the United States of America.

The Contractor shall provide, upon request of the Commission, an electronic or hardcopy screenshot of the confirmation or tentative non-confirmation screen containing the E-Verify case verification number for attachment to the Form I-9 for the three most recent hires that match the criteria above, by the Contractor, and Contractor's subcontractors, as proof that this provision is being followed.

**If this certification is falsely made, the Contract may be immediately terminated, at the discretion of the Agencies and at no fault to the Agencies, with no prior notification. The Contractor shall also be responsible for the costs of any re-solicitation that the state must undertake to replace the terminated Contract.**

## **2.8 SUBCONTRACTORS.**

(a) Any planned or proposed use of a subcontractor by Respondent after Contract award must be clearly documented in the Proposal. The selected Contractor shall perform the Contract with its own resources and those subcontractors identified in its Proposal. If the Contractor plans, after Contract award, to subcontract all or a portion of the work to be performed to subcontractors not identified in its Proposal, Contractor must obtain the prior approval of the Agencies. The Contractor shall also transmit to the Agencies for review and prior approval a true copy of the subcontract it proposes to execute with a subcontractor.

(b) The selected Contractor, in subcontracting for any performances specified in this RFP or Contract, expressly understands and acknowledges that the Finance Commission and the Agencies will not be liable, in any manner, to any subcontractors of Contractor, and any subcontractors providing services under the Contract must meet the same requirements and level of experience as required of Contractor. Neither this provision nor any subcontract under the Contract shall relieve the Contractor of its responsibility for ensuring the requested services are provided in full compliance with all terms of this RFP and Contract.

## **2.9 HISTORICALLY UNDERUTILIZED BUSINESSES.**

(a) State agencies are required to make a good-faith effort to assist historically underutilized businesses in receiving contract awards issued by the State. The statewide goal for use of historically underutilized businesses is 26% for service contracts. Respondent's Proposal should note if Respondent's business is currently certified as historically underutilized by the Texas Procurement and Support Services Division of the Texas Comptroller. If Respondent is not a certified HUB, then its Proposal should answer the following questions: (1) Is Respondent's business minority or woman owned and operated? If so, which? If minority, what category? (2) Is Respondent's business owned and operated by a disabled veteran meeting the requirements of Government Code, § 2161.001(3)(A)(vi) ("**Disabled Veteran**")? (3) What percentage of ownership of Respondent's business is minority or woman owned or owned by a Disabled Veteran?

(b) Contractor will be required to report to the Agencies, on a monthly basis, the identity of each HUB to which Contractor awarded a subcontract, following prior notice to and approval by the affected Agencies of such subcontract as required in paragraph 2.8(a), for the purchase of goods or services, and the dollar amount of HUB subcontracting participation in the Contract as provided in Texas Government Code, § 2161.122(b) and 34 T.A.C. § 20.16.

**SECTION III  
PROPOSAL INFORMATION**

**3.1 SCHEDULE OF EVENTS.** The solicitation process for this RFP will proceed according to the following schedule:

EVENT	DATE
Issue RFP	September 15, 2015
Deadline for Submission of Questions	September 30, 2015
Deadline for Submission of Proposals/RFP Proposals Opening	5:00 p.m. on October 15, 2015
Evaluation Period	October 15-30, 2015
Oral Presentations (if requested)	November 1-11, 2015
Contract Negotiation Period/Request for BAFOs( if requested) from selected Respondents	November 11 - 18, 2015
Expected Award of Contract	November 18, 2015
Expected Contract Start Date	November 18, 2015

**3.2 REVISIONS TO SCHEDULE.** The Agencies reserve the right to change the dates in the above schedule of events upon written notification to prospective Respondents through a posting of an Addendum to the RFP on the Electronic State Business Daily. It is the responsibility of interested parties to periodically check the ESB for updates to the RFP prior to submitting a Proposal. Respondent's failure to check the ESB periodically will in no way release the Respondent awarded a Contract from having to meet the requirements of addenda including the payment of any additional costs to meet the requirements of such addenda after Contract award.

**3.3 PROPOSAL REQUIREMENTS.**

(a) **Submissions.** Respondents shall submit one original of Exhibit B, Execution of Proposal, along with one original and three copies of the Proposal. **Failure to meet this**

**condition may result in disqualification of the Proposal, and the Respondent shall receive no further consideration.** Respondent shall prepare a Proposal that clearly and concisely represents Respondent's qualifications, experience, and capabilities and cost of providing the services under this Solicitation. Respondent should focus on the instructions and requirements of the Solicitation. Receipt of all addenda to this Solicitation should be acknowledged by returning a signed copy of each addendum with the Proposal. Proposal pages should be numbered and contain an organized, paginated table of contents corresponding to the section, paragraph and pages of the Proposal.

**(b) Costs.** Respondents are responsible for all expenses related to the preparation and submission of their Proposals.

**(c) Public Information Act; Confidentiality. The Agencies will not consider any Proposal that bears a copyright.** Proposals will be subject to the Texas Public Information Act and may be disclosed to the public upon request. The Proposal and other submitted information shall be presumed to be subject to disclosure unless a specific exception to disclosure under the PIA applies. If it is necessary for a Respondent to include proprietary or otherwise confidential information in its Proposal or other submitted information, the Respondent must clearly label that proprietary or confidential information and identify the specific exception to disclosure in the PIA. **Making a blanket claim that the entire Proposal is protected from disclosure because it contains some proprietary information is not acceptable, and may cause the disqualification of the Proposal by the Agencies.** If such Proposal is accepted, such blanket claim may subject the entire Proposal to release under the PIA. In order to initiate the process of seeking an Attorney General opinion on the release of proprietary or confidential information, the specific provisions of the Proposal that are considered by the Respondent to be proprietary or confidential must be clearly labeled as described below. Any information which is not clearly identified as proprietary or confidential shall be deemed to be subject to disclosure pursuant to the PIA. Proprietary or other confidential information, submitted as part of a Proposal, must be clearly marked on each page in which such information appears. Such marking should be in boldface type of at least 14 point font.

**(d) Contents.** Listed below is a summary of all information to be included in a Proposal submitted in response to this RFP. The Proposal must include this information and all other information requested or required under this RFP. The Agencies reserve the right, in their sole judgment and discretion, to waive minor technicalities and errors in the best interest of the state.

**(1) Respondent Information.** Include the following information regarding the Respondent:

- a. formal name and all assumed names used by the Respondent;
- b. structure of Respondent's business entity (i.e. sole proprietorship, partnership, corporation, etc.);
- c. state in which Respondent's business entity was formed or incorporated;
- d. physical address and mailing address;

- e. principal place of business;
- f. whether, and to what extent, Respondent has established a physical presence in the State of Texas including relevant timeframes;
- g. whether Respondent is a Historically Underutilized Business under Government Code, Chapter 2161, and the answers to the questions in Paragraph 2.9;
- h. Respondent's Texas Identification Number or other taxpayer number assigned and used by the Texas Comptroller;
- i. the name, title, address, telephone number, facsimile number, and e-mail address of Respondent's primary contact; and
- j. the name and social security number of the individual or sole proprietor submitting the proposal, as well as the name and social security number of any partner, shareholder or owner or other individual with at least 25% ownership of the business entity submitting the Proposal, as required by Texas Family Code, § 231.006.

**(2) Qualifications/Competencies.** Describe Respondent's qualifications and ability to deliver the services required, including evidence of compliance with all the minimum requirements set out in Paragraph 2.5.

**(3) List of Key Personnel.** The Respondent should include the names, titles, qualifications and experience of any of Respondent's personnel proposed to provide commercial real estate brokerage services under this RFP and Contract.

