

AN ORDINANCE **2011-06-02-0441**

AUTHORIZING THREE ON-CALL PROFESSIONAL LANDSCAPE ARCHITECTURAL SERVICE AGREEMENTS WITH BENDER INC, DBA BENDER WELLS CLARK DESIGN, RVK INC., AND TERRA DESIGN GROUP INC., EACH FOR A TWO-YEAR TERM IN AN AMOUNT UP TO \$300,000.00 PER YEAR WITH TWO OPTIONAL TWO-YEAR EXTENSIONS, TO PROVIDE PROFESSIONAL LANDSCAPE ARCHITECTURAL CONSULTING SERVICES FOR VARIOUS CITY CAPITAL IMPROVEMENT PROJECTS.

* * * * *

WHEREAS, landscaping architect services are needed for projects that require quality design to meet City standards or when the project budget and/or construction schedule is time sensitive; and

WHEREAS, the on-call contracts would allow consultants to start services immediately upon the City's recognition of the requirement for services; and

WHEREAS, the Requests for Qualifications (RFQ) was advertised in the Commercial Recorder, the San Antonio Observer and La Prensa; and

WHEREAS, the responses for this project were opened on April 5, 2011 and nine firms responded; and

WHEREAS, the firms were evaluated and scored by a committee consisting of representatives from Capital Improvements Management Services, Parks and Recreation and Economic Development Departments; and

WHEREAS, the firms were evaluated based on general information provided in the responses, the prime firms' experience and qualifications, the experience of proposed key personnel and sub consultants, project administration capability and approach to performing the required services as well as overall responsiveness and ability to provide the required services; and

WHEREAS, the new Small Business Economic Development Advocacy (SBEDA) Program, effective January 1, 2011, was used for these proposed contracts; and

WHEREAS, the Goal Setting Committee applied the Small Business Enterprise (SBE) Prime Contractor Program to this RFQ with 15 evaluation preference points; and

WHEREAS, based on the evaluations and rankings made in the selection process, staff recommends that Bender Inc. dba Bender Wells Clark Design, RVK Inc., and Terra Design Group Inc. be awarded these contracts; **NOW THEREFORE:**

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

SECTION 1. The City Manager or her designee, or the Director of the Capital Improvements Management Services Department or his designee is hereby authorized to execute on-call

professional landscape architectural service agreements with Bender Inc, dba Bender Wells Clark Design, RVK Inc., and Terra Design Group Inc., each for a two-year term in an amount up to \$300,000.00 per year with two optional two-year extensions, to provide professional landscape architectural consulting services for various City capital improvement projects. A template on-call landscape architectural service agreement in substantially final form is attached hereto and incorporated herein for all purposes as **Attachment I**.

SECTION 2. Funding for this ordinance will be identified when work orders are issued. If funding for any work orders is not previously appropriated, funding will be identified and appropriated through subsequent City Council action. Payment is limited to the amounts budgeted in the Operating and/or Capital Budget funding sources identified. All expenditures will comply with Operating and/or Capital Budgets for current and future fiscal years.

SECTION 3. Payment not to exceed \$300,000.00 per contract year is authorized to be encumbered with a purchase order and made payable to Bender Inc, dba Bender Wells Clark Design for professional landscape architectural consulting services.

SECTION 4. Payment not to exceed \$300,000.00 per contract year is authorized to be encumbered with a purchase order and made payable to RVK, Inc. for professional landscape architectural consulting services.

SECTION 5. Payment not to exceed \$300,000.00 per contract year is authorized to be encumbered with a purchase order and made payable to Terra Design Group, Inc. for professional landscape architectural consulting services.

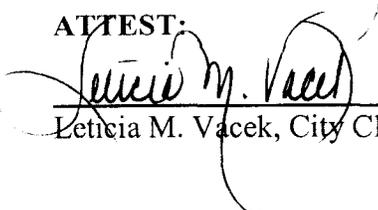
SECTION 6 The financial allocations in this Ordinance are subject to approval by the Chief Financial Officer, City of San Antonio. The Chief Financial Officer may, subject to concurrence by the City Manager, or the City Manager's designee, correct allocation to specific SAP Fund Numbers, SAP Project 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 7. This ordinance shall become effective immediately upon passage by eight (8) or more affirmative votes of the entire City Council; otherwise, said effective date shall be ten (10) days from the date of passage hereof.

PASSED AND APPROVED this 2nd day of June, 2011.

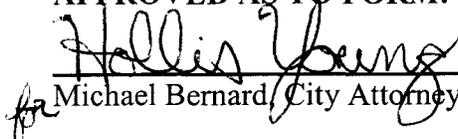

M A Y O R
Julián Castro

ATTEST:

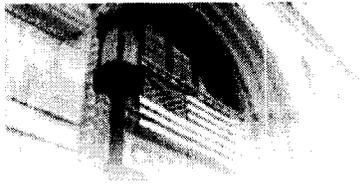


Leticia M. Vacek, City Clerk

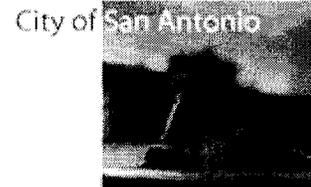
APPROVED AS TO FORM:



for Michael Bernard, City Attorney



Request for
**COUNCIL
ACTION**



Agenda Voting Results - 17

Name:	17						
Date:	06/02/2011						
Time:	09:56:54 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing three on-call professional landscape architectural service agreements with Bender Inc, dba Bender Wells Clark Design, RVK Inc., and Terra Design Group Inc., each for a two-year term in an amount up to \$300,000.00 per year with two optional two-year extensions, to provide professional landscape architectural consulting services for various City capital improvement projects. [Peter Zanoni, Assistant City Manager; Mike Frisbie, Director, Capital Improvements Management Services]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Mary Alice P. Cisneros	District 1		x				x
Ivy R. Taylor	District 2		x				
Jennifer V. Ramos	District 3		x			x	
Rey Saldaña	District 4		x				
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Justin Rodriguez	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9				x		
Carlton Soules	District 10		x				

**PROFESSIONAL SERVICES AGREEMENT
FOR ON CALL LANDSCAPE ARCHITECTURAL SERVICES**

STATE OF TEXAS

COUNTY OF BEXAR

CITY OF SAN ANTONIO

This Agreement is made and entered into in San Antonio, Bexar County, Texas; between the City of San Antonio, a Municipal Corporation in the State of Texas, hereinafter termed "City" and

hereafter referred to as "Consultant", said Agreement being executed by City pursuant to the City Charter, Ordinances, and Resolutions of the City Council, and by Consultant for construction inspection services hereinafter set forth in connection with the above designated Project for the City of San Antonio.

