RKN
03/31/16
Item No. 23

AN ORDINANCE **2016-03-31-0232**

APPROVING AN ARBITRAGE REBATE COMPLIANCE SERVICES CONTRACT WITH THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. TO PROVIDE ARBITRAGE REBATE COMPLIANCE SERVICES IN CONNECTION WITH THE CITY'S FINANCES FOR A TERM BEGINNING APRIL 1, 2016 AND ENDING MARCH 31, 2019, WITH THE OPTION TO EXTEND FOR ONE (1) ADDITIONAL TWO (2) YEAR TERM.

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WHEREAS, laws codified in Internal Revenue Service (IRS) Code Section 148 and regulations promulgated by the United States Treasury mandate that interest income derived from the investment of tax-exempt proceeds in excess of the permitted arbitrage rate must be rebated to the United States Government; and

WHEREAS, arbitrage rebate compliance requires that computations be performed which are consistent with the complex technical requirements contained in the aforementioned laws and regulations to determine the rebate amount, if any; and

WHEREAS, the scope of arbitrage rebate compliance services required by the City includes: a comprehensive review of the City's outstanding tax-exempt obligations, debt service funds, debt service reserve funds, capital projects funds and other funds, into which tax-exempt proceeds have been deposited; calculation and verification of the arbitrage rate for each tax-exempt obligation for which an arbitrage rebate computation is required; on-going services with respect to questions that may arise from time to time concerning arbitrage rebate; and assisting the City in responding to queries posed to the City related to arbitrage; and

WHEREAS, a Request for Proposal ("RFP") was developed inclusive of the various types of financings the City may undertake during the term of the Arbitrage Rebate Compliance Services Contract, for the purpose of soliciting proposals for the provision of Arbitrage Rebate Compliance Services to the City; and

WHEREAS, the RFP was released on December 21, 2016; and

WHEREAS, on February 2, 2016, four (4) firms submitted proposals for provision of Arbitrage Rebate Compliance Services, which were received by the City and evaluated by an evaluation committee; and

WHEREAS, the evaluation involved, among other inquiries, each of the following: Respondent Background, Experience, Qualifications and References; Lead Arbitrage Rebate Compliance Consultant Experience and Availability; Technical and Quantitative Expertise and Availability; Cost of Services; and Small Business Economic Development Advocacy Program Goals; and

WHEREAS, in addition to evaluating the proposals, all of the firms submitting proposals were interviewed by the evaluation committee, in order to address any outstanding issues and to gain a clear perspective of each firm's ability to service the City's unique and varied requirements; and

WHEREAS, City Staff has recommended that the City enter into an Arbitrage Rebate Compliance Services Contract with The Bank of New York Mellon Trust Company, N.A., with the term of the contract to begin April 1, 2016 and end March 31, 2019, and containing an option to extend for one (1) additional two (2) year term; and

WHEREAS, following discussion and deliberations by the City Council on the matter, the City Council is of the opinion that the recommendation of City Staff should be accepted and followed; **NOW THEREFORE:**

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

SECTION 1. The Arbitrage Rebate Compliance Services Contract between the City and The Bank of New York Mellon Trust Company, N.A., (the "Contract"), a true and correct copy of which, in substantially final form, is attached hereto and incorporated herein for all purposes as **Attachment I**, is hereby approved. The City Manager or her Designee, or the Chief Financial Officer (CFO) or his Designee, or the Finance Director or his Designee, are hereby authorized to execute the Contract containing the same or substantially the same terms and conditions as those set forth in **Attachment I**.

SECTION 2. The City Manager or the CFO or the Finance Director is authorized sixty (60) business days from the effective date of this Ordinance within which to execute a contract, substantially according to the terms and conditions set forth in Attachment I. If said contract is not executed within said sixty (60) business days, or if the parties cannot agree to terms of such contract that are in substantially the same form as Attachment I within such time, then there shall be no authority to execute said contract unless there is subsequent City Council approval.

SECTION 3. Fees for Arbitrage Rebate Compliance Services are paid from tax-exempt proceeds and the interest earned on the investment of such proceeds. Therefore, there is no impact on the City's Operating Budget.