**(4) Compensation and Fees.** Provide information as directed in Paragraph 2.4(a) & (b) regarding Respondent's proposed fees to be charged by Respondent for the commercial real estate brokerage services and for any related services.

**(5) Conflict of Interest Disclosure.** The Respondent shall identify any and all relationships that might be a conflict of interest or cause an appearance of a conflict of interest. See Paragraph 11.6 of Exhibit A to this RFP, containing the Terms and Conditions applicable to this RFP and any Contract awarded pursuant to the RFP for a description of conflicts of interest.

**(6) Proposed Services.** The Proposal must provide evidence that the Respondent and Respondent's proposed services will meet the requirements for commercial real estate brokerage services under Paragraph 2.3 and all other requirements of this RFP, and any other applicable statutes and rules. Without limitation, the Proposal must include the following:

- a. Organizational Overview - A brief overview of Respondent's organization, including history, organizational structure, market position, etc.
- b. Client Mix - A description of Respondent's client mix; the range of transactional support services offered by Respondent; any relevant research products offered by Respondent; any other unique qualifications

or capabilities Respondent possesses relative to other firms that could assist the Agencies in their transactional goals.

c. Transactions - A list of the purchase/sale transactions valued at a minimum of \$10 million within the Austin area, closed by Respondent's proposed account executive(s)/lead brokers in the last three years. Include property address, buyer, seller, square footage, price, and date closed.

d. References - A list of at least five client references for deals completed within the last five years by the account executive(s)/lead brokers, with an emphasis on government and non-profit clients, if possible. Include all relevant transaction details and the primary client contact's title, email address, and phone number.

e. Litigation - A list and description of any regulatory proceedings, licensing actions, lawsuits, arbitrations, formal protests or other legal actions related to real estate services in which Respondent and its account executive(s)/brokers/real estate professionals have been involved in the last three years.

f. Annual Report - The most recent year's annual reports, or comparable document, including detailed current profit and loss, assets and liabilities, and other relevant financial data.

g. Credentials - Copies of business licenses, professional certifications or other credentials for Respondent's account executive(s)/brokers/real estate professionals, together with evidence that Respondent, if a corporation, is in good standing and qualified to conduct business in Texas.

h. Sample Agreement - A sample or template of a brokerage services agreement.

**(7) Exhibit B — Execution of Proposal.** The Execution of Proposal must be signed by a person authorized to bind the Respondent to a contract, and be submitted with Respondent's Proposal. **Failure to sign and return the Execution of Proposal with the submitted Proposal will result in rejection of the Proposal.**

**(8) Other Proposal Requirements:**

a. Respondents must comply with all rules, regulations, and statutes regarding purchasing by the State of Texas in addition to the requirements of this RFP; and

b. Respondent must initial any alterations or amendments made to its Proposal prior to submittal to the Agencies. No Proposal may be withdrawn after opening time without the Agencies' approval of an acceptable written reason.

**3.4 MEDIA RELEASES.** Respondents are not authorized to make or participate in any media releases pertaining to this procurement, the bid, the Contract, or the services to which

they relate without the prior written approval of the Agencies, and then only in accordance with explicit written instructions from the Agencies.

### 3.5 **INQUIRIES AND EXCEPTIONS.**

(a) All inquiries to the Agencies shall be submitted in writing prior to the deadline for submission of questions, in Paragraph 3.1 above, to Vance Ivie, Purchaser, Texas Department of Banking, by facsimile at 512-475-1313 or by e-mail to Vance.Ivie@dob.texas.gov.

(b) Inquiries resulting in written responses will be posted to the Electronic State Business Daily, available at <http://esbd.cpa.state.tx.us>. If a Respondent does not have Internet access, a copy of all posted written responses may be obtained through the point of contact listed above.

(c) Except as otherwise provided in this Paragraph, upon issuance of this RFP, other employees and representatives of the Finance Commission and the Agencies will not answer questions or otherwise discuss the contents of the RFP with any potential Respondent or its representatives. **Respondent's failure to observe this restriction may result in disqualification of any subsequent Proposal.** This restriction does not preclude discussions unrelated to this RFP.

(d) **Exceptions:** If Respondent takes any exceptions to any provisions of this RFP, including the RFP Terms and Conditions stated in the form of Contract attached hereto as Exhibit A, those exceptions must be specifically and clearly identified by section and paragraph in Respondent's Proposal in response to this RFP and Respondent's proposed alternative must also be provided in the Proposal. Respondents cannot take a 'blanket exception' to this entire RFP or to the Terms and Conditions in Exhibit A. **If any Respondent takes a 'blanket exception' to this entire RFP or to such Terms and Conditions, or does not provide proposed alternative language, the Respondent's Proposal may be disqualified from further consideration. Failure to accept the terms and conditions of the RFP or in Exhibit A may result in the Contract not being awarded to the Respondent.** Respondents are strongly encouraged to submit written questions during the official question and answer period regarding any term or condition of this RFP.

(e) Any oral statement or representation will not bind the State, the Commission or the Agencies contrary to the written specifications of this RFP, as amended by any Addenda, or the written provisions of any Contract entered into pursuant to this RFP.

### 3.6 **PROPOSAL SUBMISSION.**

(a) Each proposal submitted in hard copy format shall:

(1) be placed in a separate envelope or package, clearly marked as a Proposal for Finance Commission Agencies Commercial Real Estate Brokerage Services with the RFP; and

(2) be submitted via U.S. Postal Service, Overnight/Express Mail, or hand delivery, addressed as follows:

Texas Department of Banking  
Attn: Vance Ivie, Purchaser  
2601 North Lamar Boulevard  
Austin, Texas 78705-4294

- (b) Each proposal submitted in electronic format shall:
  - (1) be sent via email to [Vance.Ivie@dob.texas.gov](mailto:Vance.Ivie@dob.texas.gov); and
  - (2) state in the subject line: Proposal for Finance Commission Agencies Commercial Real Estate Brokerage Services.
- (c) All proposals shall be submitted prior to 5 p.m., Central Daylight Time, on the date specified in the Schedule of Events above in Paragraph 3.1. If submitted at, or near, the deadline, the Respondent should obtain a time-stamped or marked receipt (if submitted in hard copy) or delivery confirmation (if submitted via email) from the Texas Department of Banking. The Agencies reserve the right to reject late submittals. A U.S. Postal Service (USPS) postmark or round validation stamp; a mail receipt with the date of mailing, stamped by the USPS; a dated shipping label, invoice, or receipt from a commercial carrier; or any other documentation in lieu of the on-site time stamp WILL NOT be accepted.
- (d) Telephone and facsimile Proposals will not be accepted.
- (e) Respondents are responsible for checking the Electronic State Business Daily for all addenda to this RFP. Receipt of all addenda to this RFP should be acknowledged by returning a signed copy of each addendum with the submitted Proposal.

For hand delivery, please note that the office hours are 8:00 a.m. to 5:00 p.m. (Central Time).

**3.7 PROPOSAL OPENING.** Proposals will be opened by the Texas Department of Banking, on behalf of the Agencies, at 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

- (a) All submitted Proposals become the property of the Agencies after the RFP submittal deadline date. The submitted Proposals and accompanying documentation will not be returned.
- (b) Proposals submitted shall constitute an offer for a period of 150 days from the opening date or until Contract award is made by the Agencies, whichever occurs earlier.

**3.8 PROPOSAL EVALUATION AND AWARD.**

- (a) The Agencies will make their selection and award of a Contract for commercial real estate brokerage services pursuant to this RFP to a Respondent whose Proposal offers the best value for the Agencies and the State under Texas Government Code §§ 2155.074 and 2156.125. The Agencies are not required to select the lowest-priced proposal, but will take into consideration services which represent the best combination under the criteria listed in subparagraph (e).