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ARTICLE I. DEFINITIONS

As used in this AGREEMENT, the following terms shall have meanings as set out below:

- 1.1 "Application for Compensation" means written form for a request from Consultant to be paid for completed work.
- 1.2 "City" mean The City of San Antonio, Texas.
- 1.3 "City Designated Representative (ODR)" means person designated by City to act for City.
- 1.4 "Compensation" means amounts paid for services under this Agreement.
- 1.5 "Consultant" means _____ and its officers, partners, employees, agents and representatives, and all sub-Consultants, if any, as well as all other persons or entities for which Consultant legally is responsible.
- 1.6 "Director" means the Director of City's Capital Improvements Management Services Department or his designee.
- 1.7 "Finalized Task Order" means a written agreement, authorized by both parties in the City's Portal system and made a part of this Agreement, setting forth the agreed to scope, pricing and associated terms for an individual Project as further defined herein.
- 1.8 "Plans and Specifications" means the construction documents.
- 1.9 "Portal" means the City's internet-based, project management software for approving Task Orders and Applications for Compensation.
- 1.10 "Project" means the specific **Landscape Architectural Services** work for which a Task Order is negotiated and executed by both Parties.
- 1.11 "Proposal" means Consultant's Proposal to provide services for this Project.
- 1.12 "Proposed Task Order Request" means a request to Consultant to submit a Proposal for a specific Project as further defined herein.
- 1.13 "SAWS" means the San Antonio Water System, Inc.
- 1.14 "Schedule of Values" means the values allocated to materials and various portions of the work, prepared in such form, and supported by such data to substantiate its accuracy as City may require.
- 1.15 "Scope of Services" mean the services described in Article IV Scope of Services.
- 1.16 "Services" means those services described in the Scope of Services as set out in a Task Order._____.

- 1.17 "Total Compensation" means the not to exceed amount of this Agreement.

ARTICLE II.

COMPENSATION

- 2.1 The Compensation for all services included in this Agreement **SHALL NOT EXCEED THREE HUNDRED THOUSAND (\$300,000.00)**. Extension of this agreement for two (2) additional two-year "Extension Periods" may increase the total amount of this Agreement to an amount not to exceed
- 2.2 Consultant shall submit a Proposed Service Plan for each Project that City requests to be performed under this Agreement. City either will approve or disapprove each Proposed Service Plan. The City's approval shall be evidenced by the Finalized Task Order executed by both parties in the Portal. Task Orders shall be numbered sequentially starting with number one and must reference this Contract. Each Finalized Task Order, as entered into the Portal, will become a part of this Agreement.
- 2.2.1 Consultant understands and agrees that City has entered into multiple professional services agreements with other Consultants and has the authority to assign work tasks at its sole discretion.
- 2.2.2 Consultant understands and agrees that City makes no minimum guarantees with regard to the amount of services, if any, Consultant may be extended under this AGREEMENT.
- 2.3 Each Task Order amount shall be based on the Scope of Services for a particular Project and will be based on the not to exceed pre-priced tasks and or hourly rates included in "**Exhibit 1**" hereto.

ARTICLE III.

METHOD OF PAYMENT

- 3.1 Payments to Consultant shall be in the amount shown on the invoices consistent with the Task Order and its supporting documentation submitted, and shall be subject to City's approval. All services shall be performed to City's satisfaction, which satisfaction shall be judged by the Director in his or her sole discretion, and City shall not be liable for any payment under this Agreement for services which are unsatisfactory and which have not been previously approved by the Director. The final payment due hereunder will not be paid until all reports, data and documents have been submitted, received, accepted and approved by City.
- 3.1.1 Payment may be made based solely on the units of services completed and approved by the Director, and the associated unit price for such service as may be described in Consultant's proposal/fee schedule (Exhibit "1" hereto) and the approved Task Order.
- 3.1.2 Monthly payments for services performed in the various additional services will be reviewed by Director upon Consultant entering itemized invoices, with required back-up and reference to the individual Task Order within the Portal. The invoice shall, indicate the value of the additional services performed to date on that Task Order and any other invoices or payments made related to that Task Order.
- 3.2 Consultant shall, within ten (10) days following receipt of Compensation from City, pay all bills for services performed and furnished by others in connection with the Project and the performance of the work, and shall, if requested, provide City with evidence of such payment. Consultant's failure to make payments within such time shall constitute a material breach of this Agreement, unless Consultant is able to demonstrate to City bona fide disputes associated with the unpaid sub-

consultant and its services. Consultant shall include a provision in each of its sub-agreements imposing the same payment obligations on the sub-consultants as are applicable to Consultant hereunder, and if City so requests, shall provide copies of such payments by Consultant to City. If Consultant has failed to make payment promptly to the sub-consultant for the Services for which City has made payment to Consultant, City shall be entitled to withhold payment to Consultant to the extent necessary to protect City.

- 3.3 Consultant warrants that title to all Services covered by an Application for Payment will pass to City no later than the time of payment. Consultant further warrants that upon submittal of an Application for Compensation, all Services for which Applications for Compensation have been previously issued and payments received from City shall, to the best of Consultant's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrance in favor of Consultant or other persons or entities making a claim by reason of having provided labor or services relating to this Agreement. **CONSULTANT SHALL INDEMNIFY AND HOLD CITY HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY ANYONE CLAIMING BY, THROUGH OR UNDER THE ITEMS COVERED BY PAYMENTS MADE BY CITY TO CONSULTANT.**
- 3.4 Consultant may submit a request for Partial Compensation prior to Task Order's completion. A request for Partial Compensation must be accompanied by a progress report detailing the Services performed. Any partial payment made shall be in proportion to the Services performed as reflected in the progress report and approved by the Director and at City's sole discretion. Compensation also may be made based solely on the tasks and services completed and approved by the Director, and the associated unit price for each Service/Project as may be described in fee schedule and/or hourly rates included in Exhibit "1" hereto.
- 3.5 Project Close Out and Final Payment:
- 3.5.1 Final billing shall indicate "Final Bill - no additional compensation is due to Consultant".
- 3.5.2 City may withhold compensation to such extent as may be necessary, in City's opinion, to protect City from damage or loss for which Consultant is responsible, because of:
- 3.5.2.1 delays in the performance of Consultant's work;
- 3.5.2.2 third-party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to City is provided by Consultant;
- 3.5.2.3 failure of Consultant to make payments properly to sub-consultants or vendors for labor, materials or equipment;
- 3.5.2.4 reasonable evidence that Consultant's work cannot be completed for the amount unpaid under this Agreement;
- 3.5.2.5 damage to City; or
- 3.5.2.6 persistent failure by Consultant to carry out the performance of its services in accordance with this Agreement.

3.5.3 When the above reasons for withholding are removed or remedied by Consultant, compensation of the amount withheld will be made within a reasonable time. City shall not be deemed in default by reason of withholding compensation as provided for in this Article.

3.5.3.1 In the event of any dispute(s) between the parties regarding the amount properly compensable for any Phase or as final compensation, or regarding any amount that may be withheld by City, Consultant shall be required to make a claim pursuant to and in accordance with the terms of this Agreement and follow the procedures provided herein for the resolution of such dispute. In the event Consultant does not initiate and follow the claims procedures provided in this Agreement in a timely manner and as required by the terms thereof, any such claim shall be waived.

3.5.3.2 City shall make final compensation of all sums due Consultant not more than thirty (30) days after Consultant's execution and delivery of a final Pay Application.

3.5.3.3 Acceptance of final compensation by Consultant shall constitute a waiver of claims except those previously made in writing and identified by Consultant as unsettled at the time of final application for compensation.

3.5.3.4 Consultant agrees to maintain adequate books, payrolls and records satisfactory to City in connection with any and all Services performed hereunder. Consultant agrees to retain all such books, payrolls and records (including data stored in computer) for a period of not less than three (3) years after completion of Services. At all reasonable times, City and its duly authorized representatives shall have access to all personnel of Consultant and all such books, payrolls and records, and shall have the right to audit same.

