

AN ORDINANCE 2015-01-15-0019

**APPROVING THE TERMS AND CONDITIONS OF A FUNDING AGREEMENT WITH THE SAN ANTONIO MUSEUM OF ART, IN AN AMOUNT NOT TO EXCEED \$1,000,000.00, AND A LEASE OF PROPERTY LOCATED AT 218 ARDEN GROVE, FROM SAN ANTONIO MUSEUM OF ART TO THE CITY OF SAN ANTONIO AND A LEASEBACK OF THIS PROPERTY TO THE SAN ANTONIO MUSEUM OF ART, FOR A TERM OF TWENTY YEARS AT A RATE OF \$1 PER YEAR; AND AUTHORIZING PAYMENT; A 2012-17 BOND PROGRAM PROJECT LOCATED IN CITY COUNCIL DISTRICT 1.**

\* \* \* \* \*

**WHEREAS**, at an election held on May 12, 2012, the voters of the City of San Antonio voted to authorize the issuance of general obligation bonds to finance certain public projects referred to as “Library, Museum & Cultural Arts Improvements,” including \$1,000,000.00 for the relocation and expansion of the San Antonio Museum of Art’s (“Museum”) central physical plant; and

**WHEREAS**, subject to the sale of such bonds, the City shall provide up to \$1,000,000.00 to the Museum for use in accordance with the proposed Funding Agreement; and

**WHEREAS**, the City shall lease the Museum property, located at 218 Arden Grove, from the Museum and lease it back to the Museum for a rate of \$1 per year for a period of twenty years;  
**NOW THEREFORE:**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** The terms and conditions of a Funding Agreement with the San Antonio Museum of Art for an amount not to exceed \$1,000,000.00, subject to the availability of bond proceeds, and the Lease and Sublease of the property located at 218 Arden Grove are authorized and approved. The City Manager, or her designee, is authorized to execute such agreements. A copy of the Funding Agreement, which includes the Lease and Sublease, all previously executed by the Museum, is attached to this Ordinance as **Exhibit I**.

**SECTION 2.** Payment in the amount of \$1,000,000.00 in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 40-00412, San Antonio Museum of Art, is authorized to be encumbered with a purchase order and made payable to San Antonio Museum of Art, for relocation and expansion of the San Antonio Museum of Art (SAMA) central physical plant. Payment is limited to the amounts budgeted in the Operating and/or Capital Budget funding sources identified. All expenditures will comply with approved operating and/or capital budgets for current and future fiscal years.

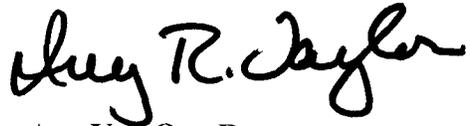
**SECTION 3.** Funding in the amount of \$1.00 for this Ordinance is available for Fund 11001000, Cost Center 5604010001 and General Ledger 5206010, as part of the Fiscal Year 2015 Budget, and payment not to exceed the budgeted amount is authorized and shall be encumbered with a purchase order.

**SECTION 4.** Funds generated by this Ordinance will be deposited into Fund 11001000, Internal Order 256000000004 and General Ledger 4401110.

**SECTION 5.** The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

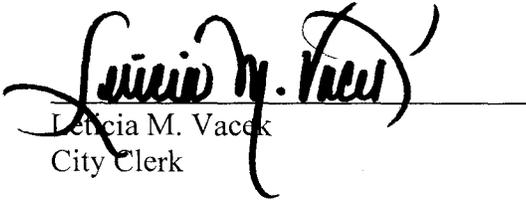
**SECTION 6.** This Ordinance shall take effect immediately upon the receipt of eight affirmative votes; otherwise it shall be effective ten days after its passage.

**PASSED AND APPROVED** this 15<sup>th</sup> day of January, 2015.



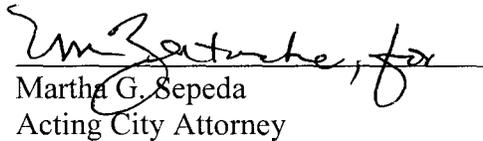
M A Y O R  
Ivy R. Taylor

**ATTEST:**



Leticia M. Vacek  
City Clerk

**APPROVED AS TO FORM:**



Martha G. Sepeda  
Acting City Attorney

<b>Agenda Item:</b>	16 ( in consent vote: 4, 5, 7, 8, 9, 10, 11, 14, 15, 16 )						
<b>Date:</b>	01/15/2015						
<b>Time:</b>	09:14:49 AM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance authorizing the execution of a Funding Agreement with the San Antonio Museum of Art in an amount not to exceed \$1,000,000.00 for capital improvements at the museum and the execution of a Lease of property, located at 218 Arden Grove, to the City from the San Antonio Museum of Art and a Lease Back of this property to the San Antonio Museum of Art for a term of twenty years at a rate of \$1 per year a 2012- 2017 Bond Program Project located in City Council District 1. [Peter Zanoni, Deputy City Manager; Mike Frisbie, Director, Transportation and Capital Improvements]						
<b>Result:</b>	Passed						
<b>Voter</b>	<b>Group</b>	<b>Not Present</b>	<b>Yea</b>	<b>Nay</b>	<b>Abstain</b>	<b>Motion</b>	<b>Second</b>
Ivy R. Taylor	Mayor		x				
Roberto C. Trevino	District 1		x				
Alan Warrick	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4	x					
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				x
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x			x	
Joe Krier	District 9		x				
Michael Gallagher	District 10		x				

# **EXHIBIT I**



## **I. TERM**

The term of this Funding Agreement shall commence upon execution of the Funding Agreement by the City Manager or designee (“Effective Date”) and continue until (a) the expiration of 20 years from the Effective Date or (b) final payment by the City of all bonds, as those bonds may be refinanced from time to time, whichever occurs later; or, notwithstanding (a) or (b), termination of this Funding Agreement as otherwise provided in this Funding Agreement (the “Term”). The Term of this Funding Agreement shall coincide with the terms of the Primary Lease and the Sub Lease.

## **II. GENERAL RESPONSIBILITIES OF GRANTEE**

2.01 The funding provided under this Funding Agreement is contingent upon the final execution of the Primary Lease and the Sub Lease, attached and incorporated as Exhibit A and B respectively. Provided Grantee receives the funding described in this Funding Agreement, Grantee accepts full responsibility for the performance of all services and activities described in this Funding Agreement.

2.02 The project, which Grantee is responsible for, includes the design and construction of (“Project”) in compliance with the approved Plans described below. Grantee will complete the relocation and expansion of the central physical plant including any necessary design and construction of the Project no later than May 1, 2017.

2.03 The Current budget estimate for the Project is \$6,200,000.00. Grantee shall provide all necessary funding for the Project beyond the City’s commitment of \$980,000.00, plus \$20,000.00 which will be retained by the City for a total of \$1,000,000.00, and provide evidence to City that all Project funds have been secured prior to the receipt of any funding under this Funding Agreement. In the event the scope of the project is adjusted downward, the City shall have the option of adjusting its commitment downward accordingly. City is not responsible for any cost overruns unless agreed to in writing in accordance with this Funding Agreement.

2.04 Grantee will provide to City their plans and specifications for the Project, including a construction schedule, (“Plans”) and such Plans shall be subject to the review and approval of City, acting in its capacity as grantor under this Funding Agreement. After approval by City, the Plans shall be attached and incorporated into this Funding Agreement as Exhibit C and Grantee shall not make any substantial changes to the Plans without the prior written approval of City. The approvals given in this Section do not relieve Grantee of the burden of obtaining all necessary governmental approvals, including those provided by City through its relevant development departments and relevant boards and commissions including the Historic and Design Review Commission, and the State of Texas Commission on Environmental Quality (Article 9102). Nor does City’s approval of the Plans release Grantee of the responsibility for the correction of Grantee’s mistakes, errors or omissions contained in the Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved.

2.05 All funds must be expended to achieve the stated public purpose of relocation, design and construction of the central physical plant in order for Grantee to maintain

accreditation from the American Association for Museums and be open to the public. Grantee is responsible for tracking the use of funds accordingly. Any improvements that impact both the public and non-public space will be apportioned.

2.06 Grantee shall submit all future changes to the CIMS Director or his designee for review and written approval to ensure their compatibility with the Plans.

2.08 City shall have authority to inspect the Project throughout the construction process to ensure compliance with the Plans. Grantee shall cause its design or construction professional to provide periodic certifications of construction certifying that construction has been conducted in compliance with the Plans. Upon request by City, any and all drawings must be certified by a qualified engineer or architect, licensed by the State of Texas and must conform to all applicable federal, state and local laws and regulations. Grantee shall submit said certification to the CIMS Director or his designee at the completion of the Project construction. City shall have the right to withhold funding until such certifications are provided.

2.09 Beginning from January 31, 2014, and on each succeeding January 31 throughout the Term of the Funding Agreement, Grantee shall provide to City an annual report (“Annual Report”). The Annual Report shall include the following:

2.09.1 Description of all activities that occurred during the previous calendar year that were available to the general public, including activity dates, estimated attendance, days and hours that the Project improvements are open to the general public, and the rules and regulations for use.

2.09.2 Evidence of insurance coverages, with City as additional insured, as outlined in Section 12 below.

2.09.3 Description of all maintenance activities, including routine, capital, and any deferred maintenance, for the previous calendar year and planned maintenance activities for the upcoming calendar year.

2.10 Unless written notification by Grantee to the contrary is received and approved by City, Grantee’s Director shall be Grantee designated representative responsible for the management of this Funding Agreement and the point of contact for City on all matters regarding this Funding Agreement.

### **III. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS**

3.01 Grantee warrants and represents that it will comply with all Federal, State and Local laws and regulations and will use all reasonable efforts to ensure said compliance by any and all contractors and subcontractors that may work on the Project.

3.02 Grantee agrees to procure all contracts under this Agreement through competitive contracting processes.

3.03 Plans must conform to Americans with Disabilities Act requirements and must be approved by the Texas Department of Licensing and Regulation before construction may begin. Inspections and final approval shall be the responsibility of Grantee.

3.04 PREVAILING WAGE RATE AND LABOR STANDARDS.

A. The requirements of Chapter 2258 of the Texas Government Code, entitled "Prevailing Wage Rates," shall apply to construction work performed on the City funded portion of this agreement. Grantee agrees that its construction contractor performing work on the City funded portion of the Project will comply with City Ordinance No. 71312 and its successors such as Ordinance No. 2008-11-20-1045 and will require subcontractors to comply with City Ordinance 71312 and its successors such as Ordinance No. 2008-11-20-1045 and shall not accept affidavits.

B. In accordance with the provisions of Chapter 2258 and Ordinance No. 2008-11-20-1045, Grantee shall request, upon advertisement of construction bids, and the City will provide Grantee with, the appropriate wage determination which includes the general prevailing rate of per diem wages in this locality for each craft or type of workman needed to perform the construction work. With respect to the City funded portion of the Project, Grantee is required, and shall require its construction contractor and all subcontractors to comply with each updated schedule of the general prevailing rates in effect at the time the Grantee calls for bids for construction of a given phase. With respect to the City funded portion of the Project, the Grantee is further required to cause the latest prevailing wage determination decision to be included in bids and contracts with the Grantee's general contractor and all subcontractors for construction of each Phase. Grantee is responsible for and shall collect and monitor weekly certified payrolls and perform site visits to ensure the prevailing wage is being paid to all workmen. City will audit certified payroll records as deemed necessary by City to confirm compliance with this Agreement.

C. Upon audit of the records and certified payrolls under this section, should the City or its auditors find any wage violations, the Grantee shall cause its construction contractor to forfeit as a penalty to the City \$60.00 for each laborer, workman, or mechanic employed, for each calendar day, or portion thereof, that such laborer, workman or mechanic is paid less than the said stipulated rates for any work done under said contract, by the contractor or any subcontractor. The establishment of prevailing wage rates in accordance with Chapter 2258, Texas Government Code shall not be construed to relieve the Grantee's contractor from its obligations under any federal or state law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed under this Agreement.

3.05 ENVIRONMENTAL Construction shall be in accordance with the all local, state and federal environmental requirements including all City applicable construction and development regulations as well as federal Environmental Protection Agency (EPA), Texas Department of State Health Services (TDSHS) and Texas Commission on Environmental Quality (TCEQ) rules and regulations and all other regulations and laws relating to the environment, asbestos containing materials, Hazardous Substances or exposure to such and shall

develop and operate the Project in accordance with the terms and conditions of this Funding Agreement.

### 3.06 SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY PROGRAM

A. The City, through City Ordinance No. 2010-06-17-0531, and as amended, has adopted and implemented a Small Business Economic Development Advocacy (“SBEDA”) Program. Information regarding the SBEDA Ordinance may be found on the City’s Economic Development Department (EDD) website and is also available in hard copy form upon request to the City. Grantee understands and agrees that for portions of the Project undertaken by Grantee in the award of contracts, subcontracts and other opportunities for design, construction and operation of the Project, this Funding Agreement shall be subject to the SBEDA Affirmative Procurement Initiative and goal as determined by the applicable SBEDA Goal Setting Committee.

B. The applied SBEDA Ordinance Compliance Provisions, Affirmative Procurement Initiative (API), goal and a Subcontractor/Supplier Utilization Plan is attached and incorporated into this Funding Agreement as Exhibit D SBEDA.

### **COMPLIANCE WITH BOND COVENANTS**

3.07 Grantee shall not use, or permit the use of, City Funds, or earnings thereon, or any other amounts or any property, the acquisition, construction, or improvement of which is to be financed directly or indirectly with City Funds or earnings thereon, in a manner which, if used or permitted to be used, respectively, would cause the interest on the City's debt to be includable in the gross income of the bond owners for federal income tax purposes. In addition, purposes which are NOT permissible include, but are not limited to religious activities, and, restaurants, cafés, and retail stores.