(b) The Agencies reserve the right to check references prior to award. Any negative responses received may be grounds for disqualification of the proposal.

(c) The Agencies reserve the right to award Contract(s) without any negotiations and reserve the right to not make awards.

(d) Each Respondent is strongly encouraged to provide its best price in its Proposal because the Agencies make no guarantee that there will be any opportunity to negotiate or provide alternative pricing at any point during the RFP process.

(e) The Agencies will evaluate and determine whether Respondents' Proposals satisfy the requirements of this RFP and applicable law and which Respondent Proposals provide the best value for the Agencies and the State by applying the following criteria and assigned weighted values:

<b>CRITERIA</b>	<b>WEIGHT</b>
Demonstrated experience, competence, qualifications, and capability to perform commercial real estate brokerage services as specified	<b>50%</b>
References and other indicators of probable performance under the Contract such as past performance, responsibility, financial resources, and ability to perform.	<b>25%</b>
Fairness and reasonableness of proposed fees	<b>25%</b>
Total	<b>100%</b>

(f) In evaluating Proposals, the Agencies may consider information related to past contract performance of a Respondent including, but not limited to, the Texas Comptroller of Public Accounts Vendor Performance Tracking System (available at <http://venperf.cpa.state.tx.us/vpedit/Dreport.cfm>).

(g) The Agencies: (1) may elect to have Respondents provide oral presentations and respond to inquiries from the Agencies related to their Proposals; and (2) will determine if Best and Final Offers are necessary. Award of a Contract may be made without Best and Final Offers. A request for a Best and Final Offer is at the sole discretion of the Agencies. Requests for BAFOs, if any, will be extended in writing.

(h) The Agencies reserve the right to reject any and all offers, to re-solicit, or to cancel this RFP, if such action is deemed in the best interests of the State of Texas or the Agencies.

(i) The Agencies will provide written notice to the Respondents within two weeks after the award of a Contract or Contracts. After the award, the Proposals will be



available for public inspection in accordance with the Texas Public Information Act, Government Code, Chapter 552.

**3.9 AWARD OF CONTRACT.** A Proposal submitted in response to this RFP is an offer to contract based upon the terms, conditions, and specifications contained herein including those in Exhibits A and B attached hereto. A Proposal of a Respondent selected by the Agencies to provide commercial real estate brokerage services under this RFP will not result in a Contract until it is accepted through an award letter and purchase orders issued by the Agencies.

**3.10 EXECUTION OF CONTRACT.** If the Respondent selected does not execute a Contract within 30 days after notification of selection, the Agencies may cancel that selection and give notice to the Respondent of the cancellation. The Agencies may then select the next most qualified Respondent or call for new Proposals, whichever the Agencies deem appropriate.

#### **SECTION IV GENERAL TERMS AND CONDITIONS**

The terms and conditions listed in Exhibit A apply to this RFP and are incorporated by reference herein. Any Contract awarded as a result of this RFP will contain the general terms and conditions listed in the form of Contract attached to this RFP as Exhibit A, as well. The Contractor selected pursuant to this RFP, and its subcontractors, shall comply with these terms and conditions. The Agencies, as directed by the Finance Commission, reserve the right to add, delete or revise terms of the Contract issued under this RFP before execution by all parties.

**EXHIBIT A**

**TO REQUEST FOR PROPOSAL FOR COMMERCIAL REAL ESTATE BROKERAGE  
SERVICES**

**AMONG  
TEXAS DEPARTMENT OF BANKING,  
DEPARTMENT OF SAVINGS AND MORTGAGE LENDING,  
AND OFFICE OF CONSUMER CREDIT COMMISSIONER**

**AND**

\_\_\_\_\_ **[CONTRACTOR]** \_\_\_\_\_

**Contract No.** \_\_\_\_\_

This agreement (**Contract**) is entered into by the following agencies of the State of Texas, the Texas Department of Banking, Department of Savings and Mortgage Lending, and Office of Consumer Credit Commissioner (**the Agencies**), who are under the oversight of the Texas Finance Commission (**Finance Commission or Commission**), and \_\_\_\_\_ (**Contractor**), located at \_\_\_\_\_.

**I. Recitals**

Whereas, on **mm/dd, 2015**, the Agencies, acting through the Texas Department of Banking, issued a Request for Proposals (RFP) from qualified, independent individuals or firms to provide commercial real estate brokerage services; and

Whereas, Contractor submitted a proposal (**Proposal**) dated \_\_\_\_\_, 2015, in response to the Finance Commission RFP; and

Whereas, the Agencies selected Contractor to serve as real estate broker pursuant to the RFP for the one year period beginning on the date of the last signature of all of the parties to the contract.

Now therefore, the Agencies and Contractor hereby agree as follows:

**II. Authority**

This Contract is entered into pursuant to Texas Finance Code, §§ 16.006 and 16.007.

**III. Services, Standards of Performance, and Contract Administration**

**3.1** Contractor shall provide the services and the deliverables described herein in the manner required by all of the following documents:

- (a) This Contract
- (b) The Award Letter
- (c) The Purchase Orders of the Agencies
- (d) Statement of Work, if any
- (e) The RFP and Addenda, if any
- (f) Contractor's Proposal and Contractor's Best and Final Offer, if any
- (g) Authorized Key Personnel List
- (h) Nondisclosure Agreement to Protect Against Release of Confidential Information.

All of the above are attached to and incorporated as part of this Contract for all purposes. All of these documents constitute the "**Standards of Performance**" for this Contract. Definitions stated in the RFP also apply to this Contract.

**3.2** In the case of conflicts between this Contract and any of its exhibits or attachments, such conflicts shall be resolved by reference to the Contract and its exhibits or attachments in the order of their numbered priority in Paragraph 3.1 above. Thus, for example, this Contract shall control over the Award Letter.

**3.3** Contractor shall provide all of the above services and all reasonably related services in accordance with applicable professional standards of a Contractor providing commercial real estate brokerage services. Professional standards shall be determined in accordance with the Texas Real Estate License Act and rules promulgated by the Texas Real Estate Commission. Contractor represents and warrants that it has the requisite qualifications, experience, personnel and other resources required by the RFP to perform in the manner required by this Contract.

#### **IV. Personnel**

**4.1** Contractor shall assign only qualified personnel to this Contract. On the effective date of this Contract, the Agencies shall authorize the Contractor's key personnel listed in the Authorized Key Personnel List, referenced in Paragraph 3.1, to provide commercial real estate brokerage services under this Contract. If the Contractor plans to substitute new key personnel, not identified in Contractor's original Proposal, to accomplish its duties, Contractor must obtain the prior approval of the Agencies of such substituted personnel. The substituted personnel must be equally qualified and skilled in the tasks necessary to accomplish the tasks and services required by the RFP as the members of Contractor's firm originally listed in Contractor's Proposal.

**4.2** Subcontractors providing services under the Contract shall meet the same requirements and level of experience as required of Contractor. No subcontract under the Contract shall relieve Contractor of responsibility for ensuring that the services are provided in full compliance with all terms of the RFP and this Contract. If Contractor uses a subcontractor for any or all of the work required, the following conditions shall apply:

(a) The Contractor shall perform the Contract with its own resources and those subcontractors identified in its Proposal. If the Contractor plans, after Contract award, to subcontract all or a portion of the work to be performed to subcontractors not identified in its Proposal, Contractor must provide 30 days' prior notice and obtain the approval of the Commission of such subcontractors. The Contractor shall also transmit to the Agencies for review and prior approval a true copy of the subcontract it proposes to execute with a subcontractor.

(b) Subcontracting shall be solely at Contractor's expense. In subcontracting for any performances specified in the RFP or Contract, the Contractor understands and expressly acknowledges that the Agencies will not be liable, in any manner, to any subcontractors of Contractor.