3.6 Internet-based Project Management Systems. City will administer its services through an Internet-Based Management System, the Portal. In such case, Consultant shall conduct communication through this media and perform all Project related functions utilizing this database system. This includes correspondence, submittals, requests for information, vouchers, compensation requests and processing, amendment, change orders and other administrative activities. City shall administer the software, shall provide training to Project Team Members and shall make the software accessible via the Internet to all necessary Project Team Members.

3.6.1 All invoices shall be submitted through City's Program Management Portal

ARTICLE IV.

SCOPE OF SERVICES

[SUBJECT TO REVISION AS APPLICABLE]

4.1 Consultant understands and agrees that City has entered into multiple **On-Call Landscape Architectural Service** agreements with other Consultants and has the authority to assign services at its sole discretion. As stated in Section 2.2.2 herein, Consultant understands and agrees that City makes no minimum guarantees with regard to the amount of work, if any, which Consultant may be extended under this Agreement.

- 4.2 This Agreement is an on-call, Task Order, or indefinite delivery agreement for **Landscape Architectural Services** and such other services that are required for Consultant to provide or are associated with **Landscape Architectural Services**. Specific requirements as to location, conditions, procedures, and associated services pertaining to a Project shall be negotiated and set out in individual Task Orders for each request, which Task Orders are incorporated into and shall become a part of this Agreement.
- 4.3 Consultant shall provide **Inspection Services**, and all associated services required for Consultant to provide such Services, pursuant to this Agreement, as further defined in individual Task Orders. Services may include, but are not limited to, the following:
- a. Pre-construction services to include conducting constructability reviews.
 - b. Checking of construction activities to ensure compliance with the Project's plans and specifications (Specifications). Informing the Department and the Contractor of any service that is in noncompliance.
 - c. Assuring that all project service is completed in compliance with the contractor/owner agreement and performing all duties so as not to impede construction progress.
 - d. Ensuring that all testing required by the Specifications is performed and all commercially produced products, such as pipe and reinforcing steel, that are used on the Project are accompanied by numerical test results or a certification from the manufacturer that the material meets the applicable standards.
 - e. Attending and taking notes at meetings with Contactor, such as pre-construction conferences, progress meetings, job conferences and other Project related meetings.
 - f. Ensuring that tests are performed at the frequency stated in the Specifications. Determining when and where tests will be taken and witness tests. If not indicated in the Specifications, a sufficient number of tests should be taken to verify that the construction is acceptable.
 - g. Reviewing test reports and certifications for conformance with the Specifications. Each test report for material in-place should, at a minimum, contain the following:
 - i. Test performed and date.
 - ii. Applicable standards or Project Specification.
 - iii. Test location.
 - iv. Test result.
 - v. Action taken on failing tests.
 - vi. Lot size and location and adjusted contract price when statistical acceptance procedures are specified or when provisions allow for reduced payment.
 - h. Maintaining a file of test reports and certifications.
 - i. Informing the Contractor of deficiencies so corrections can be made and retesting performed prior to covering any substandard work with additional material.
 - j. Documenting quantities of materials used on the Project by actual measurements and computations in a field notebook or computer printout retained in a folder. For materials paid for on a weight basis, keeping a summary of the material placed each day in the field notebook. The notebook and/or computer printouts, supported by the original set of weight tickets, is/are the basis for payment.
 - k. Maintaining a set of working drawings on the job site that can be used to prepare "record" drawings. Recording names, addresses and telephone numbers of all Contractor(s), subcontractors and major suppliers of material and equipment.

- l. Reviewing payment requests from the Contractor, including verifying the quantity or percentage of the service.
- m. Maintaining a diary with daily entries made and signed by the resident engineer. Each entry should include the following, plus any additional pertinent data:
 - i. Date and weather conditions.
 - ii. Names of important visitors.
 - iii. Construction work in progress and locations by stations or similar references.
 - iv. Size of Contractor's work force and equipment in use.
 - v. Test performed and locations. Test results.
 - vi. Instructions issued by Contractor.
 - vii. Problems encountered and action taken.
 - viii. Record date and time for placing pavement base materials, asphalt and/or concrete with test report numbers on working drawing.
 - ix. Number of hours worked per day for Contractor and subcontractors.
 - x. The substance of important conversations with the Contractor about conduct, progress, changes, test results, interpretations or specifications, or other details.

Upon completion of the Project, submitting all original inspection diaries to the Department.

- 4.5 Consultant shall provide all labor, equipment and transportation necessary to complete all services agreed to hereunder in a timely manner throughout the term of the Contract. Additionally, Consultant shall provide staff for regular, overtime, night, weekend, and holiday service, as requested by Department. Persons retained by Consultant to perform work pursuant to this Agreement shall be employees or subcontractors of Consultant.
- 4.6 Consultant shall not commence service on any Task Order authorized under this Agreement until being thoroughly briefed on the scope of the project and being notified in writing to proceed. Should the scope subsequently change, either Consultant or City may request a review of the anticipated services, with an appropriate adjustment in compensation.
- 4.7 Consultant, in consideration for the compensation herein provided, shall render the professional services described in this Section that are necessary for the advancement of the Project to substantial completion.
- 4.8 Consultant shall perform its obligations under this Agreement in accordance with the Scope of Services outlined herein, in each authorized Task Order and in accordance with the Consultant's Fee Schedule, attached and incorporated herein as Exhibit "1". The Scope of Services shall be fully described in Consultant's Proposal, as revised in accordance with negotiations with City and approval of the Director for each authorized service task, and as provided in this Agreement.
- 4.9 Consultant's Fee Schedule, which includes pre-priced tasks and/or hourly rates, is incorporated by reference herein and attached as Exhibit 1 hereto.

ARTICLE V.

TIME AND PERIOD OF SERVICE

- 5.1 The term of this Agreement shall commence upon its approval by the San Antonio City Council and the execution by both parties and shall remain in force for the period of **one (1) year**, herein referred to as the "Initial Term".
- 5.2 As the enabling Ordinance provides, City shall retain an option to extend this Agreement for **two (2) additional two (2) year periods**, herein referred to as the "Extension Period". The Director

shall have the authority to exercise such options at his/her discretion. In the event such options are exercised and any material provision of the Agreement is modified, such amendment must be approved by the City Council.

- 5.3 Time is of the essence of this Agreement. Consultant shall perform and complete its obligations for the various Tasks of services under Article IV herein in a prompt and continuous manner so as to not delay the development of the design services and so as to not delay the construction of the work for the Project in accordance with the schedules approved by City and Construction Contractor. If, upon review of task orders, corrections, modifications, alterations or additions are required of Consultant, these items shall be completed by Consultant before that Task Order is approved.
- 5.4 Consultant shall not proceed with the next appropriate Task Order without written authorization from the Director. City may elect to discontinue Consultant's services at the end of any Task Order for any reason. However, if circumstance dictates, the Director may make adjustments to the scope of Consultant's obligations at any time to achieve the required services.
- 5.5 Consultant shall not be liable or responsible for any delays due to strikes, riots, acts of God, national emergency, acts of the public enemy, governmental restrictions, laws or regulations or any other causes beyond Consultant's reasonable control. Within twenty one (21) days from the occurrence of any event, for which time for performance by Consultant shall be significantly extended under this provision, Consultant shall give written notice thereof to City stating the reason for such extension and the actual or estimated time thereof. If City determines that Consultant is responsible for the need for extended time, City shall have the right to make a Claim as provided in this Agreement.
- 5.6 This Agreement shall remain in force for a period which may reasonably be required for the design, award of the contract and the completion of the Project, including any extra work and any required extensions thereto, unless discontinued as provided for elsewhere in this Agreement.