### **IV. OWNERSHIP, USE OPERATIONS**

4.01 Grantee hereby acknowledges that it will construct the Project in a manner consistent with benefit to the general public. Further, Grantee shall not employ, nor allow others to employ, discriminatory practices in the use of the Project improvements. Grantee hereby agrees that the programs and use described herein will continue for the Term of this Funding Agreement.

4.02 Grantee shall be responsible for the operation and maintenance of the Project facility and all associated costs will be the responsibility of Grantee.

4.03 The Project improvements shall facilitate the relocation and expansion of the central physical plant allowing the museum and cultural facilities to be open to public during the entire term of the Primary Lease, Sub Lease and the term of the Bonds issued in connection with the Project.

## **V. FUNDING AND ASSISTANCE BY CITY**

5.01 City shall reimburse Grantee for all eligible expenses incurred hereunder. Notwithstanding any other provisions of this Funding Agreement, the total of all payments and other obligations made or incurred by City hereunder shall not exceed the sum of \$980,000, plus the sum of \$20,000.00 that City shall retain for fiscal and project oversight, for total funding by City of \$1,000,000.00.

5.02 City shall not be obligated nor liable under this Funding Agreement to any party, other than Grantee and CIMS, for payment of any monies or provision of any goods or services.

5.03 Funding shall consist of reimbursements paid to Grantee for costs of design and construction of the Project, not to exceed \$980,000.00, and with \$20,000.00 to be retained by the City. The City funding provided under this Funding Amendment may only be used for the portions of the Project, which are dedicated to public use/public purpose. No City funds may be used for Grantee's personal office space or other non-public aspects of the Project.

5.04 All funding provided by City shall come from available bond proceeds. City shall not be responsible for the payment of any eligible expenses until sufficient bond funds are available.

5.05 The Director of Transportation and Capital Improvements ("TCI") or his designee shall be responsible for the administration of this Funding Agreement on behalf of City and the point of contact for all communication regarding this Funding Agreement from Grantee.

## **VI. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY GRANTEE**

6.01 Grantee agrees to maintain readily identifiable records that will provide accurate, current, separate, and complete disclosure of the status of any funds received pursuant to this Funding Agreement. Grantee further agrees:

- A. That maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Funding Agreement and with all generally accepted accounting practices; and
- B. That Grantee's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure made.

6.02 Grantee agrees to retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials (hereinafter "records") pertaining to activities pertinent to this Funding Agreement for a minimum of four years from the termination of this Funding Agreement. Records will be retained by Grantee in an electronic format and Grantee will forward the records to City at the end of the four-year period.

6.03 Grantee shall maintain a numbered interest bearing account in an FDIC insured financial institution for the receipt and disbursement of all funds received pursuant to this

Funding Agreement and further agrees that all checks and withdrawals from such account shall have itemized documentation in support thereof pertaining to the use of City funds provided under this Funding Agreement. All interest earned on funds in the account shall be applied to the allowable costs of construction of the Project in accordance with the provisions hereof.

6.04 City shall reimburse Grantee on a monthly basis upon receipt and approval of an invoice through the City's Project Reporting Information Management Exchange Link (COSA PRIMElink) or any other updated program used by City for this purpose.

6.05 All requests for reimbursement shall be submitted through the COSA PRIMElink. Grantee shall sign a Business Level Agreement and ensure that all of its employees or representatives utilizing PRIMElink sign and comply with an Individual User Agreement. Such requests for reimbursement shall be completed on PRIMElink and/or utilizing forms and instructions approved by CIMS. Prior to the initial request for reimbursement, Grantee must submit a schedule of values for payment to be approved by CIMS, which approval shall not be unreasonably withheld, conditioned, or delayed. Any changes to the schedule of values once approved will be processed and approved as task orders through the portal.

6.06 Prior to reimbursement, City will have the right to inspect work completed to ensure conformance with the approved Plans. Invoices should include all supporting documentation that costs have been incurred, as required by City.

6.07 City agrees to provide Grantee written notice regarding any expenditure the City reasonably determines to be outside the permissible parameters of this Funding Agreement. Said notice will provide Grantee 30 days from receipt of said notice to cure the deficiency or refund to the City any sum of money paid by City to Grantee determined to:

- A. Have not been spent by Grantee strictly in accordance with the terms of this Funding Agreement; or
- B. Not be supported by adequate documentation to fully justify the expenditure.

6.08 Upon termination of this Funding Agreement, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in Section 6 as a result of any auditing or monitoring by City, Grantee shall refund such amount to City within 30 working days of City's written request specifying the amounts disallowed or disapproved.

## **VII. ALLOWABLE EXPENDITURES**

7.01 Upon preparation of a construction plan and budget by Grantee, Grantee shall submit said budget to City for approval of any costs to be paid from funds received hereunder. Costs shall be considered allowable only if so approved in Grantee's construction budget, or otherwise approved in advance by City in writing, and incurred directly and specifically in the performance of and in compliance with this Funding Agreement and with all city, state and federal laws; regulations and ordinances affecting Grantee's operations. Only the following categories of costs shall be considered allowable:

- Construction Contract
- Construction change orders
- Architectural/Engineering Design contract and amendments
- Project Management/Construction Administration

Expenditures of the funds provided under this Funding Agreement shall only be allowed if incurred directly and specifically in the performance of and in compliance with this Funding Agreement, for the public purpose/public use stated herein and in compliance with all applicable city, state and federal laws, regulations and/or ordinances. No City funds provided through this Funding Agreement may be used for Grantee's internal office space or other non-public aspects of the Project.

7.02 The following shall not be considered allowable costs under this Funding Agreement:

- Personnel costs, salaries or wages paid directly by Grantee or other similarly affiliated organization
- Travel and travel-related expenses
- Costs or fees for consultant and/or professional services, except for those directly related to the projects
- Costs or fees associated with attendance at meetings, seminars, or conferences
- Costs or fees associated with regular maintenance and operation
- Fundraising
- Equipment and Furnishings, except for items of a capital nature which are being provided by Grantee's General Contractor and shown on the approved Plans and specifically approved by City.
- Advertising
- Construction of non-public aspects of the Project

7.03 Written requests for prior approval shall be Grantee's responsibility and shall be made 30 days from date necessary to permit a thorough review by City. Procurements and/or purchases which must be approved pursuant to the terms of this Funding Agreement shall be conducted entirely in accordance with all applicable terms, provisions and requirements hereof.

## **VIII. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS**

8.01 Grantee further represents and warrants that:

A. All information, data or reports heretofore or hereafter provided to City is, shall be, and shall remain complete and accurate as of the date shown on the information, data, or report, and that since said date shown, shall not have undergone any significant change without written notice to City.

B. It is financially stable and capable of fulfilling its obligations under this Funding Agreement and that Grantee shall provide City immediate written notice of any adverse

material change in the financial condition of Grantee that may materially and adversely effect its obligations hereunder.

C. No litigation or proceedings are presently pending or to Grantee's knowledge, threatened against Grantee.

D. No provision contained herein contravenes or in any way conflicts with the authority under which Grantee is doing business or with the provisions of any existing indenture or agreement of Grantee.

#### **IX. ACCESSIBILITY OF RECORDS & MONITORING**

9.01 At any time and as often as City may deem necessary, upon three days written notice, Grantee shall make all of its records pertaining to this Funding Agreement available to City or any of its authorized representatives, and shall permit City or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

9.02 Grantee agrees and represents that it will cooperate with City, at no charge to the City, to satisfy, to the extent required by law, any and all requests for information received by City under the Texas Public Information Act or related laws pertaining to this Funding Agreement.

9.03 Grantee agrees that City may carry out reasonable monitoring and evaluation activities so as to ensure compliance by Grantee with this Funding Agreement, and Grantee shall provide reasonable access to City related to such activities, and with all other laws, regulations and ordinances related to the performance hereof.

#### **X. TERMINATION**

10.01 City shall have the right to terminate this Funding Agreement for non-compliance, in whole or in part, at any time before the date of completion of the Term whenever City determines that Grantee has failed to comply with any term of this Funding Agreement with the City. City will provide Grantee with written notification as to the nature of the non-compliance, and give Grantee a 60 day period from the date of the City's written notification to cure any issue of non-compliance. Should GRANTEE fail to cure any default within this period of time, City may terminate this Funding Agreement immediately by providing written notice to Grantee, withhold further payments to GRANTEE and seek repayment of any and all funds disbursed by City.

10.02 In the event of termination of the Primary Lease or the Sub Lease, for any reason, City shall have the right to immediately terminate this Funding Agreement by providing written notice to Grantee. Upon termination of this Funding Agreement, Grantee must pay City a sum equal to the unamortized amount of money received by Grantee under both this Funding Agreement. Amortization is straight-line over the life of the City bonds as such bonds may be re-financed from time to time.

10.3 The Parties have the right to seek any remedy at law to which it may be entitled, in addition to termination and repayment of funds, if Grantee defaults under the material terms of this Funding Agreement and fails to cure such default within the cure period set forth above subject to any and all lawful defenses, counterclaims, offsets, settlements, deductions or credits to which Grantee may be entitled.

## XI. INDEMNITY

11.01 Grantee covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, the City and the elected officials, employees, officers, directors, volunteers and representatives of the City, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the City directly or indirectly arising out of resulting from or related to Grantee's activities under this Funding Agreement, including any acts or omissions of Grantee, any agent, officer, director, representative, employee, consultant or subcontractor of Grantee, and their respective officers, agents, employees, directors and representatives while in the exercise of the rights or performance of the duties under this Funding Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of City, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT GRANTEE AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

11.02 The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not indented to create or grant any rights, contractual or otherwise, to any other person or entity. Grantee shall advise the City in writing within 24 hours of any claim or demand against the City or Grantee known to Grantee related to or arising out of Grantee's activities under this Funding Agreement and shall see to the investigation and defense of such claim or demand at Grantee's cost. The City shall have the right, at its option and at its own expense, to participate in such defense without relieving Grantee of any of its obligations under this paragraph.

11.03 Defense Counsel - City shall have the right to select or to approve defense counsel to be retained by Grantee in fulfilling its obligation hereunder to defend and indemnify City, unless such right is expressly waived by City in writing. Grantee shall retain City approved defense counsel within seven business days of City's written notice that City is invoking its right to indemnification under this Funding Agreement. If Grantee fails to retain counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Grantee shall be liable for all costs incurred by City. City shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

11.04 Employee Litigation – In any and all claims against any party indemnified hereunder by any employee of Grantee, any subcontractor, anyone directly or indirectly

employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Grantee or any subcontractor under worker's compensation or other employee benefit acts.

11.05. Acceptance of the Plans by the City shall not constitute nor be deemed a release of the responsibility and liability of the Grantee, its employees, associates, agents or subcontractors for the accuracy and competency of their designs, work drawings, Plans and Specifications or other documents; nor shall such acceptance be deemed an assumption of responsibility or liability by the City for any defect in the designs, drawings, Plans and Specifications or other documents prepared for the Project.

## **XII. INSURANCE & BONDS**

12.01 Prior to the commencement of any work under this Funding Agreement, Grantee shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to the City's Transportation and Capital Improvements ("TCI") Department, which shall be clearly labeled "San Antonio Museum of Art – Central Physical Plant" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The City will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the City. The City shall have no duty to pay or perform under this Funding Agreement until such certificate and endorsements have been received and approved by the City's Transportation and Capital Improvements Department. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

12.02 The City reserves the right to review the insurance requirements of this Article during the effective period of this Funding Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Funding Agreement. In no instance will City allow modification whereby City may incur increased risk.

12.03 A Grantee's financial integrity is of interest to the City; therefore, subject to Grantee's right to maintain reasonable deductibles in such amounts as are approved by the City, Grantee shall obtain and maintain in full force and effect for the duration of this Funding Agreement, and any extension hereof, at Grantee's sole expense, insurance coverage written on an occurrence basis, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:

TYPE	AMOUNTS
1. Workers' Compensation 2. Employers' Liability	Statutory \$500,000/\$500,000/\$500,000
3. Broad form Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations b. Independent Contractors c. Products/Completed Operations d. Personal Injury e. Contractual Liability f. Explosion, Collapse, Underground g. Environmental Impairment/ Impact – sufficiently broad to cover disposal liability. h. Damage to property rented by you	For <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage  \$100,000
4. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles c. Hired Vehicles	<u>Combined Single Limit</u> for <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence
5. Builder's Risk	All Risk Policy written on an occurrence basis for 100% replacement cost during construction phase of any new or existing structure.

12.04 Grantee agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverages required of Grantee herein, and provide a certificate of insurance and endorsement that names the Grantee and the CITY as additional insureds. Grantee shall provide the CITY with said certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by City's Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this Funding Agreement. Such modification may be enacted by letter signed by City's Risk Manager, which shall become a part of the contract for all purposes.

12.05 As they apply to the limits required by the City, the City shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the 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 of the parties hereto or the underwriter of any such policies). Grantee shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City at the address provided below within 10 days of the requested change. Grantee shall pay any costs incurred resulting from said changes.

City of San Antonio  
Attn: Transportation and Capital Improvements Department  
P.O. Box 839966  
San Antonio, Texas 78283-3966

12.06 Grantee agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

- Name the City, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the City, with the exception of the workers' compensation and professional liability policies;
- Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the City is an additional insured shown on the policy;
- Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of the City.
- Provide advance written notice directly to City of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten calendar days advance notice for nonpayment of premium.

12.07 Within five calendar days of a suspension, cancellation or non-renewal of coverage, Grantee shall provide a replacement Certificate of Insurance and applicable endorsements to City. City shall have the option to suspend Grantee's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Funding Agreement.

12.08 In addition to any other remedies the City may have upon Grantee's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the City shall have the right to order Grantee to stop work hereunder, and/or withhold any payment(s) which become due to Grantee hereunder until Grantee demonstrates compliance with the requirements hereof.

