

# CITY OF TOMBALL SERVICES AGREEMENT

THE STATE OF TEXAS §

COUNTY OF HARRIS §

## Description of Services: xxxx

This Agreement is made and entered into by the **City of Tomball** (referred to as the “City”), with an office at 501 James Street, Tomball, TX and, **DXI Industries, Inc.** (the “Company”), with an office at **300 Jackson Hill Street, Houston, Texas 77007**, City hereby engages the services of Company as an independent contract for Baseball Netting services, upon the following terms and conditions.

### 1. SCOPE OF AGREEMENT

- 1.1. The City hereby agrees to employ Company and Company agrees to perform the necessary services as set forth in Exhibit A – Scope of Work and Exhibit B – Contract Pricing, attached hereto and incorporated herein for all purposes.
- 1.2. In the event of a conflict among the terms of this Agreement and the Exhibit A, the term most favorable to the City, in the City’s sole discretion, shall control.

### 2. TERM OF AGREEMENT; TERMINATION

- 2.1. This Agreement shall be effective upon proper execution by the City. It shall be effective from **December 5, 2023 through December 4, 2024, with five additional one-year renewal options**. The City reserves the right to withdraw from the Agreement immediately if its governing body fails to appropriate funds necessary for the satisfaction of its contractual obligations. ***Either party may terminate this Agreement for any reason with ninety days (90) written notice to the other party.***
- 2.2. The City’s obligations under this Agreement shall not constitute a general obligation of the City or indebtedness under the constitution or laws of the State of Texas. Nothing contained herein shall ever be construed so as to require City to create a sinking fund or to assess, levy and collect any tax to fund its obligations under this Agreement.
- 2.3. The City reserves the right to enforce the performance of this Agreement in any manner prescribed by law or deemed to be in the best interest of the City in the event of breach or default of any provision of this Agreement, including immediate termination of this Agreement.

### 3. ENTIRE AGREEMENT

This Agreement represents the entire agreement between Company and the City and no prior or contemporaneous oral or written Agreements or representations shall be construed to alter its terms. No additional terms shall become part of this Agreement without the written consent of both parties and compliance with relevant state law. This Agreement supersedes all other prior agreements either oral or in writing.

### 4. ASSIGNMENT

Company shall not assign or subcontract its obligations under this Agreement without the prior written consent of the City.

## 5. COMPENSATION

For and in consideration of the services rendered by the Company pursuant to this Agreement, the City shall pay the Company only for the actual work performed under the Scope of Work, on the basis set forth in Attachment B, up to an amount not-to-exceed **\$225,000 annually**.

## 6. MODIFICATION OF RATES

Base Rate adjustments for changes in the Consumer Price Index (CPI) will be considered by the City no more than once per year during the renewal term of the Contract, during the month of October of each Contract Year.

## 7. IDEMNITY

### 7.1. DEFINITIONS

For the purpose of this section the following definitions apply:

- a. "City" shall mean all officers, agents and employees of the City of Tomball.
- b. "Claims" shall mean all claims, liens, suits, demands, accusations, allegations, assertions, complaints, petitions, proceedings and causes of action of every kind and description brought for damages.
- c. "Company" includes the corporation, company, partnership, or other entity, its owners, officers, and/or partners, and their agents, successors, and assigns.
- d. "Company's employees" shall mean any employees, officers, agents, subcontractors, licensees and invitees of Company.
- e. "Damages" shall mean each and every injury, wound, hurt, harm, fee, damage, cost, expense, outlay, expenditure or loss of any and every nature, including but not limited to:
  - i. injury or damage to any property or right
  - ii. injury, damage, or death to any person or entity
  - iii. attorneys' fees, witness fees, expert witness fees and expenses,
  - iv. any settlement amounts; and
  - v. all other costs and expenses of litigation
- f. "Premise Defects" shall mean any defect, real or alleged, which now exists or which may hereafter arise upon the premises.