ARTICLE VI.

PROJECT INSPECTION SERVICES REQUEST PROCESS

- 6.1 Necessary inspection requirements will be established with each Project-specific Task Order.
- 6.2 When Director has a Project for which he desires to procure **Landscape Architectural Services**, Director shall notify Consultant by issuing a proposed Task Order Request. Each proposed Task Order Request will include, at a minimum: name of Project, location of Project, copies of or access to Project documentation (such as specifications, environmental reports, or drawings) needed by Consultant to prepare a Proposal, Project schedule and any specific deadlines for performance of **Landscape Architectural Services**, any Project specific insurance requirements necessitated by the work which may require additional types of coverages or higher levels of coverage than required by the Agreement, and a deadline for providing Director with a Proposal based on the above.
- 6.3 Consultant shall prepare and submit to Director, within the timeline stated in a proposed Task Order Request, a Proposal for the desired services which will include at a minimum: Scope of Services, specific staffing, an estimate of Project cost based on rates and fees agreed upon in Exhibit 1, approved Fee Schedule. The Consultant shall submit the Proposal in editable electronic format to the City. By submitting a Proposal, Consultant agrees to perform the requested service within the time stated in the proposed Task Order Request.
- 6.4 Consultant and Director shall negotiate the Proposal. Once Consultant and Director reach mutual

agreement as to scope, staffing, scheduling and cost, the City shall issue a finalized Task Order in the Portal to be executed by both parties evidencing the agreed to scope and costs.

- 6.5 The Director has the authority to execute a Task Order in the Portal on behalf of the City so long as such finalized Task Order does not exceed the total contract value and funds are provided for in the Project budget as allocated by City Council.
- 6.6 Consultant shall not proceed with services until after a finalized Task Order has been executed, Consultant receives a Notice to Proceed, and all documents required by Director in advance of commencement of work, to include proof of insurance, have been provided. Any services provided or expenses incurred, prior to receiving a Notice to Proceed or after the expiration of this Agreement on a particular finalized Task Order, will be at Consultant's sole risk and expense and may not be reimbursable by City.
- 6.7 Actual amounts billed shall not exceed the total amount as set out in the finalized Task Order.
- 6.8 Each Task Order shall be entered into the Portal and incorporated herein for all purposes. Each Task Order shall be numbered sequentially starting with number one and must reference this Agreement.
- 6.9 Consultant shall not invoice for any work associated with the Project proposed Task Order Request process, including development of Proposal and the associated Task Order negotiation.

ARTICLE VII.

COORDINATION WITH THE CITY

- 7.1 Consultant shall hold periodic conferences with the Director or his representative(s) through the end of the Project. The Project shall have the full benefit of City's experience and knowledge of existing needs and facilities and be consistent with City's current policies and standards. To assist Consultant in this coordination, City shall make available for Consultant's use in planning and designing the Project all existing plans, maps, statistics, computations and other data in City's possession, relative to existing facilities and to this particular Project, at no cost to Consultant. However, any and all such information shall remain the property of City and shall be returned by Consultant upon termination or the completion of the Project or if instructed to do so by the Director.
- 7.2 The Director shall act on behalf of City, with respect to the services to be performed under this Agreement. The Director shall have complete authority to transmit instructions, receive information and interpret and define City's policies and decisions, with respect to materials, equipment, elements and systems pertinent to Consultant's services.
- 7.3 City promptly will give written notice to Consultant whenever City observes, discovers or otherwise becomes aware of any defect in Consultant's services, in the work of Construction Contractor or any development that affects the scope or timing of Consultant's services.
- 7.4 Unless otherwise required by City, City shall furnish approvals and permits from all governmental authorities having jurisdiction over the Project and other such approvals and consents from others, as may be necessary, for the completion of the Project. Consultant will provide City reasonable assistance in connection with such approvals and permits, such as the furnishing of data compiled by Consultant pursuant to other provisions of the Agreement, but Consultant shall not be obligated to develop additional data, prepare extensive reports or appear at hearings or the like unless compensated

therefore under other provisions of this Agreement.

ARTICLE VIII. REVISIONS TO DOCUMENTS

Consultant shall make, without expense to City, such revisions to the drawings, reports or other documents, as may be required to meet the needs of City which are within the Scope of Services. After the approval of reports or other documents by City, any revisions, additions or other modifications made at City's request, which involve extra services and expenses to Consultant, only shall be requested through an additional Task Order for services.

ARTICLE IX. OWNERSHIP OF DOCUMENTS

- 9.1 All documents, including the original drawings, estimates, specifications and all other documents and data, previously owned by Consultant, shall remain the property of Consultant as instruments of service. However, it is to be understood that City shall have free access to all such information and hold the right to make and retain copies of drawings, estimates, specifications and all other documents and data. Any reuse without specific written verification or adaptation by Consultant will be at City's sole risk and without liability or legal exposure to Consultant.
- 9.2 Consultant acknowledges and agrees that City exclusively shall own any and all information in whatsoever form and character produced and/or maintained in accordance with, pursuant to or as a result of this Agreement and said information shall be used as City desires. Any and all documents, including the original drawings, estimates, specifications and all other documents and data, shall be delivered to City at no additional cost to City, upon request or termination or completion of this Agreement without restriction on future use.
- 9.3 Consultant agrees and covenants to protect any and all proprietary rights of City in any materials provided to Consultant. Such protection of proprietary rights by Consultant shall include, but not be limited to, the inclusion in any copy intended for publication of copyright mark reserving all rights to City. Additionally, any materials provided to Consultant by City shall not be released to any third party without the consent of City and shall be returned intact to City upon termination or completion of this Agreement or if instructed to do so by the Director.
- 9.4 Consultant hereby assigns all statutory and common law copyrights to any copyrightable work that in part or in whole was produced from this Agreement to City, including all equitable rights. No reports, maps, documents or other copyrightable works, produced in whole or in part by this Agreement, shall be subject of an application for copyright by Consultant. All reports, maps, project logos, drawings or other copyrightable work produced under this Agreement shall become the property of City (excluding any instrument of services, unless otherwise specified herein). Consultant shall, at its own expense, defend all suits or proceedings instituted against City and pay any award of damages or loss resulting from an injunction, against City, insofar as the same are based on any claim that materials or work provided under this Agreement constitute an infringement of any patent, trade secret, trademark, copyright or other intellectual property rights.
- 9.5 Consultant may make copies of any and all documents and items for its files. Consultant shall have no liability for changes made to or use of the drawings, specifications and other documents by other engineers, or other persons, subsequent to the completion of the Project. City requires that Consultant appropriately mark all changes or modifications on all drawings, specifications and other documents by other engineers or

other persons, including electronic copies, subsequent to the completion of the Project.