12.09 Nothing herein contained shall be construed as limiting in any way the extent to which Grantee may be held responsible for payments of damages to persons or property resulting from Grantee's or its subcontractors' performance of the work covered under this Funding Agreement.

12.10 It is agreed that Grantee's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the City of San Antonio for liability arising out of operations under this Funding Agreement.

12.11 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Funding Agreement and that no claim or action by or on behalf of the City shall be limited to insurance coverage provided..

12.13 Grantee and any subcontractors are responsible for all damage to their own equipment and/or property.

12.14 Grantee shall comply with Texas Government Code Chapter 2253 provisions regarding performance and payment bonds on certain Public Works contracts (copies of required bonds must be provided to City prior to the start of construction).

### **XIII. NONDISCRIMINATION**

13.01 Grantee understands and will comply with the *Non-Discrimination Policy* of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein.

### **XIV. CONFLICT OF INTEREST**

14.01 Grantee covenants that neither it nor any member of its governing body or of its staff presently has any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Funding Agreement. Grantee further covenants that in the performance of this Funding Agreement, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

14.02 Grantee further covenants that no member of its governing body or of its staff shall possess any interest in, or use their position for, a purpose that is or gives the appearance of being motivated by desire for private gain for themselves or others, particularly those with which they have family, business, or other ties.

14.03 No member of City's governing body or of its staff who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this Funding Agreement shall:

- A. Participate in any decision relating to this Funding Agreement which may affect his or her personal interest or the interest of any corporation, partnership, or association in which he or she has a direct or indirect interest; nor
- B. Have any direct or indirect interest in this Funding Agreement or the proceeds thereof.

### **XV. POLITICAL OR RELIGIOUS ACTIVITY**

15.01 None of the activities performed hereunder shall involve, and no portion of the funds received hereunder shall be used, either directly or indirectly, for any political activity

including, but not limited to, an activity to further the election or defeat of any candidate for public office or for any activity undertaken to influence the passage, defeat or final content of local, state or federal legislation.

15.02 None of the performances rendered by Grantee under this Funding Agreement shall involve, and no portion of the funds received by Grantee under this Funding Agreement shall be used in support of, any sectarian or religious activity, nor shall any facility used in the performance of this Funding Agreement be used for sectarian instruction or as a place of religious worship.

## **XVI. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL**

16.01 All finished or unfinished reports, documents, data, studies, surveys, charts, drawings, maps, models, photographs, designs, plans, schedules, or other appended documentation to any proposal or contract, and any responses, inquiries, correspondence and related material submitted by Grantee, shall, upon receipt, become the property of City.

## **XVII. CONTRACTING**

17.01 Any work or services contracted hereunder shall be contracted only by written contract or agreement and, unless specific waiver is granted in writing by City, shall be subject by its terms to each and every provision of this Funding Agreement. Compliance by contractors with this Funding Agreement shall be the Grantee's responsibility. Grantee is responsible to ensure that all local, state and federal permits and approvals required by or for this Funding Agreement are obtained.

17.02 City shall in no event be obligated to any third party, including any sub-contractor of Grantee, for performance of or payment for work or services.

17.03 By signing this Funding Agreement, Grantee certifies that it will not award any funds provided under this Funding Agreement to any party which it knows to be debarred, suspended or otherwise excluded from or ineligible for participation in programs with the City.

## **XVIII. CHANGES AND AMENDMENTS**

18.01 Unless this Agreement expressly provides otherwise, any alterations, additions, or deletions to the terms hereof shall only be by amendment in writing executed by both City and Grantee under authority granted by formal action of the Parties' respective governing bodies.

18.02 It is understood and agreed by the Parties that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the Term of this Funding Agreement and that any such changes shall be automatically incorporated into this Funding Agreement without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

## **XIX. ASSIGNMENTS**

19.01 Grantee shall not transfer, pledge or otherwise assign this Funding Agreement, any interest in and to same, or any claim arising hereunder, without first procuring the written approval of City. Any attempt at transfer, pledge or other assignment shall be void *ab initio* and shall confer no rights upon any third person.

## **XX. SEVERABILITY OF PROVISIONS**

20.01 If any clause or provision of this Funding Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to the City Charter, City Code, or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the Parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Funding Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the Parties hereto that in lieu of each clause or provision of this Funding Agreement that is invalid, illegal, or unenforceable, there be added as a part of the Funding Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

## **XXI. NON-WAIVER OF PERFORMANCE**

21.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Funding Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Funding Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either Party hereto of any provision of this Funding Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

21.02 No act or omission of either Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to either Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

21.03 No representative or agent of City may waive the effect of the provisions of this Article without formal action from the City Council.

## **XXII. ENTIRE AGREEMENT**

22.01 This Funding Agreement constitutes the final and entire agreement between the Parties and contains all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Funding Agreement shall be deemed to exist or to bind the Parties unless same be in writing, dated subsequent to the date hereof and duly executed by the Parties.

22.02 INCORPORATION OF ATTACHMENTS. Each of the Attachments listed below is an essential part of the Funding Agreement, which governs the rights and duties of the Parties.

- Exhibit A – Lease Agreement
- Exhibit B – Sub Lease Agreement
- Exhibit C – Project Description, Budget, and Schedule
- Exhibit D – SBEDA
- Exhibit E – Determination Letter from the Internal Revenue Service
- Exhibit F – Description of property and map

### **XXIII. NOTICES**

23.01 For purposes of this Funding Agreement, all official communications and notices among the Parties shall be deemed sufficient if in writing and mailed, registered or certified mail, postage prepaid, to the addresses set forth below:

**CITY:** Director of Transportation and Capital Improvements  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

**GRANTEE:** San Antonio Museum of Art  
200 W. Jones Avenue  
San Antonio, Texas 78215

Notice of change of address by either Party must be made in writing and mailed to the other Party's last known address within five business days of such change.

### **XXIV. FORCE MAJURE**

24.01 City or Grantee may grant temporary relief from any deadline for performance of any term of this Funding Agreement if either Party is prevented from compliance and performance by an act of war, order of legal authority, act of God, terrorism, social unrest, strike, natural disaster, supply shortage, or other unavoidable cause not attributed to the fault or negligence of the Party. To obtain an extension based upon Force Majeure, Grantee must provide written notice to City of the occurrence of the Force Majeure event within 10 days following the date that Grantee becomes aware of the event and the fact that it will delay Grantee's performance of its obligations under this Funding Agreement. City will not unreasonably withhold its consent.

### **XXV. RELATIONSHIP OF PARTIES**

25.01 Grantee is an independent contractor. Nothing herein shall be deemed or construed by the Parties, or by any third party, as creating the relationship of employer and employee, officer, principal and agent, partners, joint ventures or any other similar such relationship between the Parties.

**XXVI. TEXAS LAW TO APPLY**

26.01 This Funding Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the Parties created hereunder are performable in Bexar County, Texas and venue of any court action brought directly or indirectly by reason of this Funding Agreement shall be in Bexar County, Texas.

**XXVII. GENDER**

27.01 Words of any gender used in this Funding Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

**XVIII. CAPTIONS**

28.01 The captions contained in this Funding Agreement are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Funding Agreement.

**XXIX. LEGAL AUTHORITY**

29.01 Grantee represents, warrants, assures, and guarantees that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Funding Agreement and to perform the responsibilities herein required.

29.02 The signer of this Funding Agreement for Grantee represents, warrants, assures and guarantees that he or she has full legal authority to execute this Funding Agreement on behalf of Grantee and to bind Grantee to all terms, performances and provisions herein contained.

29.03 This Funding Agreement shall be binding on and inure to the benefit of the Parties and their respective heirs, executors, administrators, legal representatives, successors and assigns, except as otherwise expressly provided herein.

*Signatures on the next page*

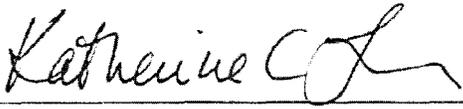
**FUNDING AGREEMENT**

**EXECUTED BY THE PARTIES IN TRIPPLICATE ORIGINALS**, each of which shall have the full force and effect of an original on this the 9<sup>th</sup> day of January, 2015.

**CITY OF SAN ANTONIO,**  
a Texas Municipal Corporation

**GRANTEE: SAN ANTONIO MUSEUM OF  
ART,** a 501(C)3 Non-profit

\_\_\_\_\_  
Sheryl Sculley  
City Manager

  
\_\_\_\_\_  
Katherine C. Luber  
Director

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

**EXHIBIT A**

**Primary Lease Agreement  
San Antonio Museum of Art Central Physical Plant**

---

**Table of Contents**

1. Basic Information, Definitions..... 20  
2. Grant ..... 21  
3. Rent..... 22  
4. Term..... 22  
5. Tenant’s Affirmative Promises..... 22  
6. Tenant’s Negative Promises. .... 23  
7. Landlord’s Affirmative Promises. .... 23  
8. Landlord’s Negative Promises..... 24  
9. Condemnation..... 24  
10. Assignment and Subletting. .... 28  
11. Holdover. .... 25  
12. Default..... 25  
13. Dispute Resolution..... 26  
14. Environmental..... 26  
15. Prohibited Interests in Contracts..... 28  
16. Appropriations. .... 26  
17. Alterations..... 26  
18. Miscellaneous. .... 29  
19. Public Information. .... 30

---

**1. Basic Information, Definitions.**

**Authorizing Ordinance:**

**Landlord:** San Antonio Museum of Art

**Landlord’s Address:** 200 W. Jones Avenue, San Antonio, Texas 78215

**Tenant:** City of San Antonio

**Tenant’s Address:** P.O. Box 829966, San Antonio, Texas 78283-3966  
(Attention: )

**Premises:** 0.514 acres (Parcel 19004) located at 218 Arden Grove  
San Antonio, Texas 78215 - as depicted on **Exhibit F**

**Permitted Use:** Any and all lawful uses

**Lease Commencement:** The date of commencement of the Funding Agreement

**Binding Date:** This agreement is binding on the Parties on the later of  
(A) the effective date of the Authorizing Ordinance or

(B) the later of the signatures of the two Parties.

**Term:** Until (a) the expiration of 20 years from the Lease Commencement Date; (b) final repayment by the City of all bonds providing funding for the Funding Agreement, as those bonds may be refinanced from time to time, whichever occurs later or (c) termination of the Funding Agreement as otherwise provided herein.

**Rent:** \$1.00 per year

**Essential Services:** (a) once the central plant is constructed, basic utilities necessary for the normal operation of the central physical plant will be essential; (b) compliance with the Funding Agreement and the Sub Lease.

**Funding Agreement:** Agreement between City of San Antonio and San Antonio Museum of Art for the Central Physical Plant pursuant to the Authorizing Ordinance.

<b>Sub Lease:</b>	Lease whereby the San Antonio Museum of Art subleases the Premises from City of even date herewith pursuant to the Authorizing Ordinance.
<b>Exhibits:</b>	The following Exhibits to this Lease are attached and incorporated into it for all purposes: Exhibit F: Description of Premises
<b>Construction Commencement Date:</b>	

## 2. Grant.

2.01. Landlord leases the Premises to Tenant, and Tenant takes the Premises from Landlord on the terms and conditions of this Lease. Landlord and Tenant are contemporaneously entering into the Funding Agreement, this Primary Lease, and the Sub Lease. The durations of the Primary Lease and the Sub Lease coincide. At the expiration of both leases, neither of the leases are an encumbrance upon the fee title to the Premises.

2.02. Tenant's right of occupancy begins at the Lease Commencement Date, which is to occur concurrently with the execution of the Funding Agreement..

2.03. Tenant may use the Premises as needed upon providing Landlord 10 days notice.

2.04. This agreement is binding on the Parties on the later of (a) the effective date of the Authorizing Ordinance or (b) the later of the signatures of the two Parties.

2.05. Tenant will have access to and may occupy the Premises before, during and after any construction, which Landlord is expected to undertake and complete during the term as called for in the Funding Agreement.

2.06. Landlord is granting this Lease (also referred to as the “Primary Lease”) on the condition that Tenant sublease the Premises back to Landlord. The durations of the Primary Lease and the Sub Lease coincide. At the expiration of both leases, neither of the leases are an encumbrance upon the fee title to the Premises.

### **3. Rent.**

Landlord acknowledges receipt in full of all Rent due under this Lease for the full term.

### **4. Term.**

4.01. The Term is as stated above.

4.02. Tenant may terminate this Lease at any time without cause by delivering 30-days prior written notice to Landlord. Tenant may also terminate this Lease if the Funding Agreement should be terminated.

### **5. Tenant’s Affirmative Promises.**

Tenant will:

5.01. Obey (a) all applicable laws relating to the use, condition, and occupancy of the Premises; (b) any requirements imposed by utility companies serving or insurance companies covering the Premises; and (c) any rules and regulations for the Premises adopted by Landlord.

5.02. Allow Landlord to enter the Premises to perform Landlord’s obligations, inspect and operate on the Premises.

5.03. Submit in writing to Landlord any request for repairs, replacement, and maintenance that are obligations of Landlord.

5.04. Vacate the Premises promptly upon expiration of the Term, subject to any holdover rights.

5.05. On request, execute an estoppel certificate that states the Lease Commencement Date, and duration of the lease, identifies any amendments to the lease, describes any rights to extend the Term or purchase rights, lists defaults by Landlord, and provides any other information reasonably requested. Tenant need not sign any certificate that purports to modify Tenant’s obligations in any respect, except for a change in the address for notice or payment of rent.

5.06. Provide Landlord a minimum of 10 days prior notice of Tenant’s intent to use the Premises.

## **6. Tenant's Negative Promises.**

Tenant will not:

- 6.01. Use the Premises for any purpose other than the Permitted Use.
- 6.02. Create a nuisance.
- 6.03. Interfere with any construction or renovations nor any of Landlord's normal business operations or management of the Premises.
- 6.04. Permit waste.
- 6.05. Use the Premises in any way that would increase insurance premiums or void insurance.
- 6.06. Alter the Premises.
- 6.07. Allow a lien to be placed on the Premises.
- 6.08. Assign this lease or sublease any portion of the Premises without Landlord's written consent, which must not be unreasonably withheld.

