

ATTACHMENT B – ANTICIPATED CONTRACT *(for Reference Only)*
RFP No. 2023-01

THEF Contract No.: 23-xxx

<p>Federal Grant Title: Economic Development Administration, U.S. Department of Commerce American Rescue Plan Act Economic Adjustment Assistance Notice of Funding Opportunity CFDA: 11.307 Federal Award Date: 8/16/2022 Federal Award No. 08-69-05638 Authority: Sections 209 and 703 of the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. § 3121 <i>et seq.</i>) Research and Development? No</p>

CONTRACT

Section 1. Parties

This agreement (Contract) is entered into by and between the TEXAS HIGHER EDUCATION FOUNDATION hereinafter designated “RECEIVING AGENCY” and [VENDOR NAME] hereinafter designated “PERFORMING AGENT.” At times, RECEIVING AGENCY and PERFORMING AGENT are referred to singularly as “Party” and collectively as “Parties.”

RECEIVING AGENCY: Texas Higher Education Foundation
P.O. Box 12788
Austin, Texas 78711-2788

PERFORMING AGENT: [Vendor Name]
[Vendor Address]
[City, State Zip]

Section 2. Term of Contract

This Contract shall begin **upon execution** and shall expire **January 1, 2024**, or upon completion of PERFORMING AGENT’s work described herein, whichever occurs first, unless terminated earlier pursuant to the terms of this Contract (Contract Term). The Parties may amend this Contract to extend the Contract Term, provided both Parties agree in writing to do so, prior to the expiration date. Any extensions shall have the same terms and conditions, plus any approved changes.

Section 3. Purpose

The purpose of this Contract is for Performing Agent to [insert purpose and description].

Section 4. Statement of Work

[Insert Statement of Work.]

Section 5. Contract Amount and Payment for Services

5.1 Contract Amount

The total amount payable to PERFORMING AGENT by RECEIVING AGENCY pursuant to this Contract shall not exceed \$[] (Contract Amount). The Contract Amount includes any pre-authorized expenses incurred. Total fees and expenses to be reimbursed shall not exceed the Contract Amount.

Allowable Costs: Funds awarded under this Contract must be spent only on the SERVICES and expenses agreed upon by both Parties.

5.2 Invoices

PERFORMING AGENT shall send an invoice for SERVICES provided to RECEIVING AGENCY upon completion of all SERVICES. PERFORMING AGENT must submit documentation of work performed under this Contract to [THEF Points of Contact] or their successors, for review and approval to initiate the payment process. Submission of an invoice shall constitute PERFORMING AGENT's certification that the SERVICES have been performed in accordance with this Contract. Each invoice is primarily subject to review and approval by RECEIVING AGENCY to determine acceptable levels of performance. RECEIVING AGENCY will pay invoices of PERFORMING AGENT only upon acceptance of SERVICES.

Section 6. Terms and Conditions

6.1 Termination

Notwithstanding the termination or expiration of this Contract, the provisions of this Contract regarding confidentiality, indemnification, transition, records, right to audit and independent audit, property rights, dispute resolution, invoice and fee verification, and default shall survive the termination or expiration dates of this Contract.

6.1.1 Convenience

RECEIVING AGENCY, in its sole discretion, may terminate this Contract, in whole or in part, without a penalty, upon four (4) calendar days' written notice to PERFORMING AGENT. Such notice shall state the effective date of such termination and if no effective date is specified, the termination shall be effective upon the fifth (5th) day after the notification. In the event of such a termination, PERFORMING AGENT shall, unless otherwise mutually agreed upon in writing, immediately cease all SERVICES or if an effective date is specified, cease all SERVICES on the effective date. RECEIVING AGENCY will be liable only for

payments for reasonable and necessary SERVICES performed before the termination date, and any SERVICES agreed by RECEIVING AGENCY to be reasonable and necessary to cost-effectively wind-up the SERVICES.

6.1.2 *Cause*

In the event that PERFORMING AGENT fails to provide the agreed upon SERVICES according to the provisions of this Contract or fails to comply with any of the terms or conditions of this Contract, RECEIVING AGENCY may, upon written notice to PERFORMING AGENT, immediately terminate all or any part of this Contract. 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.