- 9.6 Copies of documents, which may be relied upon by City are limited to the printed copies (also known as hard copies) and PDF electronic versions that are sealed and signed by Consultant. Files in editable electronic media format of text, data, graphics or other types, (such as DWG or DGN) that are furnished by Consultant to City or utility only are for convenience of City or utility. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.
- 9.7 Notwithstanding anything to the contrary contained herein, all previously owned intellectual property of Consultant, including but not limited to any computer software (object code and source code), tools, systems, equipment or other information used by Consultant or its suppliers in the course of delivering the Services hereunder, and any know-how, methodologies or processes used by Consultant to provide the services or protect deliverables to City, including without limitation, all copyrights, trademarks, patents, trade secrets and any other proprietary rights inherent therein and appurtenant thereto, shall remain the sole and exclusive property of Consultant or its suppliers.

ARTICLE X.

TERMINATION AND/OR SUSPENSION OF SERVICES

10.1 Right of Either Party to Terminate for Default

10.1.1 This Agreement may be terminated by either party for substantial failure by the other party to perform (through no fault of the terminating party) in accordance with the terms of this Agreement and a failure to cure as provided in this Paragraph 10.1.

10.1.2 The party not in default must issue a signed, written Notice of Termination (citing this paragraph) to the other party declaring the other party to be in default and stating the reason(s) why it is in default. Upon receipt of such written Notice of Default, the party in receipt shall have a period of ten (10) days to cure any failure to perform under this Agreement. Upon the completion of such ten-day period, commencing upon receipt of Notice of Termination, if such party has not cured any failure to perform, such termination shall become effective without further written notice.

10.2 Right of City to Terminate

10.2.1 City reserves the right to terminate this Agreement for reasons other than substantial failure by Consultant to perform by issuing a signed Notice of Termination (citing this paragraph), which shall take effect on the twentieth (20th) day following receipt of said notice and upon the scheduled completion date of the performance phase in which Consultant then is currently working, whichever effective termination date occurs first.

10.3 Right of City to Suspend Giving Rise to Right of Consultant to Terminate

10.3.1 City reserves the right to suspend this Agreement at the end of any phase for the convenience of City by issuing a signed, written Notice of Suspension (citing this paragraph) which shall outline the reasons for the suspension and the expected duration of the suspension, but such expected duration shall, in no way, guarantee what the total number of days of suspension will occur. Such

suspension shall take effect immediately upon receipt of said Notice of Suspension by the Consultant.

10.3.2 Consultant hereby is given the right to terminate this Agreement in the event such suspension extends for a period in excess of one hundred twenty (120) days. Consultant may exercise this right to terminate by issuing a signed, written Notice of Termination (citing this paragraph) to City after the expiration of one hundred twenty (120) days from the effective date of the suspension. Termination (under this paragraph) shall become effective immediately upon receipt of said written notice by City.

10.4 Procedures Consultant to follow upon Receipt of Notice of Termination

10.4.1 Upon receipt of a Notice of Termination and prior to the effective date of termination, unless the notice otherwise directs or Consultant immediately takes action to cure a failure to perform under the cure period set out hereinabove, Consultant immediately shall begin the phase-out and the discontinuance of all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement. Within thirty (30) days after receipt of such Notice of Termination (unless Consultant successfully has cured a failure to perform) Consultant shall submit a statement showing in detail the services performed under this Agreement prior to the effective date of termination. City retains the option to grant an extension to the time period for submittal of such statement.

10.4.2 Copies of all completed or partially completed documents and all reproductions of all completed or partially completed documents, prepared under this Agreement prior to the effective date of termination, shall be delivered to City, in the form requested by City as a pre-condition to final payment. These documents shall be subject to the restrictions and conditions set forth in Article IX herein.

10.4.3 Upon the above conditions being met, City promptly shall pay Consultant that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less any previous payments of the fee.

10.4.4 City, as a public entity, has a duty to document the expenditure of public funds. Consultant acknowledges this duty on the part of City. To this end, Consultant understands that failure of Consultant to comply with the submittal of the statement and documents, as required above, shall constitute a waiver by Consultant of any and all rights or claims to payment for services performed under this Agreement by Consultant.

10.4.5 Failure of Consultant to comply with the submittal of the statement and documents, as required above, shall constitute a waiver by Consultant of any and all rights or claims to collect monies that Consultant otherwise may be entitled to for services performed under this Agreement.

10.5 Procedures Consultant to Follow upon Receipt of Notice of Suspension

10.5.1 Upon receipt of written Notice of Suspension, which date also shall be the effective date of the suspension, Consultant shall, unless the Notice otherwise directs, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and shall proceed promptly

to suspend all existing orders and contracts, insofar as such orders and contracts are chargeable to this Agreement.

- 10.5.2 Consultant shall prepare a statement showing, in detail, the services performed under this Agreement prior to the effective date of suspension.
- 10.5.3 Copies of all completed or partially completed documents, prepared under this Agreement prior to the effective date of suspension, shall be prepared for possible delivery to City but shall be retained by Consultant until such time as Consultant may exercise the right to terminate.
- 10.5.4 In the event that Consultant exercises the right to terminate one hundred twenty (120) days after the effective suspension date, within thirty (30) days after receipt by City of Consultant's Notice of Termination, Consultant promptly shall cancel all existing orders and contracts, insofar as such orders and contracts are chargeable to this Agreement, and shall submit the above referenced statement showing, in detail, the services performed under this Agreement prior to the effective date of suspension.
- 10.5.5 Any documents prepared in association with this Agreement shall be delivered to City as a pre-condition to final payment.
- 10.5.6 Upon the above conditions being met, City promptly shall pay Consultant that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less any previous payments of the fee.
- 10.5.7 City, as a public entity, has a duty to document the expenditure of public funds. Consultant acknowledges this duty on the part of the City. To this end, Consultant understands that failure of Consultant substantially to comply with the submittal of the statements and documents, as required herein, shall constitute a waiver by Consultant of any portion of the fee for which Consultant did not supply such necessary statements and/or documents.

ARTICLE XI.

CONSULTANT'S WARRANTY

Consultant warrants that the services required under this Agreement will be performed with the same degree of professional skill and care that typically are exercised by similar consulting professionals performing similar services in Bexar County, Texas. Consultant further warrants that it has not employed or retained any company or person other than a bona fide employee, working solely for Consultant, to solicit or secure this Agreement, and that it has not, for the purpose of soliciting or securing this Agreement, paid or agreed to pay any company or person, commission, percentage, brokerage fee, gift or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach of this warranty, City shall have the right to terminate this Agreement under the provisions of Article X herein.

ARTICLE XII.

SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY (SBEDA)

12.1 DEFINITIONS

- 12.1.1 SBEDA Program. The CITY has adopted a Small Business Economic Development Advocacy Ordinance (the "SBEDA Program"), which is posted on the City's Economic Development Department website and is also available in hard copy form upon request to the CITY. In addition to the definitions provided in the SBEDA Program, the following definitions will apply pursuant to SBEDA Program requirements and this Agreement:
- 12.1.2 SBEDA Enterprise ("SE") – A corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed, as applicable, and otherwise authorized to do business in the state of Texas and certified pursuant to SBEDA Program requirements.
- 12.1.3 Commercially Useful Function – A function performed by an SE when it is responsible for supplying goods or for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether an SE is performing a Commercially Useful Function, the amount of work subcontracted, industry practices and other relevant factors shall be evaluated. Commercially Useful Function is measured for purposes of determining participation on a contract, not for determination of certification eligibility.
- 12.1.4 Conduit – An SE that knowingly agrees to pass the scope of work for which it is listed for participation, and is scheduled to perform or supply on the contract, to a non-SE firm. In this type of relationship, the SE has not performed a Commercially Useful Function and the arranged agreement between the two parties is not consistent with standard industry practice. This arrangement does not meet the Commercially Useful Function requirement and therefore the SE's participation does not count toward the SE utilization goal.
- 12.1.5 SBEDA Plan – The Good Faith Effort Plan ("GFEP"), SBEDA Narrative, List of Subcontractors/Suppliers and executed Letters of Intent (all as applicable) that are submitted with CONSULTANT's submittal for this project Agreement, attached hereto and incorporated herein as "Exhibit 2".

12.2 For this Agreement, the Parties agree that:

- 12.2.1 The terms of the CITY's SBEDA Ordinance, as amended, together with all requirements and guidelines established under or pursuant to the Ordinance (collectively, the "SBEDA Program") are incorporated into this Agreement by reference; and
- 12.2.2 The failure of CONSULTANT or any applicable SE to comply with any provision of the SBEDA Program shall constitute a material breach of the SBEDA Program and this Agreement.
- 12.2.3 Failure of CONSULTANT or any applicable SE to provide any documentation or written submissions required by the CITY Managing Department or SBEDA Program Office pursuant to the SBEDA Program, within the time period set forth by the SBEDA Program Office, shall constitute a material breach of the SBEDA Program and this Agreement.
- 12.2.4 During the Term of this Agreement, and any renewals thereof, any unjustified failure to utilize good faith efforts to meet, and maintain, the levels of SE participation identified in CONSULTANT's SBEDA Plan ("Exhibit 2") shall constitute a material breach of the SBEDA Program and this Agreement.
- 12.2.5 CONSULTANT shall pay all suppliers and subcontractors identified in its SBEDA Plan ("Exhibit 2") in a timely manner for satisfactory work, pursuant to and as outlined in Section VII, Paragraph F(2)(e) of the SBEDA Ordinance, as amended. Documentation of

all billing and payment information applicable to SBEDA Plan suppliers and subcontractors shall be submitted by CONSULTANT to the CITY Managing Department. Failure to pay SEs in a timely manner or submit the required billing and payment documentation shall constitute a material breach of this Agreement.

12.3 The Parties also agree that the following shall constitute a material breach of the SBEDA Program and this Agreement:

12.3.1 Failure of CONSULTANT to utilize an SE that was originally listed at bid opening or proposal/SOQ submission to satisfy SBEDA Program goals in order to be awarded this Agreement, or failing to allow such SE to perform a Commercially Useful Function; or

12.3.2 Modification or elimination by CONSULTANT of all or a portion of the scope of work attributable to an SE upon which the Agreement was awarded; or

12.3.3 Termination by CONSULTANT of an SE originally utilized as a Subcontractor, Joint Venturer, Supplier, Manufacturer or Broker in order to be awarded the Agreement without replacing such SE with another SE performing the same Commercially Useful Function and dollar amount, or without demonstrating each element of Modified Good Faith Efforts to do so; or

12.3.4 Participation by CONSULTANT in a Conduit relationship with an SE scheduled to perform work that is the subject of this Agreement.

12.4 Remedies for Violation of SBEDA Program. The Parties further agree that in addition to any other remedies the CITY may have at law or in equity, or under this Agreement for material breach, including the specified remedies available under the SBEDA Program for Alternative Construction Delivery Method, the CITY shall be entitled, at its election, to exercise any one or more of the following remedies if the CONSULTANT materially breaches the requirements of the SBEDA Program:

12.4.1 Terminate this Agreement for default;

12.4.2 Suspend this Agreement for default;

12.4.3 Withhold all payments due to the CONSULTANT under this Agreement until such violation has been fully cured or the Parties have reached a mutually agreeable resolution; and/or

12.4.4 Offset any amounts necessary to cure any material breach of the requirements of the SBEDA Program from any retainage being held by the CITY pursuant to the Agreement, or from any other amounts due to the CONSULTANT under the Agreement.

12.4.5 Suspension, Revocation or Modification of SE Certification: The SBEDA Program Office may suspend or revoke an offending SE's eligibility for Certification, and may suspend its participation from counting toward a project goal, based upon such SE's acting as a Conduit, failing to comply with the provisions of the SBEDA Program, failing to perform a Commercially Useful Function on a project, failing to submit information as required by the SBEDA Program Office, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations. The SBEDA Program Office may further modify the list of areas for which an SE is certified, if the SE is routinely failing to submit bids or proposals for work in a particular area, or if it becomes apparent that the SE is not qualified to perform work in a particular area.

The Parties agree that nothing in the SBEDA Program or that any action or inaction by the SBEDA Program Office or the SBEDA Program Manager shall be deemed a representation or certification that an

SE is qualified to perform work in a particular area for the purposes of this Agreement.

The remedies set forth herein shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy.

- 12.5 **City Process for Exercising SBEDA Program Remedies.** The SBEDA Program Manager shall make all decisions regarding the suspension or revocation of an SE's certification as well as the duration of such suspension or revocation. The SBEDA Program Manager shall make a recommendation to the Managing Department Director regarding appropriate remedies for the CITY to exercise in the event a Contractor violates the SBEDA Program. The Managing Department Director shall make a recommendation regarding appropriate remedies to the City Manager or designee, who shall have final approval regarding the remedy to be exercised except for termination of the Agreement. If the recommended remedy is to terminate the Agreement, then the Managing Department Director or City Manager, or her designee, shall bring forward the recommendation to City Council for final determination.
- 12.6 **Special Provisions for Extension of Agreements.** In the event the CITY extends this Agreement without a competitive Bid process, the CITY Managing Department responsible for monitoring the Agreement shall establish the following, subject to review and approval by the SBEDA Program Manager:
- 12.6.1 A SBEDA Utilization Goal for the extended period; and
- 12.6.2 A modified version of the Good Faith Efforts ("Modified Good Faith Efforts Plan") set forth in the SBEDA Program Ordinance, as amended, if CONSULTANT does not meet the SBEDA Utilization Goal; and
- 12.6.3 The required minimum Good Faith Efforts outreach attempts that CONSULTANT shall be required to document in attempting to meet the SBEDA Utilization Goal. The SBEDA Utilization Goal, Modified Good Faith Efforts Plan and the required number of minimum Good Faith Efforts outreach attempts shall be added into the Agreement extension document. The CONSULTANT entering into the extension shall either meet the SBEDA Utilization Goal or document that it has made the Good Faith Efforts to meet the SBEDA Utilization Goal. Failure to do so shall:
- 12.6.3.1 Subject CONSULTANT to any of the remedies listed above; and/or
- 12.6.3.2 Result in resolicitation of the Agreement that was considered for extension.

ARTICLE XIII.

ASSIGNMENT OR TRANSFER OF INTEREST

Consultant shall not assign or transfer Consultant's interest in this Agreement without the written consent of City.

ARTICLE XIV.