## **7. Landlord's Affirmative Promises.**

Landlord will:

- 7.01. Lease to Tenant the Premises for the entire Term, beginning on the Lease Commencement Date.
- 7.02. Obey all applicable laws with respect to Landlord's operations.
- 7.03. Provide the Essential Services.
- 7.04. Be responsible for procuring and paying for all utilities, repair, replacement and maintenance of the Premises including all structures, equipment or facilities serving the Premises.
- 7.05. Timely pay all charges for all utility services to the Premises when due.
- 7.07. Pay all real estate taxes, general and special assessments, and other charges of any kind levied on or assessed against the Premises and all interests in the Premises and all improvements and other property on them during the lease term, whether belonging to Landlord or to Tenant. Landlord must pay all the taxes, charges, and assessments directly to the public officer charged with their collection not fewer than 15 days before delinquency.

## **8. Landlord's Negative Promises.**

Landlord will not:

8.01. Interfere with Tenant's possession of the Premises as long as Tenant is not in default.

8.02. Unreasonably withhold consent to a proposed assignment or sublease.

8.03. Unreasonably deny any request by Tenant for use of the Premises or a portion of the Premises assuming Tenant has provided Landlord 10 days prior notice.

## **9. Condemnation.**

9.01. If the Premises or any part of them are taken by condemnation as a result of any action or proceeding in eminent domain, or are transferred in lieu of condemnation to any authority entitled to condemn, this article governs Landlord's and Tenant's interests in the award or consideration for the transfer and the effect of the taking or transfer on this lease.

9.02. If the entire Premises are taken or so transferred, this lease and all of the rights, titles, and interests under it ceases on the date that title to the Premises vests in the condemning authority. All proceeds of condemnation are Landlord's.

9.03. If only part of the Premises is taken or transferred, this lease terminates if, in Tenant's opinion, the remainder of the Premises is in such a location, or is in such form, shape, or reduced size, that Tenant's business cannot be effectively and practicably operated on it. In such case, this lease and all rights, title, and interest under it cease on the date that title vests in the condemning authority. All proceeds of condemnation are Landlord's.

9.04. If part of the Premises is taken or transferred and, in Tenant's opinion, the remainder of the Premises is in such that Tenant's business can be effectively and practicably operated on the remaining Premises, this Lease terminates only as to the portion of the Premises taken or transferred. The termination is as of the date title vests in the condemning authority. The Lease continues as to the portion not taken or transferred. As of the termination date, Tenant's rent is reduced during the unexpired portion of this lease to that proportion of the annual rent that the value of the part of the Premises not taken bears to the value of the whole. Such values are to be determined as of the date immediately before any actual taking. All proceeds of condemnation are Landlord's.

9.05. In any case, Tenant is free to seek a separate condemnation award for any loss of or diminishment to its leasehold.

## **10. Assignment and Subletting.**

10.01. Any attempt at transfer, assignment, or subletting of Tenant's rights, duties, and obligations hereunder, without the Landlord's prior written consent, is void and terminates the Lease. Tenant must, upon such termination, immediately and peacefully vacate the Premises within three days after Landlord's notice to Tenant.

10.02. Landlord's consent on one occasion does not waive need for consent to any later attempted transfer, assignment, or subletting.

10.03. Landlord need not consent to a sublease to a Landlord-affiliated entity.

## **11. Holdover.**

11.01. If the Lease has not been earlier terminated according to its terms and Tenant is current on rent, both after the Initial Term and after any renewals provided for in this instrument, Tenant may hold-over for up to six additional months on a month-to-month basis. Tenant need not give advance notice of intent to exercise this hold-over right, and it need not hold over all of the allowable six months. The rent during a holdover is the same as the rent for the term being held over, and all other terms of this Lease apply. Council's authorization of this instrument is authority for the City as Tenant to enter into the hold-over period without further council action if the Director of Transportation and Capital Improvements Department deems the holdover beneficial.

11.02. If prior notice is required to initiate a renewal under this Lease, the required notice period may include time in the hold-over period. If the required notice of renewal is less than the hold-over period, Tenant may deliver notice in the hold-over period.

11.03. Whenever this Lease refers to its term, events to occur during the term, or rights and obligations of Landlord and Tenant during the term, a hold-over period is considered a part of the term.

## **12. Default.**

12.01. If Tenant defaults in performing any obligation arising out of this lease and does not correct the default within 10 days after receipt of written notice to Tenant and any lender, notice to whom is required by this lease, Landlord may terminate this lease.

12.02. Termination of this lease is Landlord's sole remedy for default. Under no circumstances is Tenant liable for any damages under this Lease. Termination of this Lease terminates the Sub Ground Lease and the Funding Agreement, with the consequences for termination as provided in those agreements.

12.03. *Waiver of Liens.* As required by Article XI, § 9 of the Texas Constitution, Landlord waives all common law and statutory liens in the property of Tenant, including the lien that might otherwise arise under § 54.021 of the Texas Property Code.

### **13. Dispute Resolution.**

13.01. Before bringing any action arising out of this Agreement, including an action for declaratory relief but not an action specifically excepted below, the disputants must first submit in good faith to mediation. The Parties may not assert limitations, laches, waiver, and estoppels

### **13. Dispute Resolution.**

13.01. Before bringing any action arising out of this Agreement, including an action for declaratory relief but not an action specifically excepted below, the disputants must first submit in good faith to mediation. The Parties may not assert limitations, laches, waiver, and estoppel based upon attempts to mediate.

13.02. Filing suit on a claim that should be mediated hereunder waives the filer's right to demand mediation. But one Party's waiver does not affect another Party's right. A defendant does not waive mediation for so long as, within a reasonable time after appearing, the defendant gives written notice to the plaintiff or its counsel of intent to require compliance with this paragraph.

13.03. Mediation must be conducted in San Antonio, Bexar County, Texas.

13.04. The Party desiring relief has the burden to initiate mediation. Waiting for another Party to initiate mediation does not waive the right to it.

13.05. If the Parties can otherwise agree on a mediator, they may do so. Alternatively, either party may petition any court of competent jurisdiction to appoint a mediator. The only predicate issues the court need consider before appointing a mediator are whether (i) the copy of the contract before the court is authentic and (ii) the contract was duly signed and delivered by all Parties to be bound to mediate. If neither of those issues is denied under oath, the court may appoint a mediator upon motion, without trial.

13.06. Mediator fees must be borne equally.

13.07. Parties need not mediate before going to court (i) for either Party to seek emergency injunctive relief or (ii) for Landlord to seek forcible entry and detainer relief against Tenant.

### **14. Environmental.**

14.01. "Environmental Laws" means applicable federal, state, and local laws relating to protection of the public health, welfare, and the environment, including without limitation, those laws relating to the storage, handling, and use of chemicals and other hazardous substances, those relating to the generation, processing, treatment, storage, transport, disposal, or other management of waste materials of any kind, and those relating to the protection of environmentally sensitive areas.

14.02. "Hazardous Material" means "hazardous substance," "pollution or contaminant," "petroleum," and "natural gas liquids," as those terms are defined by or used in Environmental

Laws, or that are regulated because of their effect or potential effect on human health and the environment.

14.03. "Release" means depositing, spilling, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing.

14.04. Landlord represents that the Premises and the property of which the Premises are a part, if applicable, comply with all applicable Environmental Laws. Landlord must cause its employees, agents, contractors, tenants, and other persons occupying or present on or about the property on which the Premises are located (other than the Premises) (collectively, "Occupants") to comply with all applicable Environmental Laws.

14.05. Landlord represents and warrants that there has been no Release and there is no threat of Release of any Hazardous Materials on, onto, or from the Premises and that the Premises has not contained and does not contain any asbestos, underground or aboveground storage tanks, or "PCBs" or "PCB items," as defined in 40 CFR § 761.3.

14.06. Tenant must not allow the Release of any Hazardous Material from its use of the Premises on, onto, or from the Property. Tenant further must not to handle, use, or otherwise manage any Hazardous Material on the Premises or the Property in violation of any Environmental Laws or in any but a reasonable and prudent manner.

14.07. Landlord represents and warrants that, (i) with regard to activities and conditions on the Property Landlord has not given, nor was it required to give, and Landlord has not received, any notice that: (a) the Property violates any Environmental Law; (b) there has been a Release, or threat of Release, of Hazardous Materials from the Property; (c) the Landlord may be or is liable, in whole or in part, for costs of cleaning up, remediating, removing, or responding to a Hazardous Materials release; or (d) the Property is subject to a lien under any Environmental Laws; and (ii) no conditions currently exist, or are reasonably foreseeable, that would give rise to such a notice. In case of receipt of such notice, Landlord must immediately provide Tenant a copy.

14.08. Before the Lease Commencement Date, Landlord must permit Tenant and its, representatives and contractors to enter upon the Premises at reasonable times and in a reasonable manner to investigate environmental matters. Tenant may perform such tests, including without limitation, subsurface testing, soils, and groundwater testing, and any other tests, as the Tenant, in its sole discretion, determines are necessary to identify environmental concerns. The investigation is at Tenant's sole cost. Tenant must minimize the intrusion upon and inconvenience to Landlord and the ongoing operations at the Premises. If Tenant performs any tests that disturb the Property, Tenant must restore the Property. Tenant is responsible for damages arising from its testing on the Property and for the proper disposal of any wastes generated by its testing.

14.09. Landlord must indemnify Tenant and its officials, employees, and contractors from loss, cost, liability, or expense (including, but not limited to, attorneys' fees and expenses, including all attorney's fees and expenses incurred by Tenant in enforcing this indemnity) arising

from or relating to breach of Landlord's environmental representations, warranties, and covenants.

### **15. Prohibited Interests in Contracts.**

15.01. The City Charter of San Antonio and its Ethics Code prohibit a City officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as city owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

(i) a City officer or employee;

(ii) his parent, child or spouse;

(iii) a business entity in which the officer or employee, or his parent, child or spouse owns (i) 10% or more of the voting stock or shares of the business entity, or (ii) 10% or more of the fair market value of the business entity;

(iv) a business entity in which any individual or entity above listed is a (i) subcontractor on a City contract, (ii) a partner, or (iii) a parent or subsidiary business entity.

15.02. Landlord warrants and certifies as follows:

(i) Landlord and its officers, employees and agents are neither officers nor employees of the City.

(ii) Landlord has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City's Ethics Code.

15.03. Landlord acknowledges that City's reliance on the above warranties and certifications is reasonable.

### **16. Appropriations.**

16.01. All City obligations under this instrument are funded subject to the discretion of City Council whether to appropriate funding. If City Council fails to appropriate money for any obligation under this agreement, the City may terminate this agreement and have no further liability.

### **17. Alterations.**

17.01. Any physical additions or improvements to the Premises made by Tenant will become the property of Landlord. Landlord may require that Tenant, at the end of the Term and at Tenant's expense, remove any physical additions and improvements, repair any alterations,

and restore the Premises to the condition existing at the Lease Commencement Date or the condition upon completion of any construction pursuant to the Funding Agreement, normal wear excepted.

## **18. Miscellaneous.**

18.01. This Agreement is entered into in San Antonio, Bexar County, State of Texas. **Its Construction And The Rights, Remedies, And Obligations Arising Under It Are Governed by The Laws of The State Of Texas.** Both Parties' obligations under this Agreement are performable in San Antonio, Bexar County, Texas, and venue for any action arising under this agreement is only in Bexar County, Texas.

18.02. If any part of this Agreement is found invalid or unenforceable, the finding does not affect the remainder.

18.03. This Agreement inures to the benefit of and binds the heirs, representatives, successors, and permitted assigns of each Party. This clause does not authorize any assignment not otherwise authorized.

**18.04. This Written Agreement Together With the Funding Agreement and the Sub Ground Lease, Represents The Final Agreement Between The Parties And May Not Be Contradicted By Evidence Of Prior, Contemporaneous, Or Subsequent Oral Agreements Of The Parties. There Are No Oral Agreements Between The Parties.**

18.05. This Agreement may not be changed orally but only by a written agreement, signed by the party against whom enforcement of any modification is sought. No such modification, express or implied, affects the right of the modifying party to require observance of either (i) any other term or (ii) the same term or condition as it applies on a subsequent or previous occasion.

18.06. This Agreement benefits the Parties and their successors and permitted assigns only. It has no third party beneficiaries.

18.07. *Notices.* Notices must be in writing and by certified mail, return receipt requested, or by independent delivery service addressed to the parties at their respective addresses set forth at the beginning. If sent by certified mail, notice is complete three days after deposit, properly addressed and postage prepaid, with the United States Postal Service. If sent other than by certified mail, notice is complete on the date shown on the receipt. Address for notice may be changed by giving notice.

18.08. Paragraph captions are for ease of reference only and do not affect the interpretation.

18.09. This Agreement may be executed in multiple counterparts, each of which is an original, whether or not all Parties sign the same document. Regardless of their number, counterparts constitute only one agreement. In making proof of this agreement, one need not

produce or account for more counterparts than necessary to show execution by or on behalf of all Parties.

18.10. The Parties must execute and deliver such additional documents and instruments as may be necessary. No such additional documents can alter the rights or obligations of the Parties stated in this agreement.

18.11. The Director of Building and Equipment Services may, without further council action, agree to, sign, and deliver on behalf of the City all consents, certificates, memoranda, estoppels, attornments, and modifications of nonmaterial rights and obligations arising under this Lease and may declare defaults and pursue remedies for such defaults. This paragraph does not authorize lease amendments or renewals without City Council consent.

18.12. Whenever this Lease states a number more than one way, either by using both words and numerals or by stating a fixed amount and a calculation for arriving at an amount, and there is a conflict, the highest number controls.