6.1.3 *Rights Upon Termination or Expiration*

Upon expiration or termination of this Contract for any reason, all documents or data provided by RECEIVING AGENCY shall be returned to RECEIVING AGENCY within three (3) business days after expiration or termination of this Contract. PERFORMING AGENT has no property interest in any documents or data provided by RECEIVING AGENCY.

RECEIVING AGENCY acknowledges that all advice and/or deliverables (written or oral) given by PERFORMING AGENT to RECEIVING AGENCY in connection with this engagement is intended solely for the benefit and use of RECEIVING AGENCY and THECB and no other person or entity. PERFORMING AGENT acknowledges that RECEIVING AGENCY is the owner of any deliverables produced pursuant this Contract. RECEIVING AGENCY may use, reproduce, or distribute any deliverables produced pursuant to this Contract to the extent such materials have been adopted by RECEIVING AGENCY entirely as its own and such materials contain no reference to PERFORMING AGENT or having been created or contributed to by PERFORMING AGENT.

Upon the termination, completion, or expiration of this Contract, exclusive ownership of all documents, work product produced, or other deliverables created by PERFORMING AGENT in connection with this Contract shall remain solely vested in RECEIVING AGENCY and shall be delivered to RECEIVING AGENCY within three (3) business days after expiration or termination of this Contract.

6.1.4 *Remedies*

Notwithstanding any exercise by RECEIVING AGENCY of its rights of early termination pursuant to this section, PERFORMING AGENT shall not be relieved of any liability to RECEIVING AGENCY for damages due to RECEIVING AGENCY by virtue of any breach of this Contract by PERFORMING AGENT or for amounts otherwise due to RECEIVING AGENCY by PERFORMING AGENT.

6.2 Amendment

This Contract may be modified only by written amendment executed by the Parties hereto; however, any amendment of this Contract that conflicts with Texas state laws shall be void ab initio.

6.3 Right to Audit; Records Retention

PERFORMING AGENT understands that acceptance of funds under this Contract, or indirectly through a subcontract under this Contract, acts as acceptance of the authority of RECEIVING AGENCY or any successor agency, as well as any external auditors selected by the United States, including, but not limited to the cognizant federal agencies and/or federal Offices of the Inspector General (collectively referred to as "Audit Entities"), to conduct an audit or investigation in connection with those funds. PERFORMING AGENT further agrees to cooperate fully with the Audit Entities in the conduct of an audit or investigation, including promptly providing all records requested. PERFORMING AGENT will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through PERFORMING AGENT and the requirements to cooperate is included in any subcontract it awards.

6.3.1 *Records and Accounts*

PERFORMING AGENT shall maintain its records and accounts in a manner which assures a full accounting for all funds received and expended by PERFORMING AGENT in connection with this Contract. These records and accounts (which includes all receipts of expenses incurred by PERFORMING AGENT) shall be retained by PERFORMING AGENT and made available for inspecting, monitoring, programmatic or financial auditing, or evaluation by RECEIVING AGENCY and by others authorized by law or regulation to do so for a period of not less than five (5) years from the date of completion of the Contract or the date of receipt by RECEIVING AGENCY of PERFORMING AGENT'S final claim for payment or final expenditure report or until any litigation/billing issues are resolved, whichever is later. If an audit has been announced, the records shall be retained until such audit has been completed. PERFORMING AGENT shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all documents and other information related to the services provided in this Contract. PERFORMING AGENT and any subcontractors shall provide any Audit Entities with any information such entity deems relevant to any monitoring, investigation, evaluation, or audit.

6.3.2 *Failure to Comply*

PERFORMING AGENT's failure to comply with this subsection (Right to Audit; Records Retention) shall constitute a material breach of this Contract and shall

authorize RECEIVING AGENCY to immediately assess appropriate damages for such failure. RECEIVING AGENCY reserves the right to require the reimbursement of any over-payments determined as a result of any audit or inspection of records on work performed under this Contract.