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SECTION 4. This ordinance is effective immediately upon passage by eight (8) affirmative votes; otherwise, said effective date shall be ten (10) days from the date of passage hereof.

PASSED AND APPROVED this 31st day of March, 2016.

M A Y O R
Ivy R. Taylor

ATTEST:

Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

Martha G. Sepeda, Acting City Attorney

Agenda Item:	**23 (in consent vote: 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24)**
Date:	03/31/2016
Time:	09:12:22 AM
Vote Type:	Motion to Approve
Description:	An Ordinance authorizing the execution of a contract with The Bank of New York Mellon Trust Company, N.A. to provide Arbitrage Rebate Compliance Services for a period to commence April 1, 2016 and terminate March 31, 2019, with an option to extend the contract for one additional two-year period under the same terms and conditions. [Ben Gorzell, Chief Financial Officer; Troy Elliott, Director, Finance]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ivy R. Taylor	Mayor		x				
Roberto C. Treviño	District 1		x				
Alan Warrick	District 2		x				
Rebecca Viagran	District 3		x				x
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9		x				
Michael Gallagher	District 10		x			x	

A T T A C H M E N T I

CITY OF SAN ANTONIO
Arbitrage Rebate Compliance Services Contract

This Arbitrage Rebate Compliance Services Contract (hereinafter referred to as "**CONTRACT**") is made and entered into by and between the **CITY OF SAN ANTONIO, TEXAS**, (hereinafter referred to as "**CITY**") a Texas Municipal Corporation, acting by and through its Chief Financial Officer, pursuant to Ordinance Number 2016-03-31-____ approved on March 31, 2016, and **THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.**, a national association, hereinafter referred to as "**CONSULTANT**") to provide Arbitrage Rebate Compliance Services to **CITY**. The purpose of this **CONTRACT** is to engage **CONSULTANT** to provide Arbitrage Rebate Compliance Services in connection with **CITY**'s outstanding tax-exempt bond proceeds balances in debt service funds, debt service reserve funds, capital projects funds, and other funds, if any, into which tax-exempt proceeds may have been deposited.

IN CONDISERATION OF THE MUTUAL COVENANTS AND PROVISIONS CONTAINED HEREIN, AND OTHER GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described.

I. GENERAL STATEMENT

1.1 **CITY**, from time to time, is required to calculate interest earned on invested tax-exempt bond proceeds balances to determine the arbitrage rebate amount due to the Internal Revenue Service, if any. The purpose of this **CONTRACT** is to establish parameters within which **CONSULTANT** is to provide Arbitrage Rebate Compliance Services related to reviewing **CITY**'s tax-exempt debt service funds, debt service reserve funds, capital projects funds and other funds, if any, into which tax-exempt proceeds may have been deposited, coordinate with **CITY** the compilation of data, compute the arbitrage rate, interest income and rebate amount, if any, for each outstanding tax-exempt obligation by the required reporting date, prepare and submit a report to **CITY** citing the findings for each tax-exempt obligation for which a computation was made, provide counsel to **CITY** staff as required with respect to Arbitrage Rebate Compliance Services, attend meetings if required, assist **CITY** in responding to queries posed to **CITY** related to arbitrage, and assist **CITY** as may be required from time to time on any additional matters related to arbitrage.

II. SCOPE OF SERVICES

2.1 **CONSULTANT** agrees to provide the following services and all other Arbitrage Rebate Compliance Services normally performed by such consultants as may be necessary or advisable:

a. Provide all services as set forth in **CITY**'s Request for Proposal (RFP), issued December 21, 2015, and **CONSULTANT**'s Proposal, dated February 2, 2016, attached hereto as **Attachment "A"** and **Attachment "B"**, respectively, and incorporated herein. In the event of conflict or inconsistency between this **CONTRACT** and **Attachment A** and/or **Attachment B**, the provisions of this **CONTRACT** shall govern. In the event of conflict or inconsistency between **Attachment A** and **Attachment B**, the terms and provisions of **Attachment A** shall govern.