18.13. As long as Tenant pays the rent and other charges under this lease and observes the covenants and terms of this lease, Tenant will lawfully and quietly hold, occupy, and enjoy the Premises during the lease term without being disturbed by Landlord or any person claiming under Landlord, except for any portion of the Premises that is taken under the power of eminent domain.

18.14. Time is of the essence under this agreement.

18.15. The rights and remedies under this Lease are cumulative, and either Party's using any right or remedy does not preclude or waive its right to use any other remedy. The rights and remedies are given in addition to any other rights the Parties may have by law, statute, ordinance, or otherwise.

18.16. The relationship between Landlord and Tenant is at all times solely that of Landlord and Tenant, not that of partners or a joint venture.

## **19. Public Information.**

Landlord acknowledges that this instrument is public information within the meaning of Chapter 552 of the Texas Government Code and accordingly may be disclosed to the public. Nothing in this agreement waives an otherwise applicable exception to disclosure.

*Signatures on the next page*

**20. Appropriations.**

All obligations of the City of San Antonio under this instrument are subject to the discretion of City Council whether to appropriate funding. If the City Council fails to appropriate money for any obligation under this agreement, the City may terminate this agreement and have no further liability.

**EXECUTED BY THE PARTIES IN TRIPLICATE ORIGINALS**, each of which shall have the full force and effect of an original this the \_\_\_ day of January, 2015.

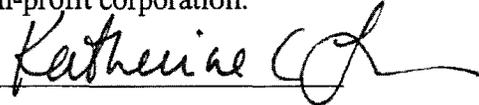
**Tenant**

**Landlord**

**City of San Antonio**, a Texas municipal corporation

**San Antonio Museum of Art**, a Texas 501(c)3 non-profit corporation.

Signature: \_\_\_\_\_

Signature:  \_\_\_\_\_

Printed Name: Mike Frisbie

Printed Name: Katherine C. Luber

Title: Director Transportation & Capital Improvements Department & City Engineer

Title: Director

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

Date: January 6, 2015

**Approved as to Form:**

\_\_\_\_\_  
City Attorney

**EXHIBIT B**

**Sub Lease  
San Antonio Museum of Art**

---

**Table of Contents**

1. Demise of Premises..... 33  
2. Lease Term..... 33  
3. Rent..... 33  
4. Taxes..... 34  
5. Utilities..... 34  
6. Use of Premises..... 34  
7. Construction by Sub-Tenant..... 34  
8. Encumbrance of Leasehold Estate..... 34  
9. Repairs, Maintenance, and Restoration..... 35  
10. Mechanic’s Liens..... 35  
11. Condemnation..... 36  
12. Insurance..... 36  
13. Indemnification..... 38  
14. Environmental Matters..... 40  
15. Assignment and Subletting..... 41  
16. Default and Remedies..... 41  
17. Dispute Resolution..... 41  
18. Miscellaneous..... 42  
19. Prohibited Interests in Contracts..... 44  
20. Public Information..... 45  
21. Appropriations..... 45

---

**Authorizing Ordinance:**

**Sub-Landlord:** City of San Antonio

**Sub-Landlord’s  
Address:** P.O. Box 839966, San Antonio, Texas 78283-3966

**Address for Rent  
Payment:** P.O. Box 839966, San Antonio, Texas 78283-3966

**Sub-Tenant** San Antonio Museum of Art

**Sub-Tenant’s Address:** 200 W. Jones Avenue, San Antonio, Texas 78215

**Premises:** 0.514 acres (parcel 19004) located at 218 Arden  
Grove, San Antonio, Texas 78215 - as depicted on  
**Exhibit F**

**Permitted Use:** Any and all lawful purposes related to operation of a central physical plant.

**Lease Commencement Date:** The date of commencement of the Funding

**Term:** Until (a) the expiration of 20 years from the Lease Commencement Date; or (b) final repayment by the City of all bonds providing funding for the Funding Agreement, as those bonds may be refinanced from time to time, whichever occurs later or (c) termination of the Funding Agreement as otherwise provided herein.

**Rent:** \$1 per year

**Funding Agreement:** Agreement of even date herewith between Sub-Landlord and Sub-Tenant for funding San Antonio Museum of Art pursuant to the Authorizing Ordinance.

**Primary Lease:** Lease whereby the City leases the Premises from San Antonio Museum of Art pursuant to the Authorizing Ordinance.

<b>Exhibits:</b>	The following Exhibits to this Lease are attached and incorporated into it for all purposes: Exhibit F: Description of Premises
<b>Construction Commencement Date:</b>	

**1. Demise of Premises.**

1.01. Sub-Landlord leases the Premises to Sub-Tenant, and Sub-Tenant leases the Premises from Sub-Landlord under the terms of this Lease. Sub-Tenant is to have and hold the Premises, together with all rights, privileges, easements, appurtenances, and immunities belonging to or in any way appertaining to them. The foregoing includes easements; rights, and privileges of Sub-Landlord, existing now or at any time during the lease term, in, to, or under adjacent streets, sidewalks, alleys, party walls, and property contiguous to the Premises and reversions that may later accrue to Sub-Landlord as owner of the Premises by reason of the closing of any street, sidewalk, or alley.

1.02. Sub-Landlord and Sub-Tenant are contemporaneously entering into the Funding Agreement, the Primary Lease, and this Sub Lease. The durations of the Primary Lease and the Sub Lease coincide. At the expiration of both leases, neither of the leases are an encumbrance upon the fee title to the Premises.

**2. Lease Term.**

The Term is as stated above.

**3. Rent.**

Landlord acknowledges receipt in full of all Rent due for the first 20 years of the Term.

#### **4. Taxes.**

Taxes are handled according to the Primary Lease.

#### **5. Utilities.**

Utilities are handled according to the Primary Lease.

#### **6. Use of Premises.**

6.01. Sub-Tenant may use the Premises only for the Permitted Use, unless Sub-Landlord otherwise consents in writing. Sub-Tenant must not use or store, or permit to be used or stored, on the Premises any hazardous or toxic substances or materials.

6.02. Sub-Tenant must not use or permit the Premises to be used for any activity violating any applicable local, state, or federal law, rule, or regulation. Sub-Tenant is not considered to have violated this provision unless:

- a. Sub-Landlord has notified Sub-Tenant in writing specifying the alleged violation;
- b. There has been a final adjudication by a court of competent jurisdiction that the specified use violates the law, rule or regulation; and
- c. Sub-Tenant has had a reasonable time after final adjudication to cure the specified violation.

#### **7. Construction by Sub-Tenant.**

##### *General Conditions*

7.01. Sub-Tenant may erect, maintain, alter, remodel, reconstruct, rebuild, replace, and remove buildings and other improvements on the Premises and may change the contour of the Premises, subject to the following:

- a. Sub-Tenant must comply with the Funding Agreement's regarding construction on the Premises and will bears the cost of the work not provided for in said Funding Agreement.
- b. Sub-Tenant keeps the Premises free of mechanics' and materialmen's liens.
- c. Tenant has secured Landlord's approval of all plans in the manner provided for later in this Lease.

#### **8. Encumbrance of Leasehold Estate.**

8.01. Sub-Tenant may encumber its leasehold interest without obtaining Sub-Landlord's consent, but no such encumbrance is or can be a lien on the fee title or Sub-Landlord's primary leasehold. The indebtedness secured by the encumbrance will at all times be and remain inferior and subordinate to all the conditions; covenants, and obligations of this lease and to all Sub-Landlord's rights under this lease. References in this lease to "Lender" refer to any person to whom Sub-Tenant has encumbered its leasehold interest.

8.02. At any time after execution and recordation in Bexar County, Texas, of any mortgage or deed of trust encumbering Sub-Tenant's leasehold interest, Lender may notify Sub-Landlord in writing that the mortgage or deed of trust has been given. On Lender's request, Sub-Landlord will deliver duplicate notices under this Lease to Lender at an address or agent it specifies.

8.03. Sub-Landlord and Sub-Tenant will neither modify nor terminate this lease by mutual consent without Lender's written consent.

8.04. Lender may do any act required of Sub-Tenant to prevent forfeiture of Sub-Tenant's leasehold interest. All such acts are as effective to prevent a forfeiture of Sub-Tenant's rights under this lease as if done by Sub-Tenant.

8.05. Lender may realize on the security afforded by the leasehold estate by exercising foreclosure proceedings or power of sale or other remedy afforded in law or equity or by the security documents. In so doing, it may transfer, convey, or assign Sub-Tenant's title to the leasehold estate created by this lease to any purchaser at a foreclosure sale. Lender also may acquire and succeed to Sub-Tenant's interest under this lease by virtue of a foreclosure sale. Lender will not be or become liable to Sub-Landlord as an assignee of this lease or otherwise, unless it assumes such liability in writing. No assumption by Lender may be inferred from or result (1) from foreclosure or other similar proceedings, or (2) from other action or remedy provided for by the mortgage, deed of trust, or other security instrument, or (3) from a conveyance from Sub-Tenant under which the buyer at foreclosure or grantee acquires Sub-Tenant's rights and interest under this lease. Any buyer at a foreclosure sale, including Lender, becomes obligated to Sub-Landlord as the Sub-Tenant under the lease.

### **9. Repairs, Maintenance, and Restoration.**

9.01. Sub-Tenant must keep Premises and any improvements maintained in a good state of appearance and repair (except for reasonable wear and tear) at Sub-Tenant's own expense.

9.02. If any building or improvement constructed on the Premises is damaged or destroyed by fire or any other casualty, regardless of the extent of the damage or destruction, Sub-Tenant must, within one year from the date of the damage or destruction, begin to repair, reconstruct, or replace the damaged or destroyed building or improvement. Sub-Tenant must pursue the repair, reconstruction, or replacement with reasonable diligence and restore the building to substantially the condition it was in before the casualty. However, if beginning or completing this restoration is prevented or delayed by war, civil commotion, acts of God, strikes, fire or other casualty, or any other reason beyond Sub-Tenant's control, the time for beginning or completing the restoration (or both) will automatically be extended for the period of each such delay.

### **10. Mechanic's Liens.**

10.01. Sub-Tenant must not cause or permit any mechanic's or other liens to be filed against the fee of the Premises or against Sub-Tenant's leasehold interest (excluding any leasehold mortgage). If such a lien is recorded, Sub-Tenant must either cause it to be removed, or if Sub-Tenant in good faith wishes to contest the lien, take timely action to do so at Sub-Tenant's sole expense. If Sub-Tenant contests the lien, Sub-Tenant must indemnify Sub-

Landlord and hold it harmless from all loss, cost, liability, or expense arising from the lien contest. If Sub-Tenant loses the contest, Sub-Tenant must cause the lien to be discharged and removed before any judgment is executed.

10.02. Despite the preceding subsection, mechanic's liens caused by act or omission of Sub-Landlord are Sub-Landlord's responsibility and are handled under the terms of the Primary Lease.

**11. Condemnation.**

Condemnation is handled according to the Primary Lease.

**12. Insurance**

12.01. Sub-Landlord disclaims any employee, agent, or invitee relationship with any person whose presence on the Premises is through Sub-Tenant. Any and all claims resulting from any obligation for which Sub-Tenant may be held liable under any workers' compensation, unemployment compensation, disability benefits, similar statutory scheme, or common law negligence is the sole obligation and responsibility of Sub-Tenant.

12.02. Sub-Tenant must provide and maintain in full force and effect with respect to the Premises from the Commencement Date of this Lease and for the duration of this Lease and any extensions thereof, insurance coverage written on an occurrence form, by companies authorized and admitted to do business in the State of Texas and rated A or better by A.M. Best Company and/or otherwise acceptable to Sub-Landlord, in the following types and amounts:

<b>Type:</b>	<b>Amount:</b>
1. Worker's Compensation	Statutory, with a Waiver of subrogation in favor of Sub-Landlord
2. Employer's Liability	\$500,000/\$500,000/\$500,000 with a Waiver of Subrogation in favor of Sub-Landlord
3. Commercial General Public Liability Insurance to include (but not be limited to coverage for) coverage for the following:	For Bodily Injury, Death, and Property Damage of \$1,000,000 per occurrence; \$2,000,000 general aggregate, or its equivalent in umbrella or excess liability coverage
(a) Premises/Operations	
(b) Independent Contractors	
(c) Products/Completed Operations	
(d) Contractual Liability	
(e) Personal Injury Liability	
(f) Broad-Form Property Damage, to include Fire Legal Liability	Coverage for replacement cost of Sub-Tenant's improvements

4. Business Automobile Liability to include coverage for:
- (a.) Owned/Leased Automobiles
  - (b.) Non-owned Automobiles
  - (c.) Hired Automobiles

Combined Single Limit for Bodily Injury, Death, and Property Damage of \$1,000,000.00 per occurrence

5. Property Insurance for physical damage to the property of the Sub-Tenant, including improvements and betterments
- Coverage for replacement cost of Sub-Tenant's improvements.

12.04. Each insurance policy required by this Lease must contain the following clauses:

“This insurance is not canceled, limited in scope or coverage, or non-renewed until after 30 days’ prior written notice has been given to:

- (a) City Clerk, City of San Antonio  
City Hall/2nd Floor  
P. O. Box 839966  
San Antonio, Texas 78283-3966  
Attention: Risk Manager

**and**

- (b) Transportation & Capital Improvements Department  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966  
Attention: Director

“The insurance provided by Sub-Tenant is primary to any insurance or self-insurance maintained by the City of San Antonio.”

“Any insurance or self-insurance maintained by the City of San Antonio applies in excess of, and does not contribute with, insurance provided by this policy.”

Each insurance policy required by this Lease, excepting policies for Workers’ Compensation and Employer’s Liability, must contain the following clause:

“The City of San Antonio, its officials, employees, representatives and volunteers are added as additional insureds as respects operations and activities of, or on behalf of, the named insured performed under this Lease with the City of San Antonio.”