6.4 Equal Opportunity

PERFORMING AGENT represents and warrants that it shall not discriminate against any person on the basis of race, color, national origin, religion, political belief, sex, age, genetic information, or disability in the performance of this Contract.

6.5 Independent Contractor

PERFORMING AGENT is an independent contractor and shall perform the SERVICES under this Contract as an independent contractor. The employees or agents of PERFORMING AGENT shall not be deemed or construed to be the employees or agents of RECEIVING AGENCY for any purposes whatsoever.

PERFORMING AGENT agrees that it shall have the total responsibility in the areas of wrongful discharge lawsuits, unemployment issues, workers' compensation, employment taxes, and reimbursement due to losses in these areas. Consistent therewith, PERFORMING AGENT agrees that it shall provide its employees with all necessary unemployment and workers' compensation benefits and RECEIVING AGENCY is in no way a party to such arrangements.

Regarding its employees, PERFORMING AGENT shall have the sole authority to hire, fire, transfer, train, evaluate, discipline, pay, and assign work.

PERFORMING AGENT is completely responsible for all SERVICES performed under this Contract, including all such SERVICES provided by subcontractors hired by PERFORMING AGENT.

6.6 Limitations

PERFORMING AGENT shall have no authority to act for or on behalf of RECEIVING AGENCY except as expressly provided herein; no other authority, power, or use is granted or implied, and likewise may not incur any debt, obligation, expense, or liability on RECEIVING AGENCY's behalf. PERFORMING AGENT shall not use RECEIVING AGENCY's name, logo, or other likeness in any materials without prior written approval.

6.7 Eligibility and Certain Certifications:

6.7.1 *Suspension and Debarment*

PERFORMING AGENT represents and warrants that neither it nor its principals are debarred, suspended, proposed for debarment, declared ineligible, or otherwise excluded from participation in contracting by any state or federal agency.

Further, PERFORMING AGENT certifies that it and its principals are not suspended or debarred from doing business with the federal government and are not listed on the governmentwide exclusions in the System for Award Management (SAM). The Federal Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion attached as Attachment C is hereby incorporated into this Contract.

6.7.2 *Felony Criminal Convictions*

PERFORMING AGENT represents and warrants that neither it nor any of its employees, agents, or representatives, including subcontractors and employees thereof, who will be involved in this Contract have been convicted of a felony criminal offense or that if such a conviction has occurred, PERFORMING AGENT has fully advised RECEIVING AGENCY in writing of the facts and circumstances surrounding the conviction(s) and has received RECEIVING AGENCY's prior written consent to proceed.

6.7.3 *Deceptive Trade Practices; Unfair Business Practices*

PERFORMING AGENT represents and warrants that neither it nor its principals have been found liable for Deceptive Trade Practices under Texas Business and Commerce Code §§ 17.01-.955 or any unfair business practice in any administrative or court proceeding.

6.7.4 *Signature Authority*

PERFORMING AGENT represents and warrants that the individual submitting this document, and any other documents made part of this Contract, is authorized to sign such documents on behalf of PERFORMING AGENT and to bind PERFORMING AGENT under this Contract.

6.8 Confidentiality of Information and Records

During the term of this Contract, as well as thereafter, PERFORMING AGENT agrees that all information and documents provided by RECEIVING AGENCY shall be treated as restricted and be protected from disclosure to any third party. All information and documents in whatever form provided to PERFORMING AGENT by RECEIVING

AGENCY pursuant to this Contract shall not be used for any purpose other than providing SERVICES within the scope of this Contract and shall not be disclosed to any third party for any purpose unless RECEIVING AGENCY expressly consents in writing, in advance of each disclosure. PERFORMING AGENT understands that release of confidential information owned or possessed by RECEIVING AGENCY or THECB, including but not limited to information confidential under Texas Government Code §§ 552.139 and 2059.055, may be a violation of law punishable by criminal offense under Texas Government Code § 552.352.