**7.2. Indemnity**

**COMPANY AGREES TO INDEMNIFY, HOLD HARMLESS, AND DEFEND THE CITY FROM AND AGAINST LIABILITY FOR ANY CLAIMS FOR DAMAGES ARISING OUT OF THE COMPANY'S WORK AND ACTIVITIES CONDUCTED IN CONNECTION WITH THIS AGREEMENT.**

**COMPANY IS AN INDEPENDENT CONTRACTOR AND IS NOT, WITH RESPECT TO ITS ACTS OR OMISSIONS, AN AGENT OR EMPLOYEE OF THE CITY.**

**COMPANY MUST AT ALL TIMES EXERCISE REASONABLE PRECAUTIONS ON BEHALF OF, AND BE SOLELY RESPONSIBLE FOR, THE SAFETY OF COMPANY'S EMPLOYEES WHILE IN THE VICINITY WHERE THE WORK IS BEING DONE. THE CITY IS NOT LIABLE OR RESPONSIBLE FOR THE NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS OF COMPANY OR COMPANY'S EMPLOYEES.**

**THE CITY ASSUMES NO RESPONSIBILITY OR LIABILITY FOR DAMAGES WHICH ARE DIRECTLY OR INDIRECTLY ATTRIBUTABLE TO PREMISE DEFECTS.**

**THE CITY AND COMPANY MUST PROVIDE THE OTHER PROMPT AND TIMELY NOTICE OF ANY COVERED EVENT WHICH IN ANY WAY AFFECTS OR MIGHT AFFECT THE COMPANY OR CITY. THE CITY HAS THE RIGHT TO COMPROMISE AND DEFEND THE SAME TO THE EXTENT OF ITS OWN INTERESTS.**

**THE INDEMNITY OBLIGATIONS HEREIN SHALL SURVIVE THE TERMINATION OF THE AGREEMENT FOR ANY REASON AND SHALL SURVIVE THE COMPLETION OF THE WORK.**

**8. INSURANCE**

**8.1. AMOUNTS OF INSURANCE**

Company agrees to provide and to maintain the following types and amounts of insurance, for the term of this Contract:

TYPE	AMOUNT
(a) Workers Compensation	(where required – Statutory by State Law)
Employer's Liability	\$100,000 per occurrence

(b) Commercial (Public) Liability, including but not limited to:

- a. Premises/ Operations                      Combined Single Limit
- b. Independent Contractors
- c. Personal Injury
- d. Products/Completed Operations
- e. Contractual Liability (insuring above indemnity provisions)

All insured at combined single limits for bodily injury and property damage at \$500,000 per occurrence.

(c) Comprehensive Automobile Liability, in include coverage for:

- a. Owned/Leased Automobiles

b. Non-owned Automobiles

c. Hired Cars

All insured at combined single limits for bodily injury and property damage for \$500,000 per occurrence.

## 8.2. OTHER INSURANCE REQUIREMENTS

Company understands that it is its sole responsibility to provide the required Certificates and that failure to timely comply with the requirements of this article shall be a cause for termination of this Contract.

Insurance required herein shall be issued by a company or companies of sound and adequate financial responsibility and authorized to do business in the State of Texas. All policies shall be subject to examination and approval by the City Attorney's Office for their adequacy as to form, content, form of protection, and providing company.

Insurance required by this Contract for the City as additional insured shall be primary insurance and not contributing with any other insurance available to City, under any third party liability policy.

Company further agrees that with respect to the above required liability insurances, the City shall:

- a. Be named as an additional insured;
- b. Be provided with a waiver of subrogation, in favor of the City,
- c. Be provided with 30 days advance written notice of cancellation, nonrenewal, or reduction in coverage (all "endeavor to" and similar language of reservation stricken from cancellation section of certificate); and
- d. Prior to execution of this Agreement, be provided through the office of the City Attorney with their original Certificate of Insurance evidencing the above requirement.

The insurance requirements set out in this section are independent from all other obligations of Company under this Agreement and apply whether or not required by any other provision of this Agreement.

## 9. PAYMENT AND PERFORMANCE

Payment for services described in this Agreement will be made in accordance with the Texas Prompt Payment Act, Chapter 2251 of the Texas Government Code, or as subsequently amended.