12.05. Sub-Tenant must require its insurance carrier(s) to deliver to Sub-Landlord’s Risk Manager and City Clerk, upon request and without expense, copies of policies and endorsements pertinent to the limits required by Sub-Landlord. Sub-Landlord may request changes in policy

terms, conditions, limitations, or exclusions (except where established by law). If Sub-Landlord does so and the changes would increase premiums, Sub-Landlord will provide 30 days' prior notice to Sub-Tenant and an opportunity to discuss the changes. If Sub-Landlord still wants the changes after discussion, Sub-Tenant must make the changes and pay the cost thereof.

12.06. Within 30 days after the Commencement Date, Sub-Tenant must deliver certificates to Sub-Landlord's Risk Manager and the City Clerk from Sub-Tenant's insurance carrier, reflecting all required insurance coverage. All endorsements and certificates must be signed by an authorized representative of the insurance company and must include the signatory's company affiliation and title. If requested by Sub-Landlord, Sub-Tenant must send Sub-Landlord documentation acceptable to Sub-Landlord that confirms that the individual signing the endorsements and certificates is authorized to do so by the insurance company.

12.07. The Notices and Certificates of Insurance must be provided to the same addresses as the notices of cancellation.

12.08. Nothing herein contained limits in any way Sub-Tenant's liability for damages to persons or property resulting from Sub-Tenant's activities or the activities of Sub-Tenant's agents, employees, sublessees, or invitees under this Lease.

**12.09. Sub-Tenant waives all claims against Sub-Landlord for injury to persons or property on or about the Premises, whether or not caused by Sub-Landlord's negligence.**

### **13. Indemnification**

13.01. These definitions apply to the indemnity provisions of this Contract:

13.01.01. "Indemnified Claims" mean all loss, cost, liability, or expense, directly or indirectly arising out of acts or omissions of any person other than an Indemnitee that give rise to assertions of Indemnitee liability under this Contract, whether or not the person is a party to this agreement. Indemnified Claims include attorneys' fees and court costs and include claims arising from property damage and from personal or bodily injury, including death.

13.01.02. "Indemnitees" means the City of San Antonio and its elected officials, officers, employees, agents, and other representatives, collectively, against whom an Indemnified Claim has been asserted.

13.01.03. "Indemnitor" means Sub-Tenant.

**13.02. Indemnitor must indemnify Indemnitees, individually and collectively, from all Indemnified Claims.**

**13.03. If Indemnitor and one or more Indemnitees are finally adjudged to be jointly liable for Indemnified Claim, Indemnitor need not further indemnify the so-adjudged Indemnitees from liability arising from the Indemnitees' adjudicated share of liability. But despite allegations of Indemnitee negligence, Indemnitor must nevertheless defend all Indemnitees until final adjudication. Indemnitor may not recover sums previously spent**

**defending or otherwise indemnifying the Indemnitee who has been adjudged to be negligent and must continue to indemnify other Indemnitees.**

13.04. There are no third-party beneficiaries of this indemnity other than the category of people and entities included within the definition of Indemnitees..

13.05. Indemnitor must promptly advise the City of San Antonio in writing of any Indemnified Claim and must, at its own cost, investigate and defend the Indemnified Claim. Whether or not the City of San Antonio is an Indemnitee as to a particular Indemnified Claim, the City of San Antonio may require Indemnitor to replace the counsel Indemnitor has hired to defend Indemnitees. The City may also require Indemnitor to hire specific-named counsel for so long as the named counsel's hourly rates do not exceed the usual and customary charges for counsel handling sophisticated and complex litigation in the locale where the suit is pending. No such actions release or impair Indemnitor's obligations under this indemnity paragraph, including its obligation to pay for the counsel selected by City. Regardless of who selects the counsel, the counsel's clients are Indemnitees, not Indemnitor.

13.06. In addition to the indemnity required under this Contract, each Indemnitee may, at its own expense, participate in its defense by counsel of its choosing without relieving or impairing Indemnitor's obligations under this indemnity paragraph.

13.07. Indemnitor may not settle any Indemnified Claim without the consent of the City of San Antonio, whether or not the City is an Indemnitee as to the particular Indemnified Claim, unless (A) the settlement will be fully funded by Indemnitor and (B) the proposed settlement does not contain an admission of liability or wrongdoing by any Indemnitee. The City's withholding its consent as allowed in the preceding sentence does not release or impair Indemnitor's obligations of this indemnity paragraph. Even if the City of San Antonio is not an Indemnitee as to a particular Indemnified Claim, Indemnitor must give City at least 20 days advance written notice of the details of a proposed settlement before it becomes binding. Any settlement purporting to bind an Indemnitee must first be approved by City Council.

13.08. Nothing in this Contract waives governmental immunity or other defenses of Indemnitees under applicable law.

13.09. If, for whatever reason, a court refuses to enforce this indemnity as written, and only in that case, the parties must contribute to any Indemnified Claim 5% by the Indemnitees and 95% by the Indemnitor. Indemnitor need look only to the City of San Antonio for Indemnitees' 5% if the City of San Antonio is an Indemnified Party as to a particular Indemnified Claim.

#### **14. Environmental Matters.**

14.01. "Environmental Laws" means applicable federal, state, and local laws relating to protection of the public health, welfare, and the environment, including without limitation, those laws relating to the storage, handling, and use of chemicals and other hazardous substances, those relating to the generation, processing, treatment, storage, transport, disposal, or other management of waste materials of any kind, and those relating to the protection of environmentally sensitive areas.

14.02. "Hazardous Material" means "hazardous substance," "pollution or contaminant," "petroleum," and "natural gas liquids," as those terms are defined by or used in Environmental Laws, or that are regulated because of their effect or potential effect on human health and the environment.

14.03. "Release" means depositing, spilling, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing.

14.03. In its use of the Premises, Sub-Tenant must comply with all applicable Environmental Laws and must cause its employees, agents, and contractors on the Premises to do so as well. Sub-Tenant will obtain all permits required under Environmental Law for its use of the Premises. At least 180 days before expiration of any such permit, Sub-Tenant must present proof to Sub-Landlord that it has applied for renewal.

14.04. Sub-Tenant must not allow the Release of any Hazardous Material from its use of the Premises on, onto, or from the Property. Sub-Tenant further must not to handle, use, or otherwise manage any Hazardous Material on the Premises or the Property in violation of any Environmental Laws or in any but a reasonable and prudent manner.

14.05. Sub-Tenant must to immediately provide to Sub-Landlord copies of: (i) any documents required to be submitted to a Governmental Authority under Environmental Law; (ii) any notice alleging a violation of Environmental Law, or (iii) any demand from or allegation by any third party in relation to Hazardous Materials or Environmental Law. Sub-Tenant must promptly deliver to Sub-Landlord any information it receives regarding any Release of Hazardous Materials on, to, from, or about the Premises.

14.06. Sub-Landlord may conduct, at Sub-Tenant's expense, periodic inspections of the Premises and Sub-Tenant's operations thereon to assure compliance with Sub-Tenant's environmental covenants. Sub-Tenant need not pay the expense of more than such inspection in any 12-month period.

14.07. If Sub-Tenant breaches any of its representations, warranties or covenants, Sub-Tenant at its sole expense, must take all actions required, including environmental cleanup of the Premises, to comply with the representations, warranties, and covenants or applicable law. Sub-Tenant must take all action required by applicable Environmental Laws. If Sub-Tenant's actions under this provision involve cleaning up a Release of Hazardous Materials, Sub-Tenant must perform the cleanup consistently with residential use of the Premises and will not use any institutional controls or engineering controls in lieu of clean-up. Sub-Tenant will further obtain a Certificate of Completion from the TCEQ's Voluntary Cleanup Program. Institutional controls include laws, rules, or regulations or private prohibitions limiting use of a property, such as a prohibition against water well use within a certain contaminated track or area of a local government's jurisdiction. Engineering controls mean physical apparatus such as an asphalt or concrete cap, detention basin, extraction well, or other engineered device to control, contain, or remove pollutants.

14.08. Sub-Tenant must indemnify Sub-Landlord and hold Sub-Landlord and its officials, employees, and contractors from loss, cost, liability, or expense (including, but not limited to, attorneys' fees and expenses, including all attorney's fees and expenses incurred by Sub-Tenant in enforcing this indemnity) arising from or relating to breach of Sub-Tenant's environmental representations, warranties, and covenants..

### **15. Assignment and Subletting**

15.01. Any attempt at transfer, assignment, or subletting of Sub-Tenant's rights, duties, and obligations hereunder, without the Sub-Landlord's prior written consent, is void and terminates the Lease. The Parties understand that short-term special events are allowable and not covered by this section.

15.02. Sub-Landlord's consent on one occasion does not waive need for consent to any later attempted transfer, assignment, or subletting.

### **16. Default and Remedies.**

16.01. If Sub-Tenant defaults in performing any obligation arising out of this lease and does not correct the default within 10 days after receipt of written notice to Sub-Tenant and any lender, notice to whom is required by this lease, Sub-Landlord may terminate this lease. Bankruptcy, insolvency, assignment for the benefit of creditors, or the appointment of a receiver is an event of default, entitling Sub-Landlord to terminate the Lease, subject to orders of the Bankruptcy Court.

16.02. Upon termination of this Lease, Sub-Tenant must pay Sub-Landlord a sum equal to the unamortized amount of money received by sub-Tenant under both the Funding Agreement and the Primary Lease. Amortization is straight-line over the term of this Lease, without interest.

### **17. Dispute Resolution.**

17.01. Before bringing any action arising out of this agreement, including an action for declaratory relief but not an action specifically excepted below, the disputants must first submit in good faith to mediation. The parties may not assert limitations, laches, waiver, and estoppel based upon attempts to mediate.

17.02. Filing suit on a claim that should be mediated hereunder waives the filer's right to demand mediation. But one party's waiver does not affect another party's right. A defendant does not waive mediation for so long as, within a reasonable time after appearing, the defendant gives written notice to the plaintiff or its counsel of intent to require compliance with this paragraph.

17.03. Mediation must be conducted in San Antonio, Bexar County, Texas.

17.04. The party desiring relief has the burden to initiate mediation. Waiting for another party to initiate mediation does not waive the right to it.

17.05. If the parties can otherwise agree on a mediator, they may do so. Alternatively, either party may petition any court of competent jurisdiction to appoint a mediator. The only predicate issues the court need consider before appointing a mediator are whether (i) the copy of

the contract before the court is authentic and (ii) the contract was duly signed and delivered by all parties to be bound to mediate. If neither of those issues is denied under oath, the court may appoint a mediator upon motion, without trial.

17.06. Mediator fees must be borne equally.

17.07. The parties need not mediate before going to court (i) for either party to seek emergency injunctive relief or (ii) for Sub-Landlord to seek forcible entry and detainer relief against Sub-Tenant.

### **18. Miscellaneous.**

18.01. The rights and remedies under agreement are cumulative, and either party's using any right or remedy does not preclude or waive its right to use any other remedy. The rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance, or otherwise.

18.02. Time is of the essence under this agreement.

18.03. Sub-Tenant will, upon expiration or termination, yield up the Premises peacefully to Sub-Landlord, in good order, condition, and repair, reasonable use and wear excepted.

18.04. This Agreement is entered into in San Antonio, Bexar County, State of Texas. **The Construction Of This Agreement And The Rights, Remedies, And Obligations Arising Thereunder Are Governed By The Laws of The State of Texas.** But the Texas conflicts of law rules must not cause the application of the laws of a jurisdiction other than Texas. The obligations performable hereunder by both parties are performable in San Antonio, Bexar County, Texas.

18.05. If any portion hereof is determined to be invalid or unenforceable, the determination does not affect the remainder hereof.

18.06. This Agreement inures to the benefit of and binds the heirs, representatives, successors, and permitted assigns of each party. This clause does not authorize any assignment not otherwise authorized.

18.07. **This Written Agreement, Together With the Funding Agreement and the Primary Lease, Represents The Final Agreement Between The Parties And May Not Be Contradicted By Evidence Of Prior, Contemporaneous, Or Subsequent Oral Agreements Of The Parties. There Are No Oral Agreements Between The Parties.**

18.08. This Agreement may not be changed orally but only by a written agreement, signed by the party against whom enforcement of any modification is sought. No such modification, express or implied, affects the right of the modifying party to require observance of either (i) any other term or (ii) the same term or condition as it applies on a subsequent or previous occasion.

18.09. This Agreement benefits only the Parties hereto and their successors and permitted assigns. There are no third party beneficiaries.

18.10. Any notice provided for or permitted hereunder must be in writing and by certified mail, return receipt requested, addressed to the Parties at their respective addresses set forth in the preamble. Notice is complete three days after deposit, properly addressed and postage prepaid, with the United States Postal Service. Failure to use certified mail does not defeat the effectiveness of notice actually received, but such notice is effective only on actual receipt. Address for notice may be changed by giving notice hereunder.

18.11. Paragraph captions in this Agreement are for ease of reference only and do not affect the interpretation hereof.

18.12. This Agreement may be executed in multiple counterparts, each of which is an original, whether or not all parties sign the same document. Regardless of the number of counterparts, they constitute only one agreement. In making proof of this agreement, it is not necessary to produce or account for more counterparts than are necessary to show execution by or on behalf of all parties.

18.13. The Parties must execute and deliver such additional documents and instruments as may be required to effect fully the provisions hereof. No such additional document(s), however, may alter the rights or obligations of the Parties as contained in this agreement

18.14. Sub-Tenant must permit Sub-Landlord or its agents, representatives, or employees to enter the Premises to (A) inspect, (B) determine whether Sub-Tenant is complying with this lease, (C) maintain, repair, or alter the Premises, or (D) show the Premises to prospective Sub-Tenants, purchasers, mortgagees, or beneficiaries under trust deeds.

18.15. The relationship between Sub-Landlord and Sub-Tenant is at all times solely that of Sub-Landlord and Sub-Tenant, not that of partners or a joint venturers.