6.8.1 *Protection of Confidential Information*

By execution of this Contract, PERFORMING AGENT agrees that it will not release any information that is confidential, including to any subcontractors, without express approval of RECEIVING AGENCY. PERFORMING AGENT agrees it will not use any such information, documents, and/or communications to the detriment of RECEIVING AGENCY or THECB or any officer or agency of the state of Texas. PERFORMING AGENT represents and warrants that it will comply with all applicable confidentiality and privacy laws and regulations, including but not limited to the Family Educational Rights and Privacy Act (FERPA), the Children's Online Privacy Protection Act (COPPA); and the Individuals with Disabilities Education Act (IDEA).

6.8.2 *Acknowledgment of No Access to Confidential Information*

PERFORMING AGENT acknowledges that this Contract does not allow PERFORMING AGENT access to any confidential information. Confidential information is defined as any confidential, sensitive, or personally identifiable information, or any student level or other FERPA confidential data. PERFORMING AGENT agrees it will not knowingly view, access, acquire, transfer, copy, or otherwise reproduce any confidential information.

6.8.3 *Data Sharing Agreement*

To the extent it becomes necessary for PERFORMING AGENT to receive confidential information for the completion of the SERVICES described in section 4. Above, a separate Data Sharing Agreement must first be executed by PERFORMING AGENT.

6.8.4 *Breach*

Any violation of these confidentiality provisions by PERFORMING AGENT may be deemed a material breach of this Contract.

6.8.5 Security Controls for THECB Data

Pursuant to Texas Government Code § 2054.138, to the extent that PERFORMING AGENT is authorized to access, transmit, use, or store THECB data, PERFORMING AGENT certifies that it will comply with the security controls that THECB determines are proportionate with THECB's or THEF's risk under this Contract based on the sensitivity of the THECB data. PERFORMING AGENT must periodically provide RECEIVING AGENCY with evidence that it meets the security controls required under this Contract.

6.8.6 Reporting Unauthorized Disclosures or Misuse of Confidential Information

While this Contract does not allow PERFORMING AGENT access to confidential information, in the event PERFORMING AGENT should in any way acquire confidential information, PERFORMING AGENT agrees to hold confidential information in strict confidence. PERFORMING AGENT shall, within one hour of confirmation, report to RECEIVING AGENCY any known and confirmed use and/or disclosure of confidential information not authorized by this Contract. PERFORMING AGENT's report shall identify, to the extent known: (a) the nature of the unauthorized use and/or disclosure, (b) the confidential information used and/or disclosed, (c) who made the unauthorized use and/or who received the unauthorized disclosure, (d) what PERFORMING AGENT has done or shall do to mitigate any deleterious effect of the unauthorized use and/or disclosure, and (e) what corrective action PERFORMING AGENT has taken or shall take to prevent future similar unauthorized use and/or disclosure. PERFORMING AGENT shall provide such other information, including a written report, as requested by RECEIVING AGENCY. PERFORMING AGENT shall be responsible for any data breach notifications and damages to affected individuals that are required by state or federal law.

6.9 Key Personnel

PERFORMING AGENT shall assign only qualified personnel to this Contract. PERFORMING AGENT, in its reasonable discretion, reserves the right to substitute appropriate key personnel to accomplish its duties so long as the substituted personnel are equally qualified to accomplish the required SERVICES. PERFORMING AGENT shall provide RECEIVING AGENCY written notice and obtain written approval from RECEIVING AGENCY prior to any change in key personnel involved in providing SERVICES under this Contract. Subcontractors providing SERVICES under this Contract shall meet the same requirements and level of experience as required of PERFORMING AGENT (see "Assignment or Subcontracting" provision for additional conditions regarding subcontracts). No subcontract under this Contract shall relieve PERFORMING AGENT of responsibility for ensuring the required SERVICES are provided. RECEIVING AGENCY, in its sole discretion, may require PERFORMING

AGENT to remove any employee, contractor, subcontractor, or vendor of PERFORMING AGENT from providing work or SERVICES under this Contract. PERFORMING AGENT shall replace such removed personnel expeditiously so that its SERVICES are performed on a timely basis.

6.10 Indemnification

To the extent allowed by law, PERFORMING AGENT shall defend, indemnify, and hold harmless RECEIVING AGENCY and its officers, employees, and contractors from and against all claims, actions, suits, demands, proceedings, costs, damages, and liabilities including without limitation attorneys' fees and court costs arising out of, connected with, or resulting from any negligent acts or omissions of PERFORMING AGENT or any agent, employee, subcontractor, or supplier of PERFORMING AGENT in the execution or performance of this Contract.