b. Perform a comprehensive review of **CITY**'s outstanding tax-exempt obligations, debt service funds, debt service reserve funds, capital projects funds and other funds, if any, into which tax-exempt proceeds may have been deposited. From such review, identify the issues to which the arbitrage rebate calculations are applicable and the reporting dates applicable to each of such issues.

c. Calculate and verify the arbitrage rate for each tax-exempt obligation for which an arbitrage rebate computation is required.

d. Coordinate with **CITY** the compilation of data and information required to review **CITY**'s outstanding tax-exempt obligations and perform the arbitrage rebate calculations.

e. Analyze the revenue, expenditures, and transfer of monies pertaining to funds into which tax-exempt proceeds have been deposited.

f. Calculate interest income and arbitrage amount, if any, for each issue or series of tax-exempt obligations prior to the Internal Revenue Service arbitrage rebate reporting deadline.

g. Advise **CITY** on revisions made to the arbitrage regulations for the term of contract, including renewals, as defined in Section III, Term.

h. Advise and assist **CITY** in complying with, and preparing arbitrage rebate reports.

i. Provide continuing Arbitrage Rebate Compliance Services on questions that may arise from time to time on one or more tax-exempt obligations prior to or subsequent to the computations made in connection with each reporting period.

j. Prepare reports and other documents for **CITY**'s review that **CITY** may be required to submit to the Internal Revenue Service and/or interested third parties.

k. Advise and assist **CITY** in responding to queries posed to **CITY** related to arbitrage. Such service shall include, but not be limited to, assembling information, preparing

written reports, making personal appearances in response to arbitrage questions, and performing such other tasks as may be required from time to time.

l. Attend meetings, as may be required.

m. Assist **CITY** in assembly and conveyance of data and information related to the Arbitrage Rebate Compliance Services provided by **CONSULTANT** as may be required by municipal bond attorneys, tax counsel, or other interested third parties if required or requested by **CITY**.

2.2 All services to be provided by **CONSULTANT** under this **CONTRACT** will be performed in accordance with all professional standards applicable to **CONSULTANT** and/or each of its state or federally licensed officers, employees, or representatives.

III. TERM

3.1 This **CONTRACT** shall commence on April 1, 2016 and shall be in effect through March 31, 2019, unless extension or earlier termination shall occur pursuant to any of the provisions of this **CONTRACT**.

3.2 **CITY** shall have the option to renew this **CONTRACT** for one (1) additional two (2) year period under the same terms and conditions as provided herein. Any renewals shall be in writing and be subject to City of San Antonio City Council approval, as evidenced by passage of an ordinance. An election by **CITY** not to renew shall not require any action or notification to **CONSULTANT**.

IV. CONSIDERATION

4.1 In consideration for the performance of services provided by **CONSULTANT,** and as reimbursement for the expenses which may be incurred and associated therewith by **CONSULTANT, CITY** agrees to pay **CONSULTANT** and **CONSULTANT** agrees to accept a fee in a total amount equal to the applicable fee set forth below, plus the applicable additional charge(s), if any, set forth in Section 4.2. **CONSULTANT** shall submit invoices upon completion of work performed. **CITY** shall pay **CONSULTANT** no later than thirty (30) days from the said invoice.

Fee Schedule	
Description	**Annual Fees Per Issue Per Computation Year (*)**
General Obligation Bonds	$1,250
Certificates of Obligation	$1,250
Tax Notes	$1,250
Airport System Revenue Improvement Bonds	$1,350
Passenger Facility Charge and Subordinate Lien Airport System Revenue Bonds	$1,350
Customer Facility Charge Revenue Bonds	$1,350
Municipal Drainage Utility System Revenue Bonds	$1,250
Municipal Facilities Corporation Lease Revenue Bonds	$1,250
Public Property Finance Contractual Obligation	$1,250
Convention Center Revenue Bonds	$1,350
Lease Purchase	$1,250
Other	$1,250

(*) Annual fees shown above are based upon an issue with five project funds or less.

4.2 Additional Charges

The structure and complexity of certain bond issues may require or benefit from additional services for which additional fees will be charged. The following table indicates situations that require additional calculations and increases the amount of work necessary to complete the report. In these instances, additional fees would be charged for that issue.