INSURANCE REQUIREMENTS

- 14.1 Prior to the commencement of any work under this Agreement, Consultant shall furnish copies of all required endorsements and a completed Certificate(s) of Insurance to City's Capital Improvements Management Services (CIMS)/Contract Services, which clearly shall be labeled "**On Call Landscape Architectural Services**" in the Description

of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. City will not accept Memorandum of Insurance or Binders as proof of insurance. The certificate(s) or form must have the agent's signature, phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to City. City shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by City's CIMS Department. No officer or employee other than City's Risk Manager shall have authority to waive this requirement.

- 14.2 City reserves the right to review the insurance requirements of this Article during the effective period of this contract 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 contract. In no instance will City allow modification whereupon City may incur increased risk.
- 14.3 Consultant's financial integrity is of interest to City. Therefore, subject to the Consultant's right to maintain reasonable deductibles in such amounts as are approved by City, Consultant shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Consultant'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 not less than A- (VII), in the following types and for an amount not less than the amount listed:

1. Workers' Compensation	Statutory
2. Employers' Liability	\$500,000/\$500,000/\$500,000
3. Commercial General Broad Form Liability Insurance to include coverage for the following: a. Premises/Operations b. Independent Contractors c. Products/completed operations d. Personal Injury e. Contractual liability	<u>Combined Single Limit for Bodily Injury and Property Damage</u> of \$1,000,000 per occurrence; General Aggregate limit of \$1,000,000 or its equivalent in umbrella or excess liability coverage
4. Business Automobile Liability a. Owned/Leased Vehicles b. Non-Owned Vehicles c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence
5. Professional Liability (Claims made form)	\$1,000,000 per claim to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any negligent act, malpractice, error or omission in professional services.

- 14.4 As they apply to the limits required by the City, City shall be entitled, upon request and without expense, to receive copies of the policies, declarations 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). Consultant 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 ten (10) days of the requested change. Consultant shall pay any costs incurred resulting from said changes.

City of San Antonio
Capital Improvements Management Services Department
Attn: Contracts Division 9th Floor
P.O. Box 839966
San Antonio, Texas 78283-3966

- 14.5 Consultant agrees that, with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following required provisions:
- Name City and 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 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 City where City is an additional insured shown on the policy;
 - Workers' compensation, employers' liability, general liability and auto liability policies will provide a waiver of subrogation in favor of City; and
 - Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of City; and
 - Provide advance written notice directly to City of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.
- 14.6 Within five (5) calendar days of a suspension, cancellation, or non-renewal of coverage, Consultant shall provide a replacement Certificate of Insurance and applicable endorsements to City. City shall have the option to suspend Consultant's performance, should there be a lapse in coverage at any time during this contract. Failure to provide and maintain the required insurance shall constitute a material breach of this Agreement.
- 14.7 In addition to any other remedies it may have, upon Consultant's failure to provide and maintain any insurance or policy endorsements, to the extent and within the time herein required, City shall have the right to order Consultant to stop services/tasks hereunder and/or withhold any compensation which become due to Consultant hereunder until Consultant demonstrates compliance with the requirements hereof.
- 14.8 Nothing herein contained shall be construed as limiting in any way the extent to which Consultant may be held responsible for payments of damages to persons or property resulting from Consultant's or its sub-Consultant's performance of the services covered under this Agreement.
- 14.9 It is agreed that Consultant's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by City for liability arising out of operations under this Agreement.
- 14.10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement and that no claim or action by or

on behalf of CITY shall be limited to the insurance coverage provided.

- 14.11 Consultant and its subcontractors are responsible for all damages to their own equipment and/or property.

ARTICLE XV.

INDEMNIFICATION

- 15.1 **Consultant, whose work product is the subject of this Agreement for professional services, agrees to INDEMNIFY AND HOLD CITY, ITS ELECTED OFFICIALS, OFFICERS AND EMPLOYEES HARMLESS against any and all claims, lawsuits, judgments, cost, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought that may ARISE OUT OF OR BE OCCASIONED OR CAUSED BY CONSULTANT'S NEGLIGENT ACT, ERROR, OR OMISSION OF CONSULTANT, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONSULTANT OR SUBCONSULTANT OF CONSULTANT, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES while in the exercise of performance of the rights or duties under this 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 CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**
- 15.2 Consultant shall advise City in writing within 24 hours of any claim or demand against City or Consultant, related to or arising out of Consultant's activities under this Agreement.
- 15.3 The provisions of this Article solely are for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

ARTICLE XVI.

CLAIMS AND DISPUTES

- 16.1 **Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of the Agreement terms, payment of money, extension of time or other relief, with respect to the terms of the Agreement. The term "Claim" also includes other disputes and matters in question between City and Consultant arising out of or relating to the Agreement. Claims must be initiated by written notice. Every Claim of Consultant, whether for additional compensation, additional time or other relief, shall be signed and sworn to by an authorized corporate officer (if not a corporation, then an official of the company authorized to bind Consultant by his signature) of Consultant, verifying the truth and accuracy of the Claim. The responsibility to substantiate Claims shall rest with the party making the Claim.**

- 16.2 Time Limit on Claims. Claims by Consultant or by City must be initiated in writing to the other party, within twenty-one (21) days after the occurrence of the event giving rise to such Claim.
- 16.3 Continuing Contract Performance. Pending final resolution of a Claim, except as otherwise agreed in writing, Consultant shall proceed diligently with performance of the Agreement and City shall continue to make payments in accordance with this Agreement.
- 16.4 Claims for Additional Time. If Consultant wishes to make a Claim for an increase in the time for performance, written notice, as stated in this Section XVI herein, must be given. Consultant's Claim shall include an estimate of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.
- 16.5 Claims for Consequential Damages. Except as otherwise provided in this Agreement, in calculating the amount of any Claim or any measure of damages for breach of contract (such provision to survive any termination following such breach), the following standards will apply both to claims by Consultant and to claims by City:
- 16.5.1 No consequential damages will be allowed.
- 16.5.2 Damages are limited to extra costs specifically shown to have been directly caused by a proven wrong for which the other party is claimed to be responsible.
- 16.5.3 No profit will be allowed on any damage claim.
- 16.6 **No Waiver of Governmental Immunity. NOTHING IN THIS SECTION 16 SHALL BE CONSTRUED TO WAIVE CITY'S GOVERNMENTAL IMMUNITY FROM LAWSUIT, WHICH IMMUNITY IS EXPRESSLY RETAINED TO THE EXTENT IT IS NOT CLEARLY AND UNAMBIGUOUSLY WAIVED BY STATE LAW.**
- 16.7 Alternative Dispute Resolution.
- 16.7.1 Continuation of Services Pending Dispute Resolution. Each party is required to continue to perform its obligations under this Agreement, pending a final resolution of any dispute arising out of or relating to this Agreement, unless it would be impossible or impracticable under the circumstances.
- 16.7.2 Requirement for Senior Level Negotiations. Before invoking mediation or any other alternative dispute process set forth herein, the parties agree that they shall first try to resolve any dispute arising out of or related to this Agreement through discussions directly between those senior management representatives within their respective organizations who have overall managerial responsibility for similar projects. This step shall be a condition precedent to use of any other alternative dispute resolution process. If the parties' senior management representatives cannot resolve the dispute within thirty days after a party delivers a written notice of such dispute, then the parties shall proceed with mediation alternative dispute resolution process contained herein. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.
- 16.7.3 Mediation.