## 10. VENUE; RECOVERY OF FEES; DISPUTE RESOLUTION; CHOICE OF LAW

Any suit or claim or cause of action regarding this Agreement shall be brought in Harris County, Texas, as the choice of venue and jurisdiction and site of performance by the parties. If the City is the prevailing party in any such action, the City may recover reasonable costs, including costs of court, attorney's fees, expert witnesses' fees, and trial consultants' fees. The parties further agree that the law of the State of Texas shall govern any interpretation of the terms of this Agreement.

## 11. COMPANY CERTIFICATIONS

Company certifies that neither it, nor any of its agents or employees, have or will offer or accept gifts or anything of value, or enter into any business arrangement, with any employee, official, or agent of the City.

Company certifies, pursuant to Texas Government Code Chapter 2270, that it does not boycott Israel and will not boycott Israel during the term of this Agreement. Company further certifies, pursuant to Texas Government Code Chapter 2252, Subchapter F, that it does not engage in business

with Iran, Sudan, or a foreign terrorist organization as may be designated by the United States Secretary of State pursuant to his authorization in 8 U.S.C. Section 1189.

12. NO WAIVER OF IMMUNITY

The City does not waive any statutory or common law right to sovereign immunity by virtue of the execution of this Agreement.

13. NOTICES

Any written notice provided under this Agreement or required by law shall be deemed to have been given and received on the next day after such notice has been deposited by Registered or Certified Mail with sufficient postage affixed thereto and addressed to the other party to the Agreement; provided, that this shall not prevent the giving of actual notice in any manner.

Notice to Company may be sent to the following address:

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14. CONTRACT ADMINISTRATOR

This Agreement shall be administered on the City's behalf by the Project Manager, and all notices, questions, or documentation, arising under this Agreement shall be addressed to the Project Manager at:

City of Tomball, Texas  
Attn: Project Manager  
501 James Street  
Tomball, Texas 77375

AGREED to and ACCPETED this 28 day of NOVEMBER, 2023.

DXI INDUSTRIES, INC.  
Company  
Lenny Leal  
Signature  
Lenny Leal  
Print Name  
Regional Sales Mgr.  
Title

THE STATE OF TEXAS §

COUNTY OF HARRIS §

This instrument was acknowledged before me on this \_\_\_ day of \_\_\_\_\_, 2023,  
by \_\_\_\_\_, on behalf of said entity.

\_\_\_\_\_  
Notary Public, State of Texas

AGREED to and ACCPETED this \_\_\_ day of \_\_\_\_\_, 2023.

City of Tomball

\_\_\_\_\_  
David Esquivel, PE  
City Manager

Attest:

\_\_\_\_\_  
Tracylynn Garcia  
City Secretary

## **EXHIBIT A**

### **CHLORINE AND SULFUR DIOXIDE GAS**

#### **GENERAL DESCRIPTION:**

The City of Tomball (City) is soliciting sealed bids for Bid Number 2024-04, for an annual agreement for the purchase of chlorine and sulfur dioxide gas for water treatment. Below are the General Specifications for all interested bidders.

The selected bidder will provide the chemicals required based on the full scope of the work.

#### **GENERAL SPECIFICATIONS**

It is the intention of the City of Tomball to enter into a contract with a reliable Vendor to furnish chlorine and sulfur dioxide gas in accordance with the following specifications for the Fiscal Year 2023-2024, beginning December 1, 2023 and ending November 30, 2024. The City of Tomball will have the right and option to extend the term for five (5) additional one (1) year period with the same terms and conditions. The City of Tomball will also have the right and option to terminate the Contract upon thirty (30) days written notice.