Description	**Annual Fees Per Issue**
Additional Charges for Special Services Related to:	
Project Fund Fee (per fund when in excess of five project funds)	$100
Commingled Fund Allocations per fund	$250
Transferred proceeds transactions due to refundings (per refunding)	$250
Yield Restriction Analysis/Yield Reduction Computation on Non-Purpose Investments	No Charge
Alternate Yield Period Calculations for Variable Rate Issues	$1,500
Refund Requests	$3,000

4.3 In the event **CITY** requests **CONSULTANT** to provide additional services not specifically provided for herein, **CITY** and **CONSULTANT** shall negotiate a reasonable fee prior to the engagement or performance of any such additional work by **CONSULTANT.** Such agreement shall be effected in accordance with Section XVII, Changes and Amendments, and is subject to City of San Antonio City Council approval, as evidenced by passage of an ordinance. **CITY** reserves the right to utilize or engage another **CONSULTANT** to provide such other services not provided for herein.

V. RECORDS

5.1 **CONSULTANT** and its subcontractors, if any, shall properly, accurately and completely maintain all documents, papers, and records, and other evidence pertaining to the services rendered hereunder, and shall make such materials available to **CITY** at their respective offices, at all reasonable times and as often as **CITY** may deem necessary during the **CONTRACT** period, including any extension or renewal hereof, and during the retention period specified below, for purposes of inspection, examination, and making excerpts and/ or copies of same by **CITY** and any of its authorized representatives.

5.2 **CONSULTANT** shall retain any and all documents produced as a result of services provided hereunder for a period of six (6) years after the related bond issue has been completely redeemed (the "Retention Period"). If at the end of the Retention Period there is litigation involving or concerning this documentation or the services provided hereunder, **CONSULTANT** shall retain the records until the resolution of such litigation. **CONSULTANT** shall return or turn over to **CITY** all documentation at the end of the Retention Period or upon resolution of litigation.

5.3 **CONSULTANT** agrees to notify **CITY** immediately if a request is made by a third person for information produced and/or maintained by **CONSULTANT** as a result of the provision of services under this **CONTRACT**. **CONSULTANT** shall immediately forward said request to **CITY** for response.

VI. INSURANCE

6.1 Prior to the commencement of any work under this **CONTRACT**, **CONSULTANT** shall furnish copies of all required endorsements and a completed Certificate(s) of Insurance to **CITY**'s Finance Department, which shall be clearly labeled "*Arbitrage Rebate Compliance Services Contract*" 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. **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 **CITY**. **CITY** shall have no duty to pay or perform under this **CONTRACT** until such certificate and endorsements have been received and

approved by **CITY**'s Finance Department. No officer or employee, other than **CITY**'s Risk Manager, shall have authority to waive this requirement.

6.2 **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 whereby **CITY** may incur increased risk.

6.3 **CONSULTANT**'s financial integrity is of interest to **CITY**; therefore, subject to **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 **CONTRACT**, 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 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 $1,000,000/$1,000,000/$1,000,000
3. Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations b. Products/Completed Operations c. Personal/Advertising Injury	For Bodily Injury and Property Damage of $1,000,000 per occurrence; $2,000,000 General Aggregate, 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 basis) To be maintained and in effect for no less than two years subsequent to the completion of the professional service.	$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 act, malpractice, error, or omission in professional services.

6.4 **CONSULTANT** agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverages required of **CONSULTANT** herein, and provide a certificate of insurance and endorsement that names **CONSULTANT** and **CITY** as additional insureds. **CONSULTANT** shall provide **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 of San Antonio City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this 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.

6.5 As they apply to the limits required by **CITY**, **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). **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.

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

- Name **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 **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 and employers' liability, general liability and automobile 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 notice for nonpayment of premium.

6.7 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 to maintain the required insurance shall constitute a material breach of this **CONTRACT**.

6.8 In addition to any other remedies **CITY** 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 work

hereunder, and/or withhold any payment(s) which become due to **CONSULTANT** hereunder until **CONSULTANT** demonstrates compliance with the requirements hereof.

6.9 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 subcontractor's performance of the work covered under this **CONTRACT**.

6.10 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 **CONTRACT**.