This subsection is not intended to and shall not be construed to require PERFORMING AGENT to indemnify or hold harmless RECEIVING AGENCY for any claims or liabilities resulting solely from the negligent acts or omissions of RECEIVING AGENCY or its employees.

6.11 Assignment or Subcontracting

No contractual right, interest, or obligation shall be assigned, delegated, or subcontracted by PERFORMING AGENT without prior written approval of RECEIVING AGENCY. As part of the approval process, PERFORMING AGENT shall provide copies of all proposed subcontracts that would assign, transfer, or convey any of its rights, titles, or interests hereunder or delegate any of its duties or obligations hereunder to a third party to RECEIVING AGENCY. No assignment, delegation, or subcontract approved by RECEIVING AGENCY shall relieve PERFORMING AGENT of any obligation or responsibility under this Contract.

6.12 Applicable Law and Venue

This Contract shall be governed by and construed in accordance with Texas state laws. The venue of any suit brought concerning this Contract or its incorporated documents is fixed in any court of competent jurisdiction in Travis County, Texas. Each Party shall comply with all applicable federal and state statutes, rules, and regulations.

6.13 Severability and Enforceability

The invalidity, illegality, or unenforceability of any provision of this Contract shall in no way affect the validity, legality, or enforceability of any other provision.

Each and every right granted to the Parties hereunder or under any other document delivered hereunder or in connection herewith, or allowed them by law or equity, shall be cumulative and may be exercised from time to time. No failure on the part of either Party to exercise and no delay in exercising any right will operate as a waiver thereof, nor will any single or partial exercise thereof or the exercise of any other right.

This Contract shall inure to the benefit of, and be binding upon, and be enforceable against, each Party and their respective representatives, successors, assigns, transferees, and delegates.

6.14 PERFORMING AGENT's Representations

PERFORMING AGENT hereby covenants, represents, and warrants that PERFORMING AGENT (including, for purposes of this section, its employees, consultants, subcontractors, and agents): (i) has the technical expertise and general skills necessary to perform the SERVICES in accordance with this Contract competently and professionally; (ii) is not a party to or bound by any agreement, obligation, or understanding that restricts or limits in any way PERFORMING AGENT's right to enter into this Contract or PERFORMING AGENT's right or ability to perform its obligations under this Contract; (iii) shall not use the trade secrets, intellectual property rights, copyrights, or other proprietary rights of any third party in the performance of PERFORMING AGENT's obligations under this Contract without having first lawfully obtained the right in writing to do so; and (iv) has the necessary equipment, facilities, and workers to perform its obligations under this Contract.

6.15 Force Majeure

RECEIVING AGENCY may grant relief from performance of this Contract if PERFORMING AGENT is prevented from performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributable to the fault or negligence of PERFORMING AGENT. The burden of proof for the need of such relief shall rest upon PERFORMING AGENT. PERFORMING AGENT shall notify RECEIVING AGENCY in writing if it believes that a force majeure may have occurred and RECEIVING AGENCY shall, in its sole discretion, determine if force majeure has occurred.

6.16 Applicable Taxes

This Contract shall not be construed so as to supersede the laws of the United States or the state of Texas that may accord RECEIVING AGENCY exemptions from payment of all taxes of whatever kind. More specifically, to the extent permitted by applicable law, RECEIVING AGENCY shall not directly or indirectly be liable for taxes of any kind. PERFORMING AGENT 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 PERFORMING AGENT or its employees. To the extent permitted by applicable law, RECEIVING AGENCY shall provide all applicable tax exemption certificates upon PERFORMING AGENT's request.

Section 7. Notice

7.1 Form of Notice

All notices and other communications in connection with this Contract shall be in writing.

7.2 Method of Notice

All notices must be given by: (i) electronic mail, (ii) express courier (with confirmation), (iii) registered or certified mail (return receipt requested), or (iv) personal delivery to the Party at the address specified in this Contract, or to the address that a Party has notified to be that Party's address for the purposes of this section.

