

Resolution No. 12- 1876

CONSULTANT CONTRACT

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

THIS CONTRACT is made and entered into by and between the CITY OF DALLAS, a Texas municipal corporation, of Dallas County, Texas, (hereinafter called "City") and DESMAN, INC. d/b/a DESMAN ASSOCIATES, INC., a Delaware corporation fully authorized to transact business in the State of Texas, having its principal place of business at 20 N. Clark Street, 5th Floor, Chicago, Illinois 60606 (hereinafter called "Consultant").

1. PURPOSE

The purpose of this Contract is to state the terms and conditions under which Consultant shall produce a financial feasibility study for parking revenue to support the construction of a parking structure and/or surface parking to accommodate the Dallas Arboretum Botanical Gardens.

2. DESCRIPTION OF SERVICES

Consultant's services hereunder shall include, but shall not be limited to, the following:

A. Consultant shall perform all the services as set forth in Consultant's proposal of May 2, 2012, attached as Exhibit A, including the July 2nd Best and Final Offer, attached as part of Exhibit A, and made a part of this Contract for all purposes.

B. Consultant shall work closely with City's Director of the Park and Recreation Department, or his designee (hereinafter referred to as "Director"), and other appropriate City officials as directed and shall perform any and all related tasks required by the Director in order to fulfill the purposes of this Contract.

C. Consultant shall deliver to the Director all reports, designs, and related documents, information, or other data which are required to be produced and given to City in performing services under this Contract (hereinafter called "deliverables") in the format required by the Director.

3. PERFORMANCE OF SERVICES

Consultant and its employees or associates shall perform all the services under this Contract. Consultant represents that all its employees or associates who perform services under this Contract shall be fully qualified and competent to perform the services described in Section 2.

4. TERM

The term of this Contract shall begin on Director's written notice to proceed and end forty-two (42) working days from the date of the notice to proceed by the Director. Consultant understands and agrees that time is of the essence. All deliverables are to be completed and delivered to City by the termination date, or by the milestone or completion date or dates provided in a performance schedule agreed upon between Consultant and the Director, unless an extension of time, based upon good reasons presented by Consultant, is approved by the Director.

5. PAYMENT FOR SERVICES

In consideration of the professional services to be performed by Consultant under the terms of this Contract, City shall pay Consultant for services actually performed a fee not to exceed **SEVENTY-NINE THOUSAND SIX HUNDRED FIFTY AND 00/DOLLARS (\$79,650.00)**. If other conditions necessitate additional services or a change in services as provided in Section 6, any increase in compensation must be authorized and funded in advance by resolution of the City Council or, where applicable, by duly authorized administrative action signed by the City Manager and approved as to form by the City Attorney. Consultant's charges for its services are not to exceed similar charges of Consultant for comparable services to other customers. Payments to Consultant shall be in the amount shown by the billings and other documentation submitted and shall be subject to the Director's approval. All services shall be performed to the satisfaction of the Director and City shall not be liable for any payment under this Contract for services which are unsatisfactory and which have not been approved by the Director. The final payment due under this Contract will not be paid until the required deliverables have been received in the required format and approved by the Director. City may, at its option, offset any amounts due and payable under this Contract against any debt (including taxes) lawfully due to City from Consultant, regardless of whether the amount due arises pursuant to the terms of this Contract or otherwise and regardless of whether or not the debt due to City has been reduced to judgment by a court.

6. CHANGE IN SERVICES

City, acting through its Director, may request from time to time changes in the scope or focus of the activities, investigations and studies conducted or to be conducted by Consultant pursuant to this Contract. Any change in the scope or focus which varies significantly from the scope of services set out in Section 2 and would entail a significant increase in cost or expense to Consultant shall be mutually agreed upon by Consultant and the Director. Changes in the scope

which in the opinion of Consultant and the Director would justify an increase in compensation requiring additional funding by City must first be authorized as described in Section 5.

7. CONFIDENTIAL WORK

No deliverables or other information (including information given by City to Consultant to assist Consultant's performance under this Contract) developed by, given to, prepared by or assembled by Consultant under this Contract shall be disclosed or made available to any third party individual or organization by Consultant without the express prior written approval of the Director.