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

6.12 **CONSULTANT** and any subcontractors are responsible for all damage to their own equipment and/or property.

VII. INDEMNITY

7.1 **CONSULTANT 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 CONSULTANT'S activities under this Agreement, including any acts or omissions of CONSULTANT, any agent, officer, director, representative, employee, consultant or subcontractor of CONSULTANT, and their respective officers, agents, employees, directors and representatives while in the exercise of the rights or performance of the 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 A COURT OF COMPETENT JURISDICTION FINDS CONSULTANT AND CITY JOINTLY LIABLE, 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.**

7.2 **The provisions of this INDEMNIFICATION are solely 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.**

7.3 **CONSULTANT shall promptly advise CITY in writing of any claim or demand against CITY or CONSULTANT known to CONSULTANT related to or arising out of CONSULTANT's activities under this CONTRACT.**

7.4 **CITY** shall have the right to select or to approve defense counsel to be retained by **CONSULTANT** in fulfilling its obligation hereunder to defend and indemnify **CITY**, unless such right is expressly waived by **CITY** in writing. **CONSULTANT** shall retain **CITY** approved defense counsel within seven (7) business days of **CITY**'s written notice that **CITY** is invoking its right to indemnification under this **CONTRACT**. If **CONSULTANT** fails to retain Counsel within such time period, **CITY** shall have the right to retain defense counsel on its own behalf, and **CONSULTANT** shall be liable for all costs incurred by **CITY**. **CITY** shall also have the right, at its option, to be represented by advisory council of its own selection and at its own expense, without waiving the foregoing.

7.5 In any and all claims against any party indemnified hereunder by **CONSULTANT**, 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 **CONSULTANT** or any subcontractor under worker's compensation or other employee benefit acts.

VIII. RESERVED

IX. CONFIDENTIALITY

9.1 **CONSULTANT** acknowledges that during the term of this **CONTRACT** it may have access to confidential information, and in accordance therewith, agrees to establish and have in place and fully operational on April 1, 2016 a method reasonably acceptable to **CITY** to secure and maintain the confidentiality of such information.

X. OWNERSHIP OF DOCUMENTS

10.1 Any and all writings, documents or information in whatsoever form and character produced by **CONSULTANT** pursuant to the provisions of this **CONTRACT**, is the exclusive property of **CITY**; and no such writing, document, or information shall be the subject of any copyright or proprietary claim by **CONSULTANT**.

10.2 **CONSULTANT** understands and acknowledges that as the exclusive owner of any and all such writings, documents and information, **CITY** has the right to use all such writings, documents and information as **CITY** desires, without restriction.

XI. TERMINATION

11.1 For purposes of this **CONTRACT**, "termination" of this **CONTRACT** shall mean termination by completion of the provision of services stated herein, expiration or earlier termination pursuant to any of the provisions hereof.

11.2 Termination for Cause: In addition to any other provisions of this **CONTRACT**, **CITY** may terminate this **CONTRACT** in accordance with this clause, in whole or in part, for any of the following:

a. Neglect or failure by **CONSULTANT** to perform or observe any of the terms, conditions, covenants or guarantees of this **CONTRACT** or of any amendment between **CITY** and **CONSULTANT**; or

b. Violation by **CONSULTANT** of any rule, regulation or law to which **CONSULTANT** is bound or shall be bound while and in performing the services required under this **CONTRACT**.

11.3 Upon a decision to terminate by **CITY**, written notice of such shall be immediately provided to **CONSULTANT** in accordance with Section XXI, Notices, specifying the effective date of termination and the extent to which performance of work under this **CONTRACT** will be terminated. **CONSULTANT** shall retain all documents created through the date of termination, whether or not completed, in accordance with Section V, Records.

11.4 Within thirty (30) days of the effective date of termination (unless an extension is authorized in writing by **CITY**), **CONSULTANT** shall submit to **CITY** any claim in detail for the monies owed by **CITY** for services performed under this **CONTRACT**, including for all work performed to date of notice of termination, and for any necessary and proper work performed in the ensuing thirty (30) day period, provided however, that such payment does not exceed the maximum amount set out in Section IV, Consideration.