(c) The Agencies retain the right to check subcontractor's background, qualifications, and conflicts and to approve or reject the use of submitted subcontractors.

(d) Contractor shall be the sole contact for the Agencies or shall list or provide a designated point of contact for all inquiries from the Agencies.

**4.3** By entering into this contract, the Contractor certifies and ensures that it utilizes and will continue to utilize, for the term of this Contract, the U.S. Department of Homeland Security's E-Verify system to determine the eligibility of:

(a) All persons employed to perform duties within Texas, during the term of the Contract; and

(b) All persons (including subcontractors) assigned by the Contractor to perform work pursuant to the Contract, within the United States of America.

The Contractor shall provide, upon request of the Agencies, an electronic or hardcopy screenshot of the confirmation or tentative non-confirmation screen containing the E-Verify case verification number for attachment to the Form I-9 for the three most recent hires that match the criteria above, by the Contractor, and Contractor's subcontractors, as proof that this provision is being followed.

**If this certification is falsely made, the Contract may be immediately terminated, at the discretion of the state and at no fault to the state, with no prior notification. The Contractor shall also be responsible for the costs of any re-solicitation that the state must undertake to replace the terminated Contract.**

## **V. Payments**

**5.1** Upon completion of a transaction for the sale of the Agencies' current property, Contractor will receive a brokerage commission, based on a percentage of the selling price of the property, to be paid from the proceeds of the sale at the close of escrow.

**5.2** Upon completion of a transaction for the purchase of a new property for the Agencies, the Agencies expect that Contractor will receive a brokerage commission paid by the seller of the new property, pursuant to a commission split agreement between Contractor and seller's

broker, in accordance with standard market practice. All payments shall be made in accordance with the Texas Real Estate License Act and rules promulgated by the Texas Real Estate Commission.

**5.3** No advance payments will be made under the Contract. All taxes due shall be the responsibility of Contractor. Subject to the foregoing, each Agency must make all payments in accordance with Government Code Chapter 2251.

**5.4** Under Texas Finance Code, Title 2, Chapter 16, the Agencies are self-directed and semi-independent financial regulatory agencies. The Texas Finance Code requires that state funds collected by each Agency must be approved by the Finance Commission for expenditure as part of each Agency's budget. Contractor acknowledges and agrees that:

**(a)** Payments under this Contract are subject to the availability of state funds approved for expenditure by the Finance Commission;

**(b)** The State of Texas will not be liable for any expense or debt under this Contract, and money from the general revenue fund may not be used to repay the expense or debt under this Contract, if incurred by the Agencies while self-directed, semi-independent financial regulatory agencies; and

**(c)** The Contract creates no personal liability on the part of members of the Finance Commission or employees of the Agencies.

## **VI. Term, Suspension, and Termination**

**6.1 (a)** Original Term. This Contract shall become effective following execution by all parties and as of the date signed by all appropriate officials of the Finance Commission and Agencies, and shall expire one year later, unless terminated earlier as provided in this Contract.

**(b)** Option to Renew Contract. The Agencies reserve the right to renew any Contract resulting from the RFP, at their sole discretion, for up to three one-year renewal terms, at the Contract rate, or rates, as modified during the term of the Contract, to be evidenced in writing prior to the expiration date of the initial term.

**6.2** Suspension. Upon reasonable notice to Contractor, the Agencies may suspend the Contract, withhold further payments, and prohibit Contractor from incurring additional obligations under the Contract. The written notice of suspension must describe the reasons for suspension and the suspension's effective date. A suspension continues until lifted by the Agencies.

**6.3** Termination for the Convenience of the State. The Agencies reserve the right, in their sole discretion and at their sole option, to terminate this Contract, in whole or in part, without penalty, upon 30 days' written notice to Contractor. Such notice may be provided by facsimile or certified mail, return receipt requested, and is effective upon Contractor's receipt. Following such notice, Contractor shall, unless otherwise mutually agreed in writing, cease all services immediately.

**6.4** Termination without Penalty. Contractor acknowledges and agrees that payments under this Contract are subject to termination or cancellation without penalty to the Finance

Commission or any of the Agencies, either in whole or in part, subject to the availability of state funds. Each Agency is a state agency whose authority, revenues and expenditures are subject to actions of the Finance Commission. If any of the Agencies becomes subject to a legislative change, revocation of statutory authority, lack of appropriated funds, or unavailability of funds collected by each Agency, or otherwise becomes subject to a condition that would render Agency's or Contractor's delivery or performance under the Contract impossible or unnecessary, the Contract will be terminated or cancelled and be deemed null and void. In the event of a termination or cancellation under this paragraph, Agency will not be liable to Contractor for any payments, damages or any other amounts which were otherwise due or which may be caused by or associated with such termination or cancellation, and Agency will not be required to give prior notice.

#### **6.5 Termination for Cause/Other Remedies.**

**(a) Termination.** If Contractor fails to provide the services contracted for according to the provisions of the Contract, fails to comply with any of its terms or conditions, or otherwise is found to be in default under any provision of the Contract, the Agencies may, upon 10 days' written notice of default to Contractor, immediately terminate all or any part of this Contract and procure the services of another provider by a new solicitation or award of the Contract to the next best responsive and responsible Respondent under the RFP. Contractor will be responsible for paying damages to the Agencies, including, but not limited to, re-procurement costs, any costs over the amount of this Contract for the services of such other provider, and any consequential damages to the State of Texas or the Agencies resulting from Contractor's breach or non-performance. The defaulting Contractor will not be considered in any re-solicitation and may not be considered in future solicitations for the same type of work, unless the specification or scope of work is significantly changed.

**(b) Other Remedies.** Termination is not an exclusive remedy, but will be in addition to any other rights and remedies provided in equity, by law, or under this Contract. The Agencies may exercise any other right, remedy, or privilege which may be available to them under applicable law of the state and any other applicable law or may proceed by appropriate court action to enforce the provisions of the Contract. The exercise of any of the foregoing remedies will not constitute a termination of the Contract unless the Agencies notify the Contractor in writing prior to the exercise of such remedy. The Contractor shall be liable for all costs and expenses, including court costs, incurred by the Agencies with respect to the enforcement of any of the remedies listed herein.

**6.6 Remedies.** Notwithstanding any exercise by the Agencies of their rights of early termination pursuant to this paragraph, Contractor will not be relieved of any liability to the Agencies for damages due to the Agencies by virtue of any breach of this Contract by Contractor or for amounts otherwise due to the Agencies by Contractor.

**6.7 Termination by Contractor.** With cause, Contractor may terminate this contract upon furnishing the Agencies with 90 days' advance written notice of its intent to cancel.

**6.8 Termination Notices.** Termination notices may be provided by facsimile or certified mail, return receipt requested, and will be effective upon receipt by the party receiving notice of termination.

**6.9** No Liability upon Termination. The Agencies shall not be liable to Contractor for any damages, claims, losses, or any other amounts arising from or related to any early termination by the Agencies of this Contract. However, Contractor may be entitled to the remedies provided in Texas Government Code, Chapter 2260.

**6.10** Rights upon Termination or Expiration; Partially Completed Work. If the Contract is terminated for any reason, or upon its expiration, the Agencies shall retain ownership of all completed, or partially completed, work, and any and all reports, research, materials, documentation, information, intellectual property, and other associated work products produced or generated by, or obtained from, the Contractor under the Contract and results of the services (collectively, "Work Product"). Following such expiration or termination, or at the request of the Agencies, Contractor shall immediately transfer all completed or partially completed work to the Agencies. All work performed pursuant to this Contract and all Work Product shall be the exclusive property of the Agencies. The Agencies may copy, modify, publish, display, transfer, distribute, prepare derivative works from, or otherwise use any component of the Work Product or other deliverables made the subject of this Contract, at no additional cost to the Agencies. Failure to timely deliver such Work Product shall be considered a material breach of this Contract. Contractor shall not make or retain any copies of the Work Product without the prior written consent of the Agencies.