7.3 Receipt of Notice

A notice in accordance with this Contract will be effective upon receipt by the Party to which it is given or, if mailed by registered or certified mail, upon the earlier of receipt or the third business day following mailing.

The address of PERFORMING AGENT for all purposes under this Contract and for all notices hereunder is listed on page 1 of this Contract.

The address of RECEIVING AGENCY for all purposes under this Contract and for all notices hereunder shall be:

Melissa I. Henderson, Executive Director
Texas Higher Education Foundation
1801 N. Congress Avenue, Suite 12.200
Austin, Texas 78701

Section 8. Entire Contract and Order of Precedence

This Contract between the Parties consists of the following documents, which, in the event of conflict, shall govern in the order of precedence listed below:

- (1) Any duly executed amendments to the final executed Contract;

- (2) The final executed contract, including its exhibits;
- (3) THEF's solicitation; and
- (3) Performing Agent's response to the solicitation.

This Contract, including its exhibit, contains the final, complete, and exclusive understanding of the Parties, and supersedes all prior, contemporaneous, oral, or written understandings, representations, and negotiations between the Parties relating to the subject matter of this Contract. The Parties further agree that this Contract may not in any way be explained or supplemented by a prior or existing course of dealing between the Parties, by usage of trade or custom, or by any prior performance between the Parties pursuant to this Contract or otherwise.

Section 9. Federal Terms and Conditions

9.1 Clean Air Act and the Federal Water Pollution Control Act

PERFORMING AGENT agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). Violations must be reported to RECEIVING AGENT, the Economic Development Administration, and the Regional Office of the Environmental Protection Agency (EPA).

9.2 Federal Certifications

PERFORMING AGENT certifies that, to the extent applicable, it has complied and will comply with all federal contracting requirements, including but not limited to the following:

- [2 C.F.R. § 200.323](#);
- [2 C.F.R. § 200.216](#); and
- [2 C.F.R. § 200.322](#).

Section 10. Federal Forms, Assurances, Certifications, and Reports

PERFORMING AGENT shall timely file with the proper authorities all forms, assurances, and reports required by state and federal laws and regulations. If THEF becomes aware of any failure by PERFORMING AGENT to comply with the foregoing laws and regulations, THEF reserves the right to report the failure to the proper authorities and deny any reimbursements due under this Contract or recoup any payments already made by THEF to PERFORMING AGENT.

The following federal certifications must be completed prior to execution of this Contract:

1. Certification Regarding Disclosure of Lobbying Activities (Attachment A) and, if applicable, Disclosure of Lobbying (Attachment A1); and
2. Certification Regarding the Federal Funding Accountability and Transparency Act (FFATA) (Attachment B).

The Certification Regarding Debarment and Suspension (Attachment C) is hereby incorporated into this Contract.

Section 11. PERFORMING AGENT's Approval

PERFORMING AGENT approves this Contract and agrees to provide the SERVICES in accordance with the terms of this Contract and Texas state laws. PERFORMING AGENT covenants that neither PERFORMING AGENT nor any of its employees presently has any interest or shall acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of SERVICES required to be performed under this Contract. PERFORMING AGENT also covenants that if the SERVICES of PERFORMING AGENT's employees are required for him/her to perform the obligations required under this Contract, only qualified employees shall be used. PERFORMING AGENT agrees to hold RECEIVING AGENCY harmless from and indemnify RECEIVING AGENCY against any and all claims, demands, or causes of action asserted by any third party as a result of or arising from PERFORMING AGENT's performance of SERVICES herein.

Section 12. Signatures

This Contract constitutes the entire agreement and understanding between the Parties with regard to its subject matter and supersedes and merges all prior discussions, writings, negotiations, understandings, and agreements concerning the provision of these SERVICES.

Having agreed to the terms herein, the Parties have signed and dated below and executed this contract in duplicate counterparts.

PERFORMING AGENT

By: _____

Name: _____

Title: _____

Date: _____

Texas Higher Education Foundation

By: _____

Name: Melissa I. Henderson

Title: Executive Director

Date: _____