18.16. The Director may, without further council action, agree to, sign, and deliver on behalf of the City all consents, certificates, memoranda, estoppels, attornments, and modifications of nonmaterial rights and obligations arising under this Lease and may declare defaults and pursue remedies for such defaults. This paragraph does not authorize lease amendments or renewals without council consent.

18.17. Whenever this lease states a number more than one way, either by using both words and numerals or by stating a fixed amount and a calculation for arriving at an amount, and there is a conflict, the highest number controls.

## **19. Prohibited Interests in Contracts**

19.01. The Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as city owned utilities. An officer or employee has a “prohibited financial interest” in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

(i) a City officer or employee;

(ii) his parent, child or spouse;

(iii) a business entity in which the officer or employee, or his parent, child or spouse owns (i) 10% or more of the voting stock or shares of the business entity, or (ii) 10% or more of the fair market value of the business entity;

(iv) a business entity in which any individual or entity above listed is a (i) subcontractor on a City contract, (ii) a partner, or (iii) a parent or subsidiary business entity.

19.02 Tenant warrants and certifies as follows:

(i) Tenant and its officers, employees and agents are neither officers nor employees of the City.

(ii) Tenant has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City’s Ethics Code.

### *City’s Reliance is Reasonable*

19.03. Tenant acknowledges that City’s reliance on the above warranties and certifications is reasonable.

## **20. Public Information.**

Sub-Tenant acknowledges that this instrument is public information within the meaning of Chapter 552 of the Texas Government Code and accordingly may be disclosed to the public.

**21. Appropriations.**

All obligations of the City of San Antonio under this instrument are subject to the discretion of City Council whether to appropriate funding. If the City Council fails to appropriate money for any obligation under this agreement, the City may terminate this agreement and have no further liability.

**EXECUTED BY THE PARTIES IN TRIPLICATE ORIGINALS**, each of which shall have the full force and effect of an original this the 9<sup>th</sup> day of January, 2015.

**Sub-Landlord**

**CITY OF SAN ANTONIO,**  
a Texas Municipal Corporation

Signature: \_\_\_\_\_  
Mike Frisbie, P.E.  
Director/City Engineer Transportation and  
Capital Improvements

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

**Sub-Tenant**

**GRANTEE: SAN ANTONIO MUSEUM  
OF ART,** a 501(C)3 Non-profit

Signature: Katherine C. Luber  
Katherine C. Luber  
Director

Date: 1/9/2015

**Approved as to Form:**

\_\_\_\_\_  
City Attorney

**Exhibit C**

Project Description, Budget and Schedule

## Exhibit D

### *Funding Agreement – San Antonio Museum of Art Central Plant Relocation*

#### **I. SBEDA Ordinance Compliance Provisions**

##### **A. SBEDA Program**

The CITY has adopted a Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531 and as amended, also referred to as “SBEDA” or “the SBEDA Program”), which is posted on the City’s Economic Development (EDD) website page and is also available in hard copy form upon request to the CITY. The SBEDA Ordinance Compliance Provisions contained in this section of the Agreement are governed by the terms of this Ordinance, as well as by the terms of the SBEDA Ordinance Policy & Procedure Manual established by the CITY pursuant to this Ordinance, and any subsequent amendments to this referenced SBEDA Ordinance and SBEDA Policy & Procedure Manual that are effective as of the date of the execution of this Agreement. Unless defined in a contrary manner herein, terms used in this section of the Agreement shall be subject to the same expanded definitions and meanings as given those terms in the SBEDA Ordinance and as further interpreted in the SBEDA Policy & Procedure Manual.

##### **B. Contract Requirements and Commitment**

GRANTEE understands and agrees that the following provisions shall be requirements of this contract, and by its execution, GRANTEE commits to comply with these requirements. In the absence of a waiver granted by the SBO, failure of GRANTEE to commit, through fully-documented and signed SBO-promulgated Subcontractor/Supplier Utilization Plan form, to satisfying the SBE and M/WBE subcontracting goals shall constitute default.

**Waiver Request** - A GRANTEE may request, for good cause, a full or partial Waiver of a **specified subcontracting goal** included in this contract by submitting the *Vendor Subcontracting Waiver Request* form (*which is available at <http://www.sanantonio.gov/SBO/Forms.aspx>*). The GRANTEE’s Waiver request must fully document subcontractor unavailability despite the GRANTEE’s good faith efforts to comply with the goals. Such documentation shall include all good faith efforts made by GRANTEE including, but not limited to, which subcontractors were contacted (with phone numbers, e-mail addresses and mailing addresses, as applicable) and the method of contact.

##### **C. Definitions**

**Affirmative Procurement Initiatives (API)** – Refers to various Small Business Enterprise, Minority Business Enterprise, and/or Women Business Enterprise (“S/M/WBE”) Program tools and Solicitation Incentives that are used to encourage greater Prime and subcontract participation by S/M/WBE firms, including bonding assistance, evaluation preferences, subcontracting goals and joint venture incentives. (For full descriptions of these and other S/M/WBE program tools, see Section III. D. of Attachment A to the SBEDA Ordinance.)

**Centralized Vendor Registration System (CVR)** – a mandatory electronic system wherein the City requires all prospective Respondents and Subcontractors that are ready, willing and able to sell goods or services to the City to register. The CVR system assigns a unique identifier to each registrant that is then required for the purpose of submitting solicitation responses and invoices, and for receiving payments from the City. The CVR-assigned identifiers are also used by the Goal Setting Committee for measuring relative availability and tracking utilization of SBE and M/WBE firms by Industry or commodity codes, and for establishing Annual Aspirational Goals and Contract-by-Contract Subcontracting Goals.

**Certification or “Certified”** – the process by which the Small Business Office (SBO) staff determines a firm to be a bona-fide small, minority-, women-owned, or emerging small business enterprise. Emerging Small Business Enterprises (ESBEs) are automatically eligible for Certification as SBEs. Any firm may apply for multiple Certifications that cover each and every status category (e.g., SBE, ESBE, MBE, or WBE) for which it is able to satisfy eligibility standards. The SBO staff may contract these services to a regional Certification agency or other entity. For purposes of Certification, the City accepts any firm that is certified by local government entities and other organizations identified herein that have adopted Certification standards and procedures similar to those followed by the SBO, provided the prospective firm satisfies the eligibility requirements set forth in this Ordinance in Section III.E.6 of Attachment A.

**Commercially Useful Function** – an S/M/WBE firm performs a Commercially Useful Function when it is responsible for execution of a distinct element of the work of the contract and is carrying out its responsibilities by actually performing, staffing, managing and supervising the work involved. To perform a Commercially Useful Function, the S/M/WBE firm must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quantity and quality, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether an S/M/WBE firm is performing a Commercially Useful Function, an evaluation must be performed of the amount of work subcontracted, normal industry practices, whether the amount the S/M/WBE firm is to be paid under the contract is commensurate with the work it is actually performing and the S/M/WBE credit claimed for its performance of the work, and other relevant factors. Specifically, an S/M/WBE firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of meaningful and useful S/M/WBE participation, when in similar transactions in which S/M/WBE firms do not participate, there is no such role performed. The use of S/M/WBE firms by GRANTEE to perform such “pass-through” or “conduit” functions that are not commercially useful shall be viewed by the CITY as fraudulent if GRANTEE attempts to obtain credit for such S/M/WBE participation towards the satisfaction of S/M/WBE participation goals or other API participation requirements. As such, under such circumstances where a commercially useful function is not actually performed by the S/M/WBE firm, the GRANTEE shall not be given credit for the participation of its S/M/WBE subcontractor or joint venture partner towards attainment of S/M/WBE utilization goals, and the GRANTEE and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

**Good Faith Efforts** – documentation of the GRANTEE’s or Respondent’s intent to comply with S/M/WBE Program Goals and procedures including, but not limited to, the following: (1) documentation within a solicitation response reflecting the Respondent’s commitment to comply with SBE or M/WBE Program Goals as established by the GSC for a particular contract; or (2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., timely advertisements in appropriate trade publications and publications of wide general circulation; timely posting of SBE or M/WBE subcontract opportunities on the City of San Antonio website; solicitations of bids/proposals/qualification statements from all qualified SBE or M/WBE firms listed in the Small Business Office’s directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Contractor’s posting of a bond covering the work of SBE or M/WBE Subcontractors; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by the Respondent; and documentation of consultations with trade associations and consultants that represent the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Subcontractors.) The appropriate form and content of GRANTEE’s Good Faith Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

**HUBZone Firm** – a business that has been certified by U.S. Small Business Administration for participation in the federal HUBZone Program, as established under the 1997 Small Business Reauthorization Act. To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and Controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its Principal Place of Business must be located in a HUBZone within the San Antonio Metropolitan Statistical Area. [See 13 C.F.R. 126.200 (1999).]

**Independently Owned and Operated** – ownership of an SBE firm must be direct, independent and by Individuals only. Ownership of an M/WBE firm may be by Individuals and/or by other businesses provided the ownership interests in the M/WBE firm can satisfy the M/WBE eligibility requirements for ownership and Control as specified herein in Section III.E.6. The M/WBE firm must also be Independently Owned and Operated in the sense that it cannot be the subsidiary of another firm that does not itself (and in combination with the certified M/WBE firm) satisfy the eligibility requirements for M/WBE Certification.

**Individual** – an adult person that is of legal majority age.

**Industry Categories** – procurement groupings for the City of San Antonio inclusive of Construction, Architectural & Engineering (A&E), Professional Services, Other Services, and Goods & Supplies (i.e., manufacturing, wholesale and retail distribution of commodities). This term may sometimes be referred to as “business categories.”

**Minority/Women Business Enterprise (M/WBE)** – firm that is certified as a Small Business Enterprise and also as either a Minority Business Enterprise or as a Women Business Enterprise, and which is at least fifty-one percent (51%) owned, managed and Controlled by one or more Minority Group Members and/or women, and that is ready, willing and able to sell goods or services that are purchased by the City of San Antonio.

**M/WBE Directory** – a listing of minority- and women-owned businesses that have been certified for participation in the City’s M/WBE Program APIs.

**Minority Business Enterprise (MBE)** – any legal entity, except a joint venture, that is organized to engage in for-profit transactions, which is certified a Small Business Enterprise and also as being at least fifty-one percent (51%) owned, managed and controlled by one or more Minority Group Members, and that is ready, willing and able to sell goods or services that are purchased by the CITY. To qualify as an MBE, the enterprise shall meet the Significant Business Presence requirement as defined herein. Unless otherwise stated, the term “MBE” as used in this Ordinance is not inclusive of women-owned business enterprises (WBEs).

**Minority Group Members** – African-Americans, Hispanic Americans, Asian Americans and Native Americans legally residing in, or that are citizens of, the United States or its territories, as defined below:

African-Americans: Persons having origins in any of the black racial groups of Africa as well as those identified as Jamaican, Trinidadian, or West Indian.

Hispanic-Americans: Persons of Mexican, Puerto Rican, Cuban, Spanish or Central and South American origin.

Asian-Americans: Persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

Native Americans: Persons having no less than 1/16<sup>th</sup> percentage origin in any of the Native American Tribes, as recognized by the U.S. Department of the Interior, Bureau of Indian Affairs and as demonstrated by possession of personal tribal role documents.

**Originating Department** – the CITY department or authorized representative of the CITY which issues solicitations or for which a solicitation is issued.

**Payment** – dollars actually paid to GRANTEES and/or Subcontractors and vendors for CITY contracted goods and/or services.

**Prime Contractor** – the vendor or contractor to whom a purchase order or contract is issued by the City of San Antonio for purposes of providing goods or services for the City. For purposes of this Agreement, this term refers to the GRANTEE.

**Relevant Marketplace** – the geographic market area affecting the S/M/WBE Program as determined for purposes of collecting data for the MGT Studies, and for determining eligibility for participation under various programs established by the SBEDA Ordinance, is defined as the San Antonio Metropolitan Statistical Area (SAMSA), currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson.

**Respondent** – a vendor submitting a bid, statement of qualifications, or proposal in response to a solicitation issued by the City. For purposes of this Agreement, GRANTEE is the Respondent.

**Responsible** – a firm which is capable in all respects to fully perform the contract requirements and has the integrity and reliability which will assure good faith performance of contract specifications.

**Responsive** – a firm’s submittal (bid, response or proposal) conforms in all material respects to the solicitation (Invitation for Bid, Request for Qualifications, or Request for Proposal) and shall include compliance with S/M/WBE Program requirements.

**San Antonio Metropolitan Statistical Area (SAMSA)** – also known as the Relevant Marketplace, the geographic market area from which the CITY’s MGT Studies analyzed contract utilization and availability data for disparity (currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson).

**SBE Directory** - a listing of small businesses that have been certified for participation in the City's SBE Program APIs.

**SBE Subcontracting Program** – an API in which Prime Contractors or vendors are required to make Good Faith Efforts to subcontract a specified percentage of the value of prime contract dollars to certified SBE firms. Such subcontracting goals may be set and applied by the GSC on a contract-by-contract basis to those types of contracts that provide subcontract opportunities for performing Commercially Useful Functions wherein there have been ongoing disparities in the utilization of available SBE Subcontractors.

When specified by the GSC, the SBE Subcontracting Plan or Good Faith Efforts plan submitted by GRANTEE may also be required to reflect Good Faith Efforts that a Prime Contractor or vendor has taken (or commits to taking in the case of solicitations that do not include a detailed scope of work or those in which price cannot be considered a factor in evaluation), toward attainment of subcontracting goals for SBE firms.

**Significant Business Presence** – to qualify for this Program, a S/M/WBE must be headquartered or have a *significant business presence* for at least one year within the Relevant Marketplace, defined as: an established place of business in one or more of the eight counties that make up the San Antonio Metropolitan Statistical Area (SAMSA), from which 20% of its full-time, part-time and contract employees are regularly based, and from which a substantial role in the S/M/WBE's performance of a Commercially Useful Function is conducted. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a significant business presence.