**6.11** Survival of Contract Provisions Following Termination or Expiration. Termination of this Contract for any reason shall not release the Contractor from liability or obligation set forth in the Contract that is expressly stated to survive any such termination or by its nature would be intended to be applicable following any such termination, including provisions regarding confidentiality, indemnification, transition, records, audit, property rights, dispute resolution, invoice and fees verification, and default. Such provisions shall also survive the expiration of this Contract.

## **VII. Confidentiality and Open Records**

**7.1** Notwithstanding any provisions of this Contract to the contrary, Contractor understands that the Agencies will comply with the Texas Public Information Act, Texas Government Code, Chapter 552, as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. All information, documentation, and other material submitted under the RFP, this Contract, and any reports, analysis, data and other information generated as a result of the performance of the duties required under the Contract may be subject to public disclosure under the Texas Public Information Act. The Agencies agree to notify Contractor in writing within a reasonable time from receipt of a request for information related to Contractor's work under this Contract. Contractor will cooperate with the Agencies in the production of documents responsive to such requests. The Agency which receives a request for information will make a determination whether to submit a Public Information Act request to the Attorney General. Contractor will notify the Agencies within 24 hours of receipt of any third party requests for information that was provided by the State of Texas for use in performing the Contract.

**7.2** Contractor is required to make any information created or exchanged with the Agencies pursuant to this Contract, and not otherwise excepted from disclosure under the Texas Public Information Act, available in a format that is accessible by the public at no additional charge to the Agencies.

**7.3** Contractor agrees to maintain the confidentiality of information received from the Agencies during the performance of this Contract, including information which is confidential under the Texas Finance Code, is otherwise confidential by law, or discloses confidential personal information particularly, but not limited to, social security numbers. Contractor will be required to complete a Nondisclosure Agreement to Protect against Release of Confidential Information related to any and all confidential records and documents that Contractor will receive or access in connection with the Contract.

### **VIII. Insurance and Other Security**

**8.1** Contractor represents and warrants that it will, within five (5) business days of executing this Contract, provide the Agencies with current certificates of insurance or other proof acceptable to the Agencies, of the following insurance coverage:

- (a)** Standard Workers' Compensation Insurance with statutory limits covering all personnel who will provide services under the contract;
- (b)** Commercial General Liability, occurrence based policy; and
- (c)** Professional Liability Insurance with minimum limits of \$500,000 per claim and \$1,000,000 annual aggregate covering the Contractor and all personnel who will provide services under this Contract for rendering or the failure to render professional services.

**8.2** Contractor represents and warrants that all of the above coverage is with companies licensed in the state of Texas, with "A" rating from A.M. Best, and authorized to provide the corresponding coverage. Contractor also represents and warrants that all policies contain endorsements prohibiting cancellation except upon at least 30 days prior written notice to the Agencies. Contractor represents and warrants that it shall maintain the above insurance coverage during the term of this Contract, and shall provide the Agencies with an executed copy of the policies immediately upon request.

### **IX. Indemnification**

#### **9.1 Acts or Omissions**

Contractor shall indemnify and hold harmless the State of Texas and the Texas Finance Commission, the Texas Department of Banking, the Department of Savings and Mortgage Lending, and the Office Of Consumer Credit Commissioner, and their officers, agents, employees, representatives, contractors, assignees, and designees from any and all liability, actions, claims, demands, or suits, and all related costs, attorney fees, and expenses arising out of, or resulting from, any acts or omissions of Contractor or its agents, employees, subcontractor, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. The defense shall be coordinated by Contractor with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and Contractor may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. Contractor and the Finance Commission and Agencies agree to furnish timely written notice to each other of any such claim.

#### **9.2 Infringements**



**(a)** Contractor shall indemnify and hold harmless the State of Texas and the Texas Finance Commission, The Texas Department of Banking, The Department of Savings and Mortgage Lending, and The Office Of Consumer Credit Commissioner, and their officers, agents, employees, representatives, contractors, assignees, and designees from any and all third party claims involving infringement of United States patents, trademarks, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the performances or actions of contractor pursuant to this contract. Contractor and the Finance Commission and Agencies agree to furnish timely written notice to each other of any such claim. Contractor shall be liable to pay all costs of defense including attorneys' fees. The defense shall be coordinated by Contractor with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and Contractor may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General.

**(b)** Contractor shall have no liability under this paragraph if the alleged infringement is caused in whole or in part by: (i) use of the product or service for a purpose or in a manner for which the product or service was not designed, (ii) any modification made to the product without Contractor's written approval, (iii) any modifications made to the product by the Contractor pursuant to the specific instructions of the Agencies, (iv) any intellectual property right owned by or licensed to the Agencies, or (v) any use of the product or service by the Agencies that is not in conformity with the terms of any applicable license agreement.

**(c)** If Contractor becomes aware of an actual or potential claim, or the Agencies provide Contractor with notice of an actual or potential claim, Contractor may (or in the case of an injunction against the Agencies, shall), at Contractor's sole option and expense; (i) procure for the Agencies the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that use by the Agencies is non-infringing.

### **9.3 Taxes/Workers' Compensation/Unemployment Insurance – Including Indemnity**

**(a)** Contractor agrees and acknowledges that during the existence of this contract, Contractor shall be entirely responsible for the liability and payment of Contractor's and Contractor's employees' taxes of whatever kind, arising out of the performances in this Contract. Contractor agrees to comply with all state and federal laws applicable to such persons, including laws regarding wages, taxes, insurance, and workers' compensation. The Finance Commission, the Agencies and/or the state shall not be liable to the Contractor, its employees, agents, or others for the payment of taxes or the provision of unemployment insurance and/or workers' compensation or any benefit available to a state employee.

**(b)** Contractor agrees to indemnify and hold harmless the State of Texas and the Texas Finance Commission, the Texas Department of Banking, the Department of Savings and Mortgage Lending, and the Office of Consumer Credit Commissioner, and their employees, agents, representatives, contractors and assignees, from any and all liability, actions, claims, demands, or suits, and all related costs, attorneys' fees, and expenses relating to tax liability, unemployment insurance and/or workers' compensation in its performance under this Contract. Contractor shall be liable to pay all costs of

defense including attorneys' fees. The defense shall be coordinated by Contractor with the Office of the Attorney General when Texas state agencies are named defendants in any lawsuit and Contractor may not agree to any settlement without first obtaining the concurrence from the Office of the Attorney General. Contractor and the Finance Commission and Agencies agree to furnish timely written notice to each other of any such claim.

## **X. Dispute Resolution/No Waiver of Immunities**

**10.1** Chapter 2260 Process. The dispute resolution process provided for in Texas Government Code, Chapter 2260 shall be used by Contractor and the Agencies to resolve any dispute arising under this Contract. Any Contractor claims for breach of this Contract that the parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260, Subchapter B. To initiate the process, Contractor shall submit written notice, as required by Subchapter B, to each Agency, specifically stating that the provisions of Subchapter B, Chapter 2260, are being invoked. Compliance by Contractor with Subchapter B is a condition precedent to the filing of a contested case proceeding under Subchapter C.

**10.2** Contested Case Process. The contested case process provided in Government Code, Chapter 2260, Subchapter C is Contractor's sole and exclusive process for seeking a remedy for any alleged breach of Contract by the Agencies if the parties are unable to resolve their disputes under the negotiation process provided in Paragraph 10.1. Compliance with the contested case process provided in Subchapter C is a condition precedent to seeking consent to sue from the Legislature under Texas Civil Practices and Remedies Code, Chapter 107.