8. OWNERSHIP OF DOCUMENTS

Upon acceptance or approval by City, all deliverables prepared or assembled by Consultant under this Contract, and any other related documents or items shall become the sole property of City and shall be delivered to City, without restriction on future use. Consultant may make copies of any and all deliverables and related documents or items for its files. By execution of this Contract and in consideration of the fee for services to be paid under the Contract, Consultant hereby conveys, transfers and assigns to City all rights under the Federal Copyright Act of 1976 (or any successor copyright statute), as amended, all common law copyrights and all other intellectual property rights acknowledged by law in the project designs and other project data developed under this Contract.

9. CONSULTANT'S LIABILITY

Approval of City shall not constitute or be deemed a release of the responsibility and liability of Consultant, its employees, agents, associates, or subconsultants for the accuracy and competency of the deliverables prepared by Consultant, its employees, agents, associates, or subconsultants, as required under this Contract. In addition, approval of City shall not be deemed to be the assumption of any responsibility by City for any defect, error, or omission in the deliverables prepared by Consultant, its employees, agents, associates, or subconsultants.

10. COMPLIANCE WITH LAWS AND REGULATIONS

This Contract is entered into subject to and controlled by the Charter and ordinances of the City of Dallas, as amended, and all applicable laws, rules, and regulations of the State of Texas and the Government of the United States of America. Consultant shall, during the course of performance of this Contract, comply with all applicable City codes and ordinances, as amended and all applicable State and Federal laws, rules and regulations, as amended.

11. NOTICE OF CONTRACT CLAIM

This Contract is subject to the provisions of Section 2-86 of the Dallas City Code, as amended, relating to requirements for filing a notice of a breach of contract claim against City. Section 2-86 of the Dallas City Code, as amended, is expressly incorporated by reference and made a part of this Contract as if written word for word in this Contract. Consultant is expected

to fully comply with the requirements of this ordinance in the event of a claim, in addition to all other requirements in this Contract related to claims and notice of claims.

12. INDEPENDENT CONTRACTOR

Consultant's status shall be that of an independent contractor and not an agent, servant, employee, or representative of City in the performance of the services under this Contract. Consultant shall exercise independent judgment in performing services under this Contract and is solely responsible for setting working hours, scheduling or prioritizing the work flow and determining how the work is to be performed. No term or provision of this Contract or act of Consultant in the performance of this Contract shall be construed as making Consultant the agent, servant or employee of City, or making Consultant or any of its employees eligible for the fringe benefits, such as retirement, insurance and worker's compensation, which City provides its employees.

13. INDEMNITY

Consultant agrees to defend, indemnify and hold City, its officers, agents and employees, harmless against any and all claims, lawsuits, judgments, costs and expenses for personal injury (including death), property damage or other harm for which recovery of damages is sought, suffered by any person or persons, that may arise out of or be occasioned by Consultant's breach of any of the terms or provisions of this Contract, or by any negligent or strictly liable act or omission of Consultant, its officers, agents, employees or subconsultants, in the performance of this Contract; except that the indemnity provided for in this paragraph shall not apply to any liability resulting from the sole negligence or fault of City, its officers, agents, employees or separate contractors, and in the event of joint and concurring negligence or fault of Consultant and City, responsibility and indemnity, if any, shall be apportioned in accordance with the law of the State of Texas, without waiving any governmental immunity available to City under Texas law and without waiving any defenses of the parties under Texas law. The provisions of this paragraph are solely for the benefit of the parties to this Contract and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

14. INSURANCE REQUIREMENTS

A. Consultant shall procure, pay for, and maintain during the term of this Contract, with a company authorized to do business in the State of Texas and otherwise acceptable to City, the minimum insurance coverage contained in Attachment A, attached to and made a part of this Contract.

B. Approval, disapproval or failure to act by City regarding any insurance supplied by Consultant or its subconsultants shall not relieve Consultant of full responsibility or liability for damages, errors, omissions or accidents as set forth in this Contract. The bankruptcy or insolvency of Consultant's insurer or any denial of liability by Consultant's insurer shall not exonerate Consultant from the liability or responsibility of Consultant set forth in this Contract.