11.5 Termination without Cause: Notwithstanding the provisions contained in Section 11.2 above, either party may terminate this **CONTRACT** by giving the other party thirty (30) days written notice in accordance with Section XXI, Notices.

XII. SUBCONTRACTING

12.1 None of the work or services covered by this **CONTRACT** shall be subcontracted without the prior written approval of **CITY**. **CONSULTANT** shall secure said written approval prior to the performance by any subcontractor of the work or services required hereunder. Any work or services approved for subcontracting, however, shall be subcontracted only by written contract, and unless specific waiver is granted in writing by **CITY**, such subcontracted work shall be subject by its terms to all provisions of this **CONTRACT**. Compliance by subcontractors with this **CONTRACT** shall be the responsibility of **CONSULTANT**.

XIII. ASSIGNMENT OF RIGHTS OR DUTIES

13.1 This **CONTRACT** shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and their assigns, except as otherwise expressly provided for herein.

13.2 Except as otherwise provided herein, **CONSULTANT** may not sell, assign, pledge, transfer or convey any interest in this **CONTRACT** nor delegate the performance of any duties hereunder, by transfer, by subcontracting, or any other means, without the consent of **CITY**.

13.3 As a condition of consent, if same is given, **CONSULTANT** shall remain liable for completion of services outlined in this **CONTRACT** in the event of default by the successor consultant, assignee, transferee or subcontractor. Any references in this **CONTRACT** to an assignee, transferee or subcontractor indicate only such an entity as has been approved by **CITY** in accordance with this Section.

13.4 Any attempt to assign, transfer, pledge, convey or otherwise dispose of any part of, or all of, its right, title, interest or duties to or under this **CONTRACT** without said written approval shall be void *ab initio* and shall confer no rights upon any third party. Should **CONSULTANT** assign, transfer, convey or otherwise dispose of any part of, or all of, its right, title or interest or duties to or under this **CONTRACT**, **CITY** may, at its option, terminate this **CONTRACT** in accordance with Section XI, Termination, and all rights, titles and interest of **CONSULTANT** shall thereupon cease and terminate, notwithstanding any other remedy available to **CITY** under this **CONTRACT**. The violation of this provision by **CONSULTANT** shall in no event release **CONSULTANT** from any obligation under the terms of this **CONTRACT**, nor shall it relieve or release **CONSULTANT** from payment of any damages to **CITY** which **CITY** sustains as a result of such violation.

13.5 **CONSULTANT** agrees to notify **CITY** of any changes in ownership interest greater than thirty percent (30%) or control of its business entity not less than sixty (60) days in advance of the effective date of such change. Notwithstanding any other remedies that are available to **CITY** under this **CONTRACT**, any such change of ownership interest or

control of its business entity may be grounds for termination of this **CONTRACT** in accordance with Section XI, Termination.

XIV. CONFLICT OF INTEREST

14.1 **CONSULTANT** warrants and certifies, and this **CONTRACT** is made in reliance thereon, that it, its individual officers, employees, and agents are neither officers nor employees of **CITY** or any **CITY** agencies, such as **CITY**-owned utilities. **CONSULTANT** further warrants and certifies that it, its individual officers, employees, and agents do not have a prohibited financial interest as proscribed by the Ethics Code of **CITY**.

14.2 An 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 individuals or entities is a party to the **CONTRACT**: **CITY** officer or employee; his or her parent, child, or spouse; a business entity in which the officer or employee, or his or her parent, child or spouse, directly or indirectly, 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 of which any individual or entity above listed is a subcontractor on a **CITY** contract, a partner, or a parent or subsidiary business entity.

XV. COMPLIANCE

15.1 **CONSULTANT** and each of its licensed employees or representatives shall comply with all federal, state and local laws, rules and regulations, including but not limited to all securities rules and regulations, in performing the services required hereunder.

XVI. INDEPENDENT CONTRACTOR

16.1 It is expressly understood and agreed that **CONSULTANT** provides services as an independent contractor responsible for its respective acts or omissions and that **CITY** shall in no way be responsible therefore. Except as provided herein, neither party hereto has authority to bind the other or to hold out to third parties that it has the authority to bind the other.