**10.3** Governing Rules. The submission, processing, and resolution of Contractor's claim is governed by the published rules (7 T.A.C. §§ 10.1 et seq.) adopted by the Finance Commission to govern the mediation and negotiation of breach of contract claims against the Agencies pursuant to Texas Government Code, Chapter 2260.

**10.4** No Waiver of Immunities or Rights.

**(a)** Nothing in this Contract shall be considered as a waiver of the State's sovereign immunity. This Contract shall not constitute or be construed as a waiver of the State's sovereign immunity or of any of the privileges, rights, defenses, remedies, or immunities available to the State of Texas the Finance Commission or the Agencies. The Finance Commission and the Agencies do not waive any privileges, rights, defenses, or immunities available to them by entering into this Contract or by their conduct prior to or subsequent to entering into this Contract.

**(b)** Participation by the Agencies in, or the results of, the dispute resolution process provided for in Texas Government Code, Chapter 2260, or in mediation or negotiation of breach of contract claims against the Agencies under 7 T.A.C. §§ 10.1 et seq., or otherwise under this paragraph, shall not be construed as a waiver by the Agencies of (1) any rights, privileges, defenses, remedies or immunities available to any of the Agencies as an agency of the State of Texas or otherwise available to the Agencies; (2) the termination rights of the Agencies; or (3) other termination provisions or expiration dates of the Contract.

**(c)** The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to the State of Texas, the Finance Commission, or the Agencies under this Contract or under applicable law, shall not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel.

**(d)** Notwithstanding any other provision of the Contract to the contrary, unless otherwise requested or approved in writing by the Agencies, the Contractor shall continue performance and shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes; however, the Contractor may suspend performance during the pendency of such claim or dispute if the Contractor has complied with all provisions of Government Code, § 2251.051, and such suspension of performance is expressly applicable and authorized under that law.

## **XI. Representations, Warranties, and General Provisions**

**11.1 Contractor Certifications.** Contractor hereby represents and warrants that all Contractors' certifications in Contractor's Execution of Proposal remain current, complete, and accurate.

**11.2 Liability for Taxes.** Contractor represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, but not limited to, any federal, State, or local income, sales or excise taxes of Contractor or its employees. The Agencies shall not be liable for any taxes, including state sales tax and federal excise tax, resulting from this Contract. Excise exemption certifications are available upon request.

**11.3 Historically Underutilized Businesses.** Contractor represents and warrants that it shall comply with the Historically Underutilized Business requirements pursuant to Texas Government Code, Chapter 2161, and the rules adopted by the Texas Comptroller at 34 T.A.C. §§ 20.10-20.28. Contractor agrees to report, on a monthly basis, to the Agencies the information required regarding any HUB subcontractors, as required by Paragraph 2.9 of the RFP.

**11.4 Deceptive Trade Practices; Unfair Business Practices.** Contractor represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Texas Business & Commerce Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit, and that Contractor has not been found to be liable for such practices in such proceedings. Contractor certifies that it has no officers who have served as officers of other entities who have been found to be liable for Deceptive Trade Practices violations or any unfair business practices in an administrative hearing or court suit or who have themselves been found to be individually liable for such practices in such proceedings.

**11.5 Equal Opportunity.** Contractor represents and warrants that it shall not discriminate against any person on the basis of race, color, national origin, creed, religion, political belief, sex, sexual orientation, age, or disability in the performance of this Contract.

**11.6 No Conflicts.**

**(a) Actual and Perceived Conflicts.** Contractor represents and warrants that Contractor, its employees, and its subcontractors have no actual or potential conflict of

interest in entering a Contract with the Agencies that it did not disclose in its Proposal. Contractor also represents and warrants that entering a Contract with the Agencies or the Finance Commission will not create the appearance of impropriety. Contractor represents that no member of the Finance Commission, or officer or employee of the Texas Department of Banking, the Department of Savings and Mortgage Lending, or the Office of Consumer Credit Commissioner has a direct or indirect interest in the proceeds from a Contract resulting from this RFP. Contractor represents that it is not funded by, affiliated with, or related to any person or entity licensed, chartered, registered or regulated by any of the Agencies, other than entities disclosed in its Proposal.

**(b)** Current and Former Finance Commission and Agency Employees. Except as disclosed in its Proposal, Contractor has no personnel who are current or former officers or employees of the Finance Commission or the Agencies, or who are related, within the third degree by consanguinity (as defined by Texas Government Code, § 573.023) or within the second degree by affinity (as defined by Government Code, § 573.025), to any current or former officers or employees of the Finance Commission or the Agencies. If a member of Contractor's firm, is a former officer, member or employee of the Finance Commission or the Agencies, Contractor and such members, officers or employees agree to fully comply with the requirements of Government Code, § 2252.901.

**(c)** Bar on Future Employment. Within the first 24 months of leaving employment of one of the Agencies, a former employee or retiree shall not become employed by any Respondent.

**11.7** Felony Criminal Convictions. Contractor represents and warrants that Contractor has not, and Contractor's employees have not, been convicted of a felony criminal offense, or that, if such a conviction has occurred, Contractor has fully advised the Finance Commission and the Agencies of the facts and circumstances surrounding the conviction.

**11.8** Prohibited Use of Appropriated or other Funds under Control of State Agency; Lobbying. The Contractor represents and warrants that Contractor's receipt of state funds or appropriated funds, if any, under this Contract is not prohibited by Government Code, §§ 556.005 or 556.008.

**11.9** Licenses, Patents, and Permits. Contractor represents that it has determined what licenses, patents and permits are required under this Contract and has acquired all such licenses, patents and permits.

**11.10** Records Access and Retention; Supporting Documents; Right to Audit.

**(a)** Agency Records. All pertinent original records and documents concerning an Agency may be reviewed or inspected by Contractor at 2601 North Lamar Boulevard, Austin, Texas. Subject to providing the Nondisclosure Agreement referenced in Paragraph 3.1, Contractor may copy the records and documents necessary to a specific service performed under this Contract. An original record or document may not be removed without the prior written consent of the affected Agency.

**(b)** Records Access. Contractor's records pertinent to this Contract may be inspected, examined, audited, or copied during normal business hours by any authorized representative of the State Auditor's Office, the Finance Commission, or any of the Agencies. Contractor shall make requested records, including all documents and other

information related to "Work Product" as defined in Paragraph 6.10, available on or before the third business day after the date written request for such records is received, at 2601 North Lamar Boulevard, Austin, Texas, or at such other reasonable times and locations as are agreed by the parties to the request. Work Product relating to this Contract, other than Contractor's working papers, may be used by the State of Texas for any purpose without Contractor's consent.

**(c) Records Retention; Supporting Documents.** Contractor shall maintain all financial records, supporting fiscal documents, statistical records, working papers, and any other documents, records or books relating to the services to be provided under the Contract and to showing that payments under the Contract were expended in accord with the laws and regulations of the State of Texas, including requirements of the Comptroller and the State Auditor's Office (SAO). Contractor must retain all work, records, and other supporting documents pertaining to this Contract, for purposes of inspecting, monitoring, auditing, or evaluating by the Agencies and any authorized agency of the State of Texas, including an audit by the SAO or Comptroller. Contractor shall maintain all such documents and other records relating to this Contract and the State's property, which are not transferred to the Agencies at Contract termination, for a period of seven years after the payment of all brokerage commissions or until a resolution of all billing questions, whichever is later. Contractor's failure to comply with this paragraph shall constitute a material breach of this Contract and shall authorize the Agencies to immediately assess appropriate damages for such failure.