15. CONFLICT OF INTEREST

The following section of the Charter of the City of Dallas shall be one of the conditions, and a part of, the consideration of this Contract, to wit:

“CHAPTER XXII. Sec. 11. FINANCIAL INTEREST OF EMPLOYEE OR OFFICER PROHIBITED --

(a) No officer or employee shall have any financial interest, direct or indirect, in any contract with the City or be financially interested, directly or indirectly, in the sale to the City of any land, materials, supplies or services, except on behalf of the City as an officer or employee. Any violation of this section shall constitute malfeasance in office, and any officer or employee guilty thereof shall thereby forfeit the officer's or employee's office or position with the City. Any violation of this section, with knowledge, express or implied, of the person or corporation contracting with the City shall render the contract involved voidable by the City Manager or the City Council.

(b) The alleged violations of this section shall be matters to be determined either by the Trial Board in the case of employees who have the right to appeal to the Trial Board, and by the City Council in the case of other employees.

(c) The prohibitions of this section shall not apply to the participation by City employees in federally-funded housing programs, to the extent permitted by applicable federal or state law.”

16. GIFT TO PUBLIC SERVANT

City may terminate this Contract immediately if Consultant has offered, or agreed to confer any benefit upon a City employee or official that the City employee or official is prohibited by law from accepting.

For purposes of this section, “benefit” means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct or substantial interest, but does not include a contribution or expenditure made and reported in accordance with law.

Notwithstanding any other legal remedies, City may require Consultant to remove any employee of Consultant from the Project who has violated the restrictions of this section or any similar state or federal law, and obtain reimbursement for any expenditures made as a result of the improper offer, agreement to confer, or conferring of a benefit to a City employee or official.

17. ASSIGNMENT

This Contract provides for unique professional services. Consultant, therefore, shall not sell, assign, transfer or convey this Contract, in whole or in part, without the prior written consent of City's Director.

18. TERMINATION

City's Director may, at its option and without prejudice to any other remedy City may be entitled to at law, in equity or elsewhere under this Contract, terminate further work under this Contract in whole or in part for cause or for the convenience of City by giving at least ten (10) days advance written notice of termination to Consultant, with the understanding that all performance being terminated shall cease as of a date to be specified in the notice. City also has the right to request that Consultant assign and transfer to City all of Consultant's rights and obligations under existing subcontracts it has to perform Contract work in the event of termination under this Section. City shall compensate Consultant in accordance with the terms of this Contract for Contract work properly performed prior to the date of termination specified in the notice, following inspection and acceptance of same by City's Director. Consultant shall not, however, be entitled to lost or anticipated profits should City choose to exercise its option to terminate.

19. NOTICES

Except as otherwise provided in Section 11, any notice, payment, statement, or demand required or permitted to be given under this Contract by either party to the other may be effected by personal delivery in writing or by mail, postage prepaid. Mailed notices shall be addressed to the parties at the addresses appearing below, but each party may change its address by written notice in accordance with this section. Mailed notices shall be deemed communicated as of three (3) days after mailing.

If intended for City, to:

Ben Collins, Assistant Director
Business Development and Procurement Services
City of Dallas
1500 Marilla Street, 3FN
Dallas, Texas 75201

If intended for Consultant, to:

Pier Panicali, Secretary
Desman Associates
20 N. Clark Street, 4th Floor
Chicago, Illinois 60602

20. NONDISCRIMINATION

As a condition of this Contract, Consultant covenants that Consultant will take all necessary actions to insure that, in connection with any operations under this Contract, Consultant, its officers, employees and subcontractors, will not discriminate in the treatment or employment of any individual or groups of individuals on the grounds of race, color, religion, national origin, age, sex, or handicap unrelated to job performance, either directly, indirectly or

through contractual or other arrangements. Consultant shall also comply with all applicable requirements of the Americans with Disabilities Act, 42 U.S.C.A. §§12101-12213, as amended. In this regard, Consultant shall keep, retain and safeguard all records relating to this Contract or work performed hereunder for a minimum period of three (3) years from final Contract completion, with full access allowed to authorized representatives of City, upon request, for purposes of evaluating compliance with this and other provisions of the Contract.