XVII. CHANGES AND AMENDMENTS

17.1 Except where the terms of this **CONTRACT** expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both **CITY** and **CONSULTANT**, and subject to approval by the City of San Antonio City Council, evidenced by passage of an ordinance.

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

XVIII. LICENSES/CERTIFICATIONS

18.1 **CONSULTANT** warrants and certifies that **CONSULTANT** and any other person designated to provide services hereunder has the requisite training, license and/or certification to provide said services, and meets all competence standards promulgated by all other authoritative bodies, as applicable to the services provided herein.

XIX. ENTIRE AGREEMENT

19.1 This **CONTRACT**, together with its authorizing ordinance and exhibits, if any, constitute the final and entire agreement between the parties hereto and contain all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this **CONTRACT** shall be deemed to exist or to bind the parties hereto unless same be in writing, dated subsequent to the date hereof, and executed by both parties in accordance with Section XVII, Changes and Amendments.

XX. SEVERABILITY

20.1 If any clause or provision of this **CONTRACT** 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 **CONTRACT** 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 **CONTRACT** that is invalid, illegal, or unenforceable, there be added as a part of the **CONTRACT** 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. NOTICES

21.1 For purposes of this **CONTRACT**, all official communications and notices among the parties shall be deemed sufficient if in writing and mailed certified mail, postage prepaid, effective upon receipt, to the addresses set forth below:

CITY	**CONSULTANT**
City of San Antonio Chief Financial Officer Attention: Ben Gorzell, Jr. 111 Soledad, 5th Floor San Antonio, Texas 78205	The Bank of New York Mellon Trust Company, N.A. Attention: Terence P. Burke Managing Director 2001 Bryan Street, 10th Floor Dallas, Texas 75201

XXII. RESERVED

XXIII. SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY (SBEDA)

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. 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.)

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.

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.

Commercially Useful Function – a 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 **CONSULTANT** to perform such "pass-through" or "conduit" functions that are not commercially useful shall be viewed by the CITY as fraudulent if **CONSULTANT** 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 **CONSULTANT** 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 **CONSULTANT** and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

Evaluation Preference – an API that may be applied by the Goal Setting Committee ("GSC") to Construction, Architectural & Engineering, Professional Services, Other Services, and Goods and Supplies contracts that are to be awarded on a basis that includes factors other than lowest price, and wherein responses that are submitted to the City by S/M/WBE firms may be awarded additional Points in the evaluation process in the scoring and ranking of their proposals against those submitted by other prime **CONSULTANT**s or Respondents.

Good Faith Efforts – documentation of the **CONSULTANT**'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 **CONSULTANT**'s Good Faith Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

HUB Zone 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 thirty-five percent (35%) 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 $1/16^{th}$ 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 **CONSULTANTS** and/or Subcontractors and vendors for **CITY** contracted goods and/or services.

Points – the quantitative assignment of value for specific evaluation criteria in the vendor selection process used in some Construction, Architectural & Engineering, Professional Services, and Other Services contracts (e.g., up to 10 points out of a total of 100 points assigned for S/M/WBE participation as stated in response to a Request for Proposals).

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 **CONSULTANT**.

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, **CONSULTANT** 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.

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 twenty percent (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** who 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 or **CONSULTANT** in furtherance of the Prime Contractor's performance under a contract or purchase order with the City. A copy of each binding agreement between the **CONSULTANT** and its subcontractors shall be submitted to the **CITY** prior to execution of this contract agreement and any contract modification agreement.

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 **CONSULTANT**'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 **CONSULTANT**'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 **CONSULTANT**'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 EDD 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 who 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.