**(d) Right to Audit.** Pursuant to Texas Government Code, § 2262.154, the State Auditor's Office, or successor agency, may conduct an audit or investigation of the Contractor or any other entity or person receiving funds from the State directly under the Contract or indirectly through a subcontract under the Contract. The Contractor understands that acceptance of state funds under this Contract acts as acceptance of the authority of the State Auditor's Office to conduct an audit or investigation in connection with those funds. The Contractor further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit or investigation, including providing all records requested. The Contractor will ensure that this clause concerning the State Auditor's Office's authority to audit state funds and the requirement to cooperate fully with the State Auditor's Office is included in any subcontracts it awards. Additionally, the State Auditor's Office shall at any time have access to and the rights to examine, audit, excerpt, and transcribe any pertinent books, documents, audit documentation, and records of the Contractor relating to this contract.

**11.11 Force Majeure.** Neither the Contractor nor the Agencies shall be liable to the other party for any delay in, or failure of, performance of any requirement included in this Contract caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. "Force majeure" is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three business days of the existence of such force majeure, or otherwise waive this right as a defense.

**11.12 Eligibility/Debts or Delinquencies to State.** The Comptroller is prohibited from issuing any payment to a person or entity that has been reported as having an indebtedness or delinquency to the State. Contractor represents and warrants that Contractor is not delinquent in the payment of any franchise taxes owed the State of Texas. Contractor agrees that, to the extent Contractor owes any debt or delinquent taxes to the State of Texas, any payments or other amounts Contractor is otherwise owed under this Contract shall be applied toward the debt or delinquent taxes until the debt or delinquent taxes are paid in full. Contractor agrees to comply with all applicable laws regarding satisfaction of debts or delinquencies to the State of Texas.

**11.13 Buy Texas.** In accordance with Texas Government Code, § 2155.4441, the State of Texas requires that during the performance of a contract for services, Contractor shall purchase products and materials produced in the State of Texas when available at a price and time comparable to products and materials produced outside the State.

**11.14 Independent Contractor.** Contractor and each of Contractor's employees, representatives, agents and any subcontractors shall serve as an independent contractor in providing the services under any Contract resulting from this RFP. Contractor, its employees, its representatives, its agents, and any subcontractors shall not be employees of the Finance Commission or the Agencies.

**11.15 Federal, State, and Local Requirements.** If Contractor is a firm, Contractor shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2's to common law employees. Contractor is responsible for both federal and State unemployment insurance coverage and standard worker's compensation insurance coverage. Contractor shall comply with all federal and State tax laws and withholding requirements.

**11.16 Antitrust.** Contractor represents and warrants that neither Contractor, nor any firm, corporation, partnership, or institution represented by Contractor, or anyone acting for such firm, corporation or institution, has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws, 15 U.S.C. § 1 et seq.; or (2) communicated directly or indirectly its Proposal to any competitor or any other person engaged in such line of business during the procurement process for this Contract.

**11.17 Compliance with Applicable Law; Conforming Amendments.** Contractor must comply with all laws, regulations, requirements and guidelines applicable to a Contractor providing services to the State of Texas as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of this Contract. The Agencies reserve the right, in their sole discretion, to unilaterally amend this Contract throughout its term to incorporate any modifications necessary for compliance by the Agencies or the Contractor with all applicable State and federal laws and regulations.

**11.18 Amendments.** Except as provided in Paragraph 11.17 of this Contract, this Contract may be amended only upon written agreement between the Contractor and the Agencies; however, any amendment of this Contract that conflicts with the laws of the State of Texas shall be void ab initio.

**11.19 Applicable Law; Venue.** This Contract shall be governed by and construed in accordance with the laws of the State of Texas, except for its provisions regarding conflicts of

laws. The exclusive jurisdiction and venue of any suit arising under this Contract is fixed in any court of competent jurisdiction of Travis County, Texas.

**11.20 Strict Compliance.** Time is of the essence in the performance of this Contract. Contractor shall strictly comply with all of the deadlines, requirements, and Standards of Performance for this Contract.

**11.21 Assignments.** Without the prior written consent of the Agencies, Contractor may not assign this Contract, in whole or in part, and may not assign any right or duty required under it.

**11.22 Severability Clause.** In the event that any provision of this Contract is later determined to be invalid, void, or unenforceable, then the remaining terms, provisions, covenants, and conditions of this Contract shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated.

**11.23 Family Code.** Under Texas Family Code, § 231.006(d), regarding child support, Contractor certifies that the individual or business entity named in this Contract is not ineligible to receive the specified payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate. Furthermore, any Contractor subject to § 231.006 must include names and Social Security numbers of each person with at least 25% ownership of the business entity submitting the Proposal under the RFP. This information must be provided prior to Contract award.

**11.24 Financial Interests; Gifts.** Contractor represents and warrants that neither Contractor nor any person or entity that will participate financially in this Contract has received compensation from the Finance Commission, any of the Agencies or any other agency of the State of Texas for participation in preparation of specifications for this Contract. Texas Government Code, § 2155.004 prohibits a person or entity from receiving a state contract if that person or entity received compensation for participating in preparing the solicitation or specifications for the Contract. Under Texas Government Code, § 2155.004, Contractor represents and warrants that Contractor is not ineligible to receive this Contract and acknowledges that this Contract may be terminated and payment withheld if this representation and warranty is inaccurate. Contractor represents and warrants that it has not given, offered to give, and does not intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to any public servant or employee in connection with this Contract.

**11.25 Certification Concerning Hurricane Relief.** Texas Government Code, §§ 2155.006 and 2261.053 prohibit state agencies from awarding a contract to any person who, in the past five years, has been convicted of violating a federal law or assessed a penalty in connection with a contract involving relief for Hurricane Rita, Hurricane Katrina, or any other disaster, as defined by Government Code, § 418.004, occurring after September 24, 2005. Under Government Code, § 2155.006, the Contractor certifies that the individual or business entity named in its Proposal is not ineligible to receive the Contract and acknowledges that the Contract may be terminated and payment withheld if this certification is inaccurate.

**11.26 Limitation on Authority; No Other Obligations.** Contractor shall have no authority to act for or on behalf of the Agencies or the State of Texas except as expressly provided for in this Contract; no other authority, power or use is granted or implied. Contractor may not incur any

debts, obligations, expenses, or liabilities of any kind on behalf of the State of Texas the Finance Commission or the Agencies.

**11.27 Notices.** Any written notices required under this Contract will be by either hand delivery or by U.S. Mail, certified, return receipt requested, to Contractor's office address specified on Page 1 of this Contract or to Charles G. Cooper, Commissioner, Texas Department of Banking, 2601 North Lamar, Austin, Texas 78705-4294. Notice will be effective on receipt by the affected party. Either party may change the designated notice address in this paragraph by written notification to the other party.

**11.28 False Statements; Breach of Representations.** By signature to this Contract, Contractor makes all the representations, warranties, guarantees, certifications and affirmations included in this Contract. If Contractor signed its Proposal with a false statement or signs this Contract with a false statement or it is subsequently determined that Contractor has violated any of the representations, warranties, guarantees, certifications or affirmations included in this Contract, Contractor shall be in default under this Contract and the Agencies may terminate or void this Contract for cause and pursue other remedies available to the Agencies under this Contract and applicable law.

**11.29 Drug Free Workplace Policy.** The contractor shall comply with the applicable provisions of the Drug-Free Work Place Act of 1988 (Public Law 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.) and maintain a drug-free work environment; and the final rule, government-wide requirements for drug-free work place (grants), issued by the Office of Management and Budget and the Department of Defense (32 CFR Part 280, Subpart F) to implement the provisions of the Drug-Free Work Place Act of 1988 is incorporated by reference and the Contractor shall comply with the relevant provisions thereof, including any amendments to the final rule that may hereafter be issued.