21. RIGHT OF REVIEW AND AUDIT

City may review any and all of the services performed by Contractor under this Contract. City is granted the right to audit, at City's election, all of Contractor's records and billings relating to the performance of this Contract. Contractor agrees to retain such records for a minimum of three (3) years following completion of this Contract. Any payment, settlement, satisfaction, or release made or provided during the course of performance of this Contract shall be subject to City's rights as may be disclosed by an audit under this section.

22. VENUE

The obligations of the parties to this Contract shall be performable in Dallas County, Texas, and if legal action is necessary in connection with or to enforce rights under this Contract, exclusive venue shall lie in Dallas County, Texas.

23. GOVERNING LAW

This Contract shall be governed by and construed in accordance with the laws and court decisions of the State of Texas, without regard to conflict of law or choice of law principles of Texas or of any other state.

24. LEGAL CONSTRUCTION

In case any one or more of the provisions contained in this Contract shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Contract, and this Contract shall be considered as if such invalid, illegal, or unenforceable provision had never been contained in this Contract.

25. COUNTERPARTS

This Contract may be executed in any number of counterparts, each of which shall be deemed an original and constitute one and the same instrument. If this Contract is executed in counterparts, then it shall become fully executed only as of the execution of the last such counterpart called for by the terms of this Contract to be executed.

26. CAPTIONS

The captions to the various clauses of this Contract are for informational purposes only and shall not alter the substance of the terms and conditions of this Contract.

27. SUCCESSORS AND ASSIGNS

This Contract shall be binding upon and inure to the benefit of the parties and their respective administrators, successors and, except as otherwise provided in this Contract, their assigns.

28. ENTIRE AGREEMENT; NO ORAL MODIFICATIONS

This Contract (with all referenced Exhibits, attachments, and provisions incorporated by reference) embodies the entire agreement of both parties, superseding all oral or written previous and contemporary agreements between the parties relating to matters set forth in this Contract. Except as otherwise provided elsewhere in this Contract, this Contract cannot be modified without written supplemental agreement executed by both parties.

EXECUTED this the 8th day of August, 2012, by City, signing by and through its City Manager, duly authorized to execute same by Resolution No. 12- 1876 adopted by the City Council on August 8, 2012, and by Consultant, acting through its duly authorized officials.

APPROVED AS TO FORM:
THOMAS P. PERKINS, JR.
City Attorney

CITY OF DALLAS
MARY K. SUHM
City Manager

BY *Christine Lawrence*
Assistant City Attorney

BY *Jayme Brown*
Assistant City Manager

ATTEST:

PARK AND RECREATION BOARD:

BY *Diana M. Lee*
Secretary

BY *Jean Walne*
President

ATTEST:

CONSULTANT: DESMAN, INC. d/b/a
DESMAN ASSOCIATES, INC.,
a Delaware corporation

BY *[Signature]*
Corporate Secretary

BY *[Signature]*
President

Attachment A Insurance Requirements

SECTION A. Prior to the approval of this contract by the CITY, CONSULTANT shall procure, pay for and maintain the following insurance written by companies approved by the State of Texas and acceptable to CITY. The insurance shall be evidenced by delivery to the CITY, at the address shown in **REQUIRED PROVISIONS b.(i)**, certificates of insurance executed by the insurer or its authorized agent stating coverages, limits, expiration dates and compliance with all applicable required provisions. Upon request, the CITY shall be entitled to receive without expense, copies of the policies and all endorsements. **CITY HAS NO DUTY TO PAY OR PERFORM UNDER THIS CONTRACT OR AGREEMENT UNTIL SUCH CERTIFICATE HAS BEEN DELIVERED TO THE CITY** and no officer or employee shall have authority to waive this requirement.

SECTION B. The CITY reserves the right to review the insurance requirements of this section during the effective period of the contract and to modify insurance coverages and their limits when deemed necessary and prudent by City's Office of Risk Management based upon economic conditions, recommendation of professional insurance advisors, changes in statutory law, court decisions or other relevant factors. The CONSULTANT agrees to make any reasonable request for deletion, revision or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either party to the contract). Upon request by CITY, CONSULTANT shall exercise reasonable efforts to accomplish such changes in policy coverages and shall pay the cost thereof.