**Small Business Enterprise (SBE)** – a corporation, partnership, sole proprietorship or other legal entity for the purpose of making a profit, which is Independently Owned and Operated by Individuals legally residing in, or that are citizens of, the United States or its territories, and which meets the U.S. Small Business Administration (SBA) size standard for a small business in its particular industry(ies) and meets the Significant Business Presence requirements as defined herein.

**Small Business Office (SBO)** – the office within the Economic Development Department (EDD) of the CITY that is primarily responsible for general oversight and administration of the S/M/WBE Program.

**Small Business Office Manager** – the Assistant Director of the EDD of the CITY that is responsible for the management of the SBO and ultimately responsible for oversight, tracking, monitoring, administration, implementation and reporting of the S/M/WBE Program. The SBO Manager is also responsible for enforcement of contractor and vendor compliance with contract participation requirements, and ensuring that overall Program goals and objectives are met.

**Small Minority Women Business Enterprise Program (S/M/WBE Program)** – the combination of SBE Program and M/WBE Program features contained in the SBEDA Ordinance.

**Subcontractor** – any vendor or contractor that is providing goods or services to a Prime Contractor in furtherance of the Prime Contractor’s performance under a contract or purchase order with the City.

**Suspension** – the temporary stoppage of the SBE or M/WBE firm’s beneficial participation in the CITY’s S/M/WBE Program for a finite period of time due to cumulative contract payments the S/M/WBE firm received during a fiscal year that exceed a certain dollar threshold as set forth in Section III.E.7 of Attachment A to the SBEDA Ordinance, or the temporary stoppage of GRANTEE’s and/or S/M/WBE firm’s performance and payment under CITY contracts due to the CITY’s imposition of Penalties and Sanctions set forth in Section III.E.13 of Attachment A to the SBEDA Ordinance.

**Subcontractor/Supplier Utilization Plan** – a binding part of this contract Agreement which states the GRANTEE’s commitment for the use of Joint Venture Partners and / or Subcontractors/Suppliers in the performance of this contract Agreement, and states the name, scope of work, and dollar value of work to be performed by each of GRANTEE’s Joint Venture partners and Subcontractors/Suppliers in the course of the performance of this contract, specifying the S/M/WBE Certification category for each Joint Venture partner and Subcontractor/Supplier, as approved by the SBO Manager. Additions, deletions or modifications of the Joint Venture partner or Subcontractor/Supplier names, scopes of work, of dollar values of work to be performed requires an amendment to this Agreement to be approved by the IEDD Director or designee.

**Women Business Enterprises (WBEs)** - any legal entity, except a joint venture, that is organized to engage in for-profit transactions, that is certified for purposes of the SBEDA Ordinance as being a Small Business Enterprise and that is at least fifty-one percent (51%) owned, managed and Controlled by one or more non-minority women Individuals that are lawfully residing in, or are citizens of, the United States or its territories, that is ready, willing and able to sell goods or services that are purchased by the City and that meets the Significant Business Presence requirements as defined herein. Unless otherwise stated, the term “WBE” as used in this Agreement is not inclusive of MBEs.

#### D. SBEDA Program Compliance – General Provisions

As GRANTEE acknowledges that the terms of the CITY’s SBEDA Ordinance, as amended, together with all requirements, guidelines, and procedures set forth in the CITY’s SBEDA Policy & Procedure Manual are in furtherance of the CITY’s efforts at economic inclusion and,

moreover, that such terms are part of GRANTEE's scope of work as referenced in the CITY's formal solicitation that formed the basis for contract award and subsequent execution of this Agreement, these SBEDA Ordinance requirements, guidelines and procedures are hereby incorporated by reference into this Agreement, and are considered by the Parties to this Agreement to be material terms. GRANTEE voluntarily agrees to fully comply with these SBEDA program terms as a condition for being awarded this contract by the CITY. Without limitation, GRANTEE further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. GRANTEE shall cooperate fully with the Small Business Office and other CITY departments in their data collection and monitoring efforts regarding GRANTEE's utilization and payment of Subcontractors, S/M/WBE firms, and HUBZone firms, as applicable, for their performance of Commercially Useful Functions on this contract including, but not limited to, the timely submission of completed forms and/or documentation promulgated by SBO, through the Originating Department, pursuant to the SBEDA Policy & Procedure Manual, timely entry of data into monitoring systems, and ensuring the timely compliance of its Subcontractors with this term;
2. GRANTEE shall cooperate fully with any CITY or SBO investigation (and shall also respond truthfully and promptly to any CITY or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of GRANTEE or its Subcontractors or suppliers;
3. GRANTEE shall permit the SBO, upon reasonable notice, to undertake inspections as necessary including, but not limited to, contract-related correspondence, records, documents, payroll records, daily logs, invoices, bills, cancelled checks, and work product, and to interview Subcontractors and workers to determine whether there has been a violation of the terms of this Agreement;
4. GRANTEE shall immediately notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to GRANTEE's Subcontractor / Supplier Utilization Plan for this contract, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by GRANTEE to replace the Subcontractor / Supplier in accordance with the applicable Affirmative Procurement Initiative. All proposed changes to the Subcontractor / Supplier Utilization Plan including, but not limited to, proposed self-performance of work by GRANTEE of work previously designated for performance by Subcontractor or supplier, substitutions of new Subcontractors, terminations of previously designated Subcontractors, or

reductions in the scope of work and value of work awarded to Subcontractors or suppliers, shall be subject to advanced written approval by the Originating Department and the SBO.

5. GRANTEE shall immediately notify the Originating Department and SBO of any transfer or assignment of its contract with the CITY, as well as any transfer or change in its ownership or business structure.
6. GRANTEE shall retain all records of its Subcontractor payments for this contract for a minimum of four years, or as required by state law, following the conclusion of this contract or, in the event of litigation concerning this contract, for a minimum of four years, or as required by state law, following the final determination of litigation, whichever is later.
7. In instances wherein the SBO determines that a Commercially Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in a GRANTEE's Subcontractor / Supplier Utilization Plan, the GRANTEE shall not be given credit for the participation of its S/M/WBE or HUBZone subcontractor(s) or joint venture partner(s) toward attainment of S/M/WBE or HUBZone firm utilization goals, and the GRANTEE and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.
8. GRANTEE acknowledges that the CITY will not execute a contract or issue a Notice to Proceed for this project until the GRANTEE and each of its Subcontractors for this project have registered and/or maintained active status in the CITY's Centralized Vendor Registration System, and GRANTEE has represented to CITY which primary commodity codes each registered Subcontractor will be performing under for this contract.

#### E. SBEDA Program Compliance – Affirmative Procurement Initiatives

The CITY has applied the following contract-specific Affirmative Procurement Initiative to this contract:

**SBE Subcontracting Program.** In accordance with SBEDA Ordinance Section III. D. 1. (c), this contract is being awarded pursuant to the SBE Subcontracting Program. DEVELOPER agrees to subcontract at least *twenty-four percent (24%)* of its prime contract value to certified SBE firms headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). The Subcontractor / Supplier Utilization Plan that GRANTEE submitted to the CITY with its response for this contract (or, as appropriate, that it

agrees to submit during the price proposal negotiation phase of this contract), and that contains the names of the certified SBE Subcontractors to be used by GRANTEE on this contract, the respective percentages of the total prime contract dollar value to be awarded and performed by each SBE Subcontractor, and documentation including a description of each SBE Subcontractor's scope of work and confirmation of each SBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount is hereby attached and incorporated by reference into the material terms of this Agreement, **and**

**M/WBE Subcontracting Program.** In accordance with SBEDA Ordinance Section III. D. 2. (b), this contract is being awarded pursuant to the M/WBE Subcontracting Program. GRANTEE agrees to subcontract at least *nineteen percent (19%)* of its prime contract value to certified S/M/WBE firms headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). The Subcontractor / Supplier Utilization Plan that GRANTEE submitted to CITY with its response for this contract (or, as appropriate, that it agrees to submit during the price proposal negotiation phase of this contract), and that contains the names of the certified M/WBE Subcontractors to be used by GRANTEE on this contract, the respective percentages of the total prime contract dollar value to be awarded and performed by each M/WBE Subcontractor, and documentation including a description of each M/WBE Subcontractor's scope of work and confirmation of each S/M/WBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount is hereby attached and incorporated by reference into the material terms of this Agreement. In the absence of a waiver granted by the SBO, the failure of GRANTEE to attain these subcontracting goals for SBE or M/WBE firm participation in the performance of a Commercially Useful Function under the terms of its contract shall be a material breach and grounds for termination of the contract with the CITY, and may result in debarment from performing future CITY contracts, withholding of payment for retainage equal to the dollar amount of the underutilization below the agreed upon SBE or M/WBE subcontracting goals, and/or shall be subject to any other remedies available under the terms of this Agreement for violations of the SBEDA Ordinance, or under any other law.

**Segmented M/WBE Goal.** In accordance with SBEDA Ordinance Section III. D. 2. (d), this contract is being awarded pursuant to Segmented M/WBE Goals. GRANTEE agrees to subcontract at least *one percent (1%)* of the contract value to a certified African American Business Enterprise (AABE) firm headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). This one percent (1%) subcontracting goal will also count toward the aforementioned nineteen percent (19%) M/WBE subcontracting goal.

The Subcontractor / Supplier Utilization Plan that GRANTEE submitted to CITY with its response for this contract (or, as appropriate, that it agrees to submit during the price proposal negotiation phase of this contract), and that contains the names of the certified AABE Subcontractors to be used by GRANTEE on this contract, the respective percentages of the total prime contract dollar value to be awarded and performed by each AABE Subcontractor, and documentation including a description of each AABE Subcontractor's scope of work and confirmation of each AABE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount is hereby attached and incorporated by reference into the material terms of this Agreement. In the absence of a waiver granted by the SBO, the failure of

GRANTEE to attain this subcontracting goal for AABE firm participation in the performance of a Commercially Useful Function under the terms of its contract shall be a material breach and grounds for termination of the contract with the CITY, and may result in debarment from performing future CITY contracts, withholding of payment for retainage equal to the dollar amount of the underutilization below the agreed upon AABE subcontracting goal, and/or shall be subject to any other remedies available under the terms of this Agreement for violations of the SBEDA Ordinance, or under any other law.

**Subcontractor Diversity:** The City of San Antonio strongly encourages each bidder to be as inclusive as possible, and to reach out to all segments of the M/WBE community in its efforts to exercise good faith in achieving the SBE subcontracting goal of 24%; the M/WBE subcontracting goal of 19% and the AABE subcontracting goal of 1% that have been established for this contract. While the relative availability of ready, willing, and able firms within various ethnic and gender categories will vary significantly from contract to contract based upon the particular trades that are involved, overall in the San Antonio Construction industry, as reflected in the City's Centralized Vendor Registration system for the month of February 2014, African-American owned firms represent approximately 2.28% of available subcontractors, Hispanic-American firms represent approximately 17.62%, Asian-American firms represent approximately 1.14%, Native American firms represent approximately 0.36%, and Women-owned firms represent approximately 5.21% of available construction subcontractors.

#### F. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, the GRANTEE represents and warrants that it has complied with throughout the course of this solicitation and contract award process, and will continue to comply with, the CITY's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, GRANTEE shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation or, on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring or commercial treatment of Subcontractors, vendors, suppliers, or commercial customers, nor shall the company retaliate against any person for reporting instances of such discrimination. The company shall provide equal opportunity for Subcontractors, vendors and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the CITY's Relevant Marketplace. The company understands and agrees that a material violation of this clause shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification of the company from participating in CITY contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party. GRANTEE's certification of its compliance with this Commercial Nondiscrimination Policy as submitted to the CITY pursuant to the solicitation for this contract is hereby incorporated into the material terms of this Agreement. GRANTEE shall incorporate this clause into each of its Subcontractor and supplier agreements entered into pursuant to CITY contracts.

G. Prompt Payment

Upon execution of this contract by GRANTEE, GRANTEE shall be required to submit to CITY accurate progress payment information with each invoice regarding each of its Subcontractors, including HUBZone Subcontractors, to ensure that the GRANTEE's reported subcontract participation is accurate. GRANTEE shall pay its Subcontractors in compliance with Chapter 2251, Texas Government Code (the "Prompt Payment Act") within ten days of receipt of payment from CITY. In the event of GRANTEE's noncompliance with these prompt payment provisions, no final retainage on the Prime Contract shall be released to GRANTEE, and no new CITY contracts shall be issued to the GRANTEE until the CITY's audit of previous subcontract payments is complete and payments are verified to be in accordance with the specifications of the contract.

H. Violations, Sanctions and Penalties

In addition to the above terms, GRANTEE acknowledges and agrees that it is a violation of the SBEDA Ordinance and a material breach of this Agreement to:

1. Fraudulently obtain, retain, or attempt to obtain, or aid another in fraudulently obtaining, retaining, or attempting to obtain or retain Certification status as an SBE, MBE, WBE, M/WBE, HUBZone firm, Emerging M/WBE, or ESBE for purposes of benefitting from the SBEDA Ordinance;
2. Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of the SBEDA Ordinance;
3. Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;
4. Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of the SBEDA Ordinance; and
5. Make false statements to any entity that any other entity is, or is not, certified as an S/M/WBE for purposes of the SBEDA Ordinance.

Any person who violates the provisions of this section shall be subject to the provisions of Section III. E. 13. of the SBEDA Ordinance and any other penalties, sanctions and remedies available under law including, but not limited to:

1. Suspension of contract;
2. Withholding of funds;

3. Rescission of contract based upon a material breach of contract pertaining to S/M/WBE Program compliance;
4. Refusal to accept a response or proposal; and
5. Disqualification of GRANTEE or other business firm from eligibility for providing goods or services to the City for a period not to exceed two years (upon City Council approval).

**Exhibit E - Determination Letter from the Internal Revenue Service**



# San Antonio Museum of Art