The services to be furnished in this agreement will be for the purchase and delivery of chlorine gas in 150-pound capacity cylinders and one (1) ton capacity cylinders and sulfur dioxide gas in one (1) ton capacity cylinders to be ordered as needed and delivered to the specified locations as deemed by the City according to the specifications listed below:

- I. Chemicals to be supplied:
  - A. Chlorine shall be 100% gas
    - i. Packaging and delivery:
      1. 150-pound cylinders
      2. 1-ton cylinders
    - ii. Estimate Yearly Usage:
      1. 150-pound cylinders: 250
      2. 1-ton cylinders: 50
  - B. Sulfur Dioxide shall be 100% gas
    - i. Packaging and deliver:
      1. 1-ton cylinders
    - ii. Estimated Yearly Usage:
      1. 1-ton cylinders: 25
- II. Vendor Requirements
  - A. Vendor agrees to provide an annual contract commencing on December 1, 2023 through November 30, 2024. All quoted prices will be effective for a period of one (1) year from the date of the contract with an option to renew for five (5) additional one-year terms.
  - B. All deliveries shall be made during normal business hours, Monday through Friday from 8 a.m. to 4 p.m. CST, where designated by the City of Tomball Public Works Department. No weekend deliveries will be permitted.

- C. All chemicals shall be purchased upon demand and delivered to the specified destination within 24 hours of request. If a logistics issue will delay a scheduled delivery than the delivery must be made early.
- III. Insurance Requirements
  - Vendors shall obtain and keep the duration of the contract insurance against claims for injuries to persons or damage to property, which arise from or in connection with the performance of the executed agreement. The Vendor shall pay the cost of such insurance.
  - A. The amount of insurance shall not be less than:
    - i. Commercial General Liability: Minimum of \$1,000,000 commercial general liability coverage with \$1,000,000 for each occurrence. Policy to include coverage for operations, contractual liability, personal injury liability, products/completed operations liability, broad-form property damage (if applicable) and independent Vendor's liability (if applicable) written on an occurrence form.
    - ii. Business Automobile Liability: \$1,000,000 combined single limit per occurrence for bodily injury and property damage for owned, non-owned and hired autos.
    - iii. Workers' Compensation and Employer's Liability: Worker's Compensation limits as required by the Labor Code of the State of Utah and employer's liability with limits of \$1,000,000 per accident.
  - B. Each insurance policy required by this Agreement shall have the following clauses:
    - i. "This insurance shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty days prior written notice by certified mail, return receipt requested, has been given to the City of Tomball".
    - ii. "It is agreed that any insurance or self-insurance maintained by the City of Tomball, its elected or appointed officials, employees, agents and volunteers shall be excess of Vendor's insurance and shall not contribute with insurance provided by this policy."
  - C. Each insurance policy required by this Agreement, excepting policies for Workers' Compensation, shall have the following clause in a separate endorsement:
    - i. "The City of Tomball, its elected and appointed officials, employees, volunteers and agents are to be named as additional insureds in respect to operations and activities of or on behalf of, the named insured as performed under Agreement with the City of Tomball."
  - D. Insurance is to be placed with insurers acceptable to and approved by the City of Tomball. Vendor's insurer must be authorized to do business in Texas at the time the license is executed and throughout the period the license is maintained, unless otherwise agreed to in writing by the City of Tomball. Failure to keep or renew coverage or to supply evidence of renewal will be treated as a material breach of contract.
  - E. City shall be given original certificates of insurance and endorsements effecting coverage required within, signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements are to be received by the city before work begins on the premises.
  - F. City reserves the right to require complete, certified copies of all required insurance policies at any time.
  - G. Any deductibles or self-insured retentions must be declared to and approved by the city. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respect to the City, their elected and appointed officials, employees, agents, and volunteers; or Vendor shall provide a financial guarantee satisfactory to the City



- guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- H. Vendor shall include all its Vendors as insured under its policies or shall furnish separate certificates and endorsements for each Vendor. All coverages for Vendor's Vendors shall be subject to all the requirements stated herein.
  - I. Nothing contained herein shall be construed as limiting in any way the extent to which Vendor may be held responsible for payments of damages to persons or property resulting from the activities of Vendor or its agents, employees, invitees, or Vendors upon the Premises during the License Period.

**Bid Number 2024-04: Chlorine & Sulfur Dioxide Gas**

Bid Form

Item	Chemical	Cylinder Amount	Price per Cylinder
1	Chlorine Gas	150 pound	\$281.00
2	Chlorine Gas	1 ton	\$2,097.00
3	Sulfur Dioxide Gas	1 ton	\$2,097.00