INSURANCE COVERAGE REQUIRED

SECTION C. Subject to CONSULTANT'S right to maintain reasonable deductibles, CONSULTANT shall obtain and maintain in full force and effect for the duration of this contract and any extension hereof, at CONSULTANT'S sole expense, insurance coverage in the following type(s) and amounts:

1. If CONSULTANT'S employees will be performing services under the contract at a CITY owned facility, then, **Workers' Compensation** with statutory limits; **Employers Liability** with minimum limits for bodily injury: a) by accident, \$100,000 per each accident b) by disease, \$100,000 per employee with a per policy aggregate of \$500,000.
2. **Commercial General Liability Insurance** including, but not limited to, Premises/Operations, Personal & Advertising Injury, Products/Completed Operations, Independent Contractors and Contractual Liability with minimum combined bodily injury (including death) and property damage limits of \$500,000 per occurrence, \$1,000,000 general aggregate.
3. If vehicles will be used in the performance of services under the contract, then, **Business Automobile Liability Insurance** covering owned, hired, and non-owned vehicles, with a minimum combined bodily injury (including death) and property damage limit of \$500,000 per occurrence.

4. If the services provided by the CONSULTANT include work by a licensed or certified person(s) who renders professional services, then, **Professional Liability Insurance** to provide coverage against any claim which the CONSULTANT becomes legally obligated to pay as damages arising out of the performance of professional services caused by any negligent error, omission or act with minimum limits of \$500,000 per claim, \$1,000,000 annual aggregate. If the CONSULTANT has higher limits available to them, then the City shall inure to the higher limit.

NOTE: If the insurance described in #2 or #4 above is written on a claims-made form, coverage shall be continuous (by renewal or extended reporting period) for not less than thirty-six (36) months following completion of the contract and acceptance by the City. Coverage, including any renewals, shall have the same retroactive date as the original policy applicable to this contract.

REQUIRED PROVISIONS

The CONSULTANT agrees that with respect to the above required insurance, all insurance contracts and certificate(s) of insurance will contain and state, in writing, the following required provisions:

- a. Name the City of Dallas and its officers, employees and elected representatives as additional insureds to all applicable coverages.
- b. State that coverage shall not be canceled, nonrenewed or materially changed except after thirty (30) days written notice by certified mail to:
 - (i) Office of Business Development & Procurement Services, Attention: Sandra Baxter, Buyer, 1500 Marilla, 3F-South, Dallas, Texas 75201 and
 - (ii) Director, Office of Risk Management, 1500 Marilla, 6A-South, Dallas, Texas 75201.
- c. Waive subrogation against the City of Dallas, its officers and employees, for bodily injury (including death), property damage or any other loss.
- d. Provide that the CONSULTANT'S insurance is primary insurance as respects the CITY, its officers, employees and elected representatives.
- e. Name the City department shown in **REQUIRED PROVISIONS** b.(i) as the Certificate Holder.

SECTION D. (1) Without limiting any of the other obligations or liabilities of the CONSULTANT, the CONSULTANT shall require each Subcontractor performing work under the contract, at the Subcontractor's own expense, to maintain during the term of the contract, levels of insurance that are necessary and appropriate for the services being performed, comply with all applicable laws and are consistent with industry standards. The Subcontractor's liability insurance shall name the CONSULTANT as an additional insured. (2) The CONSULTANT shall obtain and monitor the certificates of insurance from each Subcontractor. The CONSULTANT must retain the certificates of insurance for the duration of the contract and shall have the responsibility of enforcing insurance requirements among its subcontractors. The CITY shall be entitled, upon request and without expense, to receive copies of these certificates.

SECTION E. Approval, disapproval or failure to act by the CITY regarding any insurance supplied by the CONSULTANT or its subcontractors shall not relieve the CONSULTANT of full responsibility or liability for damages and accidents as set forth in the contract documents. Neither shall the bankruptcy, insolvency nor denial of liability by the insurance company exonerate the CONSULTANT from liability.