## **XII. Signatories**

The undersigned signatories represent and warrant that they have full authority to enter into this Contract on behalf of the respective parties.

## **XIII. Merger**

This Contract incorporates by reference all the documents listed in Paragraph 3.1 (**collectively, the "Contract Documents"**) and contains the entire agreement between the Contractor and the Agencies. The Contract supersedes any prior understandings or oral or written agreements among the Agencies and Contractor on the matters contained in the Contract and the incorporated Contract Documents. Except as provided in Paragraph 11.17, no modification, alteration, or waiver of any term, covenant, or condition of this Contract or any of its exhibits shall be valid unless in writing and executed by the Agencies and Contractor.



**TEXAS DEPARTMENT OF BANKING**

**[CONTRACTOR NAME]**

**By:** \_\_\_\_\_  
**Charles G. Cooper**  
**Commissioner**  
**Texas Department of Banking**  
**2601 North Lamar Boulevard**  
**Austin, Texas 78705-4294**

**By:** \_\_\_\_\_  
**Name:** \_\_\_\_\_  
**Title:** \_\_\_\_\_

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

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

**OFFICE OF CONSUMER CREDIT COMMISSIONER**

**BY:** \_\_\_\_\_  
**Leslie L. Pettijohn**  
**Consumer Credit Commissioner**  
**2601 North Lamar Boulevard, 2<sup>nd</sup> Floor**  
**Austin, Texas 78705-4294**

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

**DEPARTMENT OF SAVINGS AND MORTGAGE LENDING**

**BY:** \_\_\_\_\_  
**Caroline Jones**  
**Department of Savings and Mortgage Lending Commissioner**  
**2601 North Lamar Boulevard, 2<sup>nd</sup> Floor**  
**Austin, Texas 78705-4294**



## EXHIBIT B

### TO REQUEST FOR PROPOSAL FOR COMMERCIAL REAL ESTATE BROKERAGE SERVICES

#### EXECUTION OF PROPOSAL

RFP Number \_\_\_\_\_

**NOTE: THIS EXHIBIT MUST BE SIGNED AND RETURNED WITH THE PROPOSAL. PROPOSALS THAT DO NOT INCLUDE THIS EXHIBIT WILL BE DISQUALIFIED. THE PROPOSAL SHALL BE VOID IF FALSE STATEMENTS ARE CONTAINED IN THIS EXHIBIT.**

**By signature hereon, Respondent certifies that:**

All statements and information prepared and submitted in the Proposal responding to this RFP are current, complete, and accurate.

Respondent has not given, offered to give, nor intends to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted Proposal.

Neither Respondent nor the firm, corporation, partnership, or institution represented by Respondent or anyone acting for such firm, corporation, or institution has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws, 15 U.S.C. § 1 *et seq.*; or (2) communicated the contents of this Proposal either directly or indirectly to any competitor or any other person engaged in such line of business.

When a Texas business address is shown hereon, that address is, in fact, the legal business address of Respondent and Respondent qualifies as a Texas Resident Bidder under Texas Government Code § 2252.001(4).

Under Texas Government Code, § 2155.004, no person who prepared the specifications or this RFP has any financial interest in Respondent's Proposal. Neither Respondent nor any person or entity that will participate financially in this Contract has received compensation from the Finance Commission, the Agencies or any agency of the State of Texas for participation in preparation of specifications for this RFP. Furthermore, under § 2155.004, Respondent certifies that the individual or business entity named in this Proposal is not ineligible to receive the specified Contract under this RFP and acknowledges that this Contract may be terminated and payment withheld if this certification is inaccurate.

Respondent certifies either:

1. Respondent has not, and Respondent's employees have not, been convicted of a felony criminal offense; or
2. If such a conviction has occurred, Respondent has fully disclosed the facts and circumstances surrounding the conviction in its Proposal.

Under Section 231.006, Family Code, Respondent certifies that the individual or business entity named in the Proposal is not ineligible to receive the specified grant, loan or payment and acknowledges that this Contract may be terminated and payment may be withheld if this certification is inaccurate.

Any Proposal submitted under this RFP shall contain the names and social security numbers of every person or entity holding at least a twenty-five percent (25%) ownership interest in the business entity submitting the Proposal.

Respondent agrees that any payments due under any Contract awarded pursuant to this RFP will be applied towards any debt, including, but not limited to, delinquent taxes and child support that is owed to the State of Texas.

Respondent is not delinquent in the payment of any franchise taxes owed to the State of Texas.

Under Texas Government Code, § 669.003, relating to contracting with an executive of a state agency, Respondent represents that no person who, in the past four years, served as an executive of the Texas Department of Banking (**DOB**), the Department of Savings and Mortgage Lending (**SML**), or the Office of Consumer Credit Commissioner (**OCCC**), was involved with or has any interest in this Proposal or any Contract resulting from this RFP. If Respondent employs or has used the services of a former executive head of the DOB, the SML, or the OCCC, then Respondent shall provide the following information in order for the Proposal to be evaluated: name of former executive, name of State agency, date of separation from State agency, employee's position with Respondent, and date of employment with Respondent.

Respondent certifies that Respondent, if an individual, has not been an employee of any of the Agencies within the last 24 months.

The Agencies are federally mandated to adhere to the directions provided in the President's Executive Order (EO) 13224, Executive Order on Terrorist Financing – Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, effective 9/24/2001 and any subsequent changes made to it via cross-referencing respondents/vendors with the Federal General Services Administration's Excluded Parties List System (EPLS), (<https://www.sam.gov>), which is inclusive of the United States Treasury's Office of Foreign Assets Control (OFAC) Specially Designated National (SDN) list.

Respondent certifies that: (1) the responding entity and its principals are eligible to participate in this transaction and have not been subjected to suspension, debarment, or similar ineligibility determined by any federal, state or local governmental entity; (2) Respondent is in compliance with the State of Texas statutes and rules relating to procurement; and (3) Respondent is not listed on the federal government's terrorism watch list as described in Executive Order 13224. Entities ineligible for federal procurement are listed at <https://www.sam.gov>.

Under Texas Government Code, § 2155.006(b) a state agency may not accept a proposal or award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five-year period preceding the date of the proposal or award, has been: (1) convicted of violating a federal law, or (2) assessed a penalty in a federal civil or administrative enforcement action, in connection with a contract awarded by the federal government for relief, recovery, or

reconstruction efforts as a result of Hurricane Rita, as defined by Texas Utilities Code, § 39.459, Hurricane Katrina, or any other disaster occurring after September 24, 2005. Pursuant to Government Code, § 2155.006, the Respondent certifies that the individual or business entity named in this Proposal is not ineligible to receive the specified Contract and acknowledges that any Contract resulting from this RFP may be terminated and payment withheld if this certification is inaccurate.

Respondent represents that it is not claiming a preference under 34 T.A.C. § 20.38, or if it is claiming such a preference, that it is stated in Respondent's Proposal.

Respondent represents and warrants that the individual signing this Execution of Proposal is authorized to sign this document on behalf of Respondent and to bind Respondent under any contract resulting from this Proposal.

**RESPONDENT (COMPANY):** \_\_\_\_\_

**SIGNATURE (INK):** \_\_\_\_\_

**NAME (TYPED/PRINTED)** \_\_\_\_\_

**TITLE:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

**STREET:** \_\_\_\_\_

**CITY/STATE/ZIP:** \_\_\_\_\_

**TELEPHONE AND FACSIMILE NUMBERS:** \_\_\_\_\_

**TEXAS IDENTIFICATION NUMBER (TIN):** \_\_\_\_\_