- 16.7.3.1 In the event that City or Consultant shall contend that the other has committed a material breach of this Agreement, the party alleging such breach shall, as a condition precedent to filing any lawsuit, request mediation of the dispute.
- 16.7.3.2 Request for mediation shall be in writing, and shall request that the mediation commence not less than thirty (30) or more than ninety (90) days following the date of the request, except upon agreement of both parties.
- 16.7.3.3 In the event the City and the CONSULTANT are unable to agree to a date for the mediation or to the identity of the mediator or mediators within 30 days following the date of the request for mediation, all conditions precedent in this article shall be deemed to have occurred.
- 16.7.3.4 The parties shall share the mediator's fee and any filing fees equally. Venue for any mediation or lawsuit arising under this Agreement shall be in Bexar County, Texas. Any agreement reached in mediation shall be enforceable as a settlement agreement in any court having jurisdiction thereof. No provision of this Agreement shall waive any immunity or defense. No provision of this Agreement is a consent to suit.

ARTICLE XVII.

SEVERABILITY

If for any reason, any one or more paragraphs of this Agreement are held invalid or unenforceable, such invalidity or unenforceability shall not affect, impair or invalidate the remaining paragraphs of this Agreement but shall be confined in its effect to the specific section, sentences, clauses or parts of this Agreement held invalid or unenforceable, and the invalidity or unenforceability of any section, sentence, clause or parts of this Agreement, in any one or more instance, shall not affect or prejudice in any way the validity of this Agreement in any other instance.

ARTICLE XVIII.

INTEREST IN CITY CONTRACTS PROHIBITED

- 18.1 No officer or employee of City shall have a financial interest, directly or indirectly, in any contract with City or shall be financially interested, directly or indirectly, in the sale to City of any land, materials, supplies or service, except on behalf of City as an officer or employee. This prohibition extends to City's Public Service Board, SAWS and other City boards and commissions, which are more than purely advisory. The prohibition also applies to subcontracts on City projects.
- 18.2 Consultant acknowledges that it is informed that the Charter of City and its Ethics Code prohibit a City officer or employee, as those terms are defined in the Ethics Code, from having a financial interest in any contract with City or any City agency, such as the City-owned utilities. Consultant's officer or employee has a "prohibited financial interest" in a contract with City or in the sale to City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a City officer or employee; a City officer or employee's parent, child or spouse; a business entity in which the City officer or employee, or the officer or employee's parent, child or spouse, owns ten percent (10%) or more of the voting stock or shares of the business entity, or ten percent (10%) or more of the fair market value of the business entity; a business

entity in which any individual or entity above listed is a subcontractor on a City contract, a partner or a parent or subsidiary business entity.

- 18.3 Consultant warrants and certifies, and this Agreement is made in reliance thereon, that Consultant, its officers, employees and agents are neither officers nor employees of City. Consultant further warrants and certifies that is has tendered to City a Discretionary Contracts Disclosure Statement in compliance with City's Ethics Code.

ARTICLE XIX.

CONFLICTS OF INTEREST DISCLOSURE

Consultant must disclose if it is associated in any manner with a City officer or employee in a business venture or business dealings. Failure to do so will constitute a violation of City Ordinance No. 76933. To be "associated" in a business venture or business dealings includes: a) being in a partnership or joint venture with a City officer or employee; b) having a contract with a City officer or employee; c) being joint owners of a business with a City officer or employee; d) owning at least ten percent (10%) of the stock in a corporation in which a City officer or employee also owns at least ten percent (10%); or e) having an established business relationship with a City Officer or employee as a client or customer.

ARTICLE XX.

STANDARD OF CARE/LICENSING

- 20.1 Services provided by Consultant under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.
- 20.2 Consultant shall be represented by personnel with appropriate certification(s) at meetings of any official nature concerning the Project, including but not limited to scope meetings, review meetings, pre-bid meetings and preconstruction meetings.

ARTICLE XXI.

RIGHT OF REVIEW AND AUDIT

- 21.1 Consultant grants City, or its designees, the right to audit, examine or inspect, at City's election, all of Consultant's records relating to the performance of the Work under the Agreement, during the term of the Agreement and retention period herein. The audit, examination or inspection may be performed by a City designee, which may include its internal auditors or an outside representative engaged by City. Consultant agrees to retain its records for a minimum of four (4) years following termination of the Agreement, unless there is an ongoing dispute under the contract, then, such retention period shall extend until final resolution of the dispute. "Consultant's records" include any and all information, materials and data of every kind and character generated as a result of the work under this Agreement. Example of Consultant records include, but are not limited to, billings, books, general ledger, cost ledgers, invoices, production sheets, documents, correspondence, meeting notes, subscriptions, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, procedures, federal and state tax filings for issue in question and any and all other agreements, sources of information and matters that may,

in City's judgment, have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Agreement Documents.

- 21.2 City agrees that it will exercise the right to audit, examine or inspect Consultant's records only during regular business hours. Consultant agrees to allow City's designee access to all of Consultant's Records, Consultant's facilities and current or former employees of Consultant, deemed necessary by City or its designee(s), to perform such audit, inspection or examination. Consultant also agrees to provide adequate and appropriate work space necessary to City or its designees to conduct such audits, inspections or examinations.
- 21.3 Consultant must include this audit clause in any subcontractor, supplier or vendor contract.

ARTICLE XXII.

ENTIRE AGREEMENT

This Agreement represents the entire and integrated Agreement between CITY and CONSULTANT and supersedes all prior negotiations, representations or agreements, either oral or written. This Agreement may be amended only by written instrument signed by both CITY and CONSULTANT.

ARTICLE XXIII.

VENUE

The obligations of the parties to this Agreement shall be performable in San Antonio, Bexar County, Texas, and if legal action, such as civil litigation, is necessary in connection therewith, exclusive venue shall lie in Bexar County, Texas.

ARTICLE XXIV.

NOTICES

Except as may be provided elsewhere herein, all notices, communications, and reports required or permitted under this Agreement shall be personally delivered or mailed to the respective party by depositing the same in the United States Postal Service, addressed to the applicable address shown below, unless and until either party is otherwise notified in writing by the other party of a change of such address. Mailed notices shall be deemed communicated as of five (5) days of mailing.

If intended for City, to:

Capital Improvements Management
Services

Attention: Contract Services
114 West Commerce, 9th Floor
San Antonio, Texas 78205

If intended for Consultant, to:

ARTICLE XXV.

INDEPENDENT CONTRACTOR

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

ARTICLE XXVI

CAPTIONS

The captions for the individual provisions of this Agreement are for informational purposes only and shall not be construed to effect or modify the substance of the terms and conditions of this Agreement to which any caption relates.

IN WITNESS WHEREOF, the City of San Antonio has lawfully caused these present to execute this Agreement by the hand of the City Manager, or designee; Consultant, acting by the hand of _____, thereunto authorized _____ does now sign, execute and deliver this document.

Executed on this ____ day of _____, A. D. _____.

CITY OF SAN ANTONIO

NAME OF CONSULTANT

Peter Zanoni
Assistant City Manager

CITY CLERK

DATE

APPROVED:

CITY ATTORNEY