C. SBEDA Program Compliance – General Provisions

As **CONSULTANT** 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 **CONSULTANT**'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. **CONSULTANT** voluntarily agrees to fully comply with these SBEDA program terms as a condition for being awarded this contract by the **CITY**. Without limitation, **CONSULTANT** further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. **CONSULTANT** shall cooperate fully with the Small Business Office and other **CITY** departments in their data collection and monitoring efforts regarding **CONSULTANT**'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. **CONSULTANT** 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 **CONSULTANT** or its Subcontractors or suppliers;

3. **CONSULTANT** 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. **CONSULTANT** shall immediately notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to **CONSULTANT**'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 **CONSULTANT** 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 **CONSULTANT** 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. **CONSULTANT** 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. **CONSULTANT** 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 **CONSULTANT**'s Subcontractor / Supplier Utilization Plan, the **CONSULTANT** 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 **CONSULTANT** and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

8. **CONSULTANT** acknowledges that the **CITY** will not execute a contract or issue a Notice to Proceed for this project until the **CONSULTANT** and each of its Subcontractors for this project have registered and/or maintained active status in the **CITY**'s Centralized Vendor Registration System, and **CONSULTANT** has represented to **CITY** which primary commodity codes each registered Subcontractor will be performing under for this contract.

D. SBEDA Program Compliance – Affirmative Procurement Initiatives

The **CITY** has applied the following contract-specific Affirmative Procurement Initiatives to this **CONTRACT**. **CONSULTANT** hereby acknowledges and agrees that the selected API requirement shall also be extended to any change order or subsequent contract modification and, absent SBO's granting of a waiver, that its full compliance with the following API terms and conditions are material to its satisfactory performance under this Agreement:

SBE Prime Contract Program. In accordance with the SBEDA Ordinance, Section III. D. 5. (d), this **CONTRACT** is being awarded pursuant to the SBE Prime Contract Program, and as such, **CONSULTANT** affirms that if it is presently certified as an SBE, **CONSULTANT** agrees not to subcontract more than forty-nine percent (49%) of the contract value to a non-SBE firm; **and**

M/WBE Prime Contract Program. In accordance with the SBEDA Ordinance, Section III. D. 6. (d), this contract is being awarded pursuant to the M/WBE Prime Contract Program and as such, **CONSULTANT** affirms that if it is presently certified as an M/WBE (see *Minority/Women Business Enterprise* definition), **CONSULTANT** agrees not to subcontract more than forty-nine percent (49%) of the contract value to a non-M/WBE firm.

E. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, the **CONSULTANT** 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, **CONSULTANT** 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. **CONSULTANT**'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. **CONSULTANT** shall incorporate this clause into each of its Subcontractor and supplier agreements entered into pursuant to **CITY** contracts.

F. Prompt Payment

Upon execution of this contract by **CONSULTANT**, **CONSULTANT** 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 **CONSULTANT**'s reported subcontract participation is accurate. **CONSULTANT** 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 **CONSULTANT**'s noncompliance with these prompt payment provisions, no final retainage on the Prime Contract shall be released to **CONSULTANT**, and no new **CITY** contracts shall be issued to the **CONSULTANT** 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.

G. Violations, Sanctions and Penalties

In addition to the above terms, **CONSULTANT** 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 **CONSULTANT** 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).

XXIV. GOVERNING LAW AND VENUE

24.1 **THIS CONTRACT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS.**

24.2 Any legal action, claim, proceeding or dispute brought or maintained, directly or indirectly, as a result of this **CONTRACT** shall be heard and determined in the City of San Antonio, County of Bexar, Texas.

XXV. LEGAL AUTHORITY

25.1 The signer of this **CONTRACT** for **CONSULTANT** represents, warrants, assures and guarantees that he has full legal authority to execute this **CONTRACT** on behalf of **CONSULTANT** and to bind **CONSULTANT** to all of the terms, conditions, provisions and obligations herein contained.

XXVI. PARTIES BOUND

26.1 This **CONTRACT** shall be binding on and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives and successors, except as otherwise expressly provided for herein.

XXVII. GENDER

27.1 Words of any gender used in this **CONTRACT** 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.

XXVIII. CAPTIONS

28.1 The captions contained in this **CONTRACT** are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this **CONTRACT**.

XXIX. ACKNOWLEDGMENT

29.1 Each of the Parties acknowledges that it has read this **CONTRACT**, understands its contents and executes this **CONTRACT** voluntarily.

EXECUTED and **AGREED** to this the ____ day of _____, 2016.

CITY

CITY OF SAN ANTONIO

By: _____

Name: Ben Gorzell, Jr., CPA

Title: Chief Financial Officer

CONSULTANT

THE BANK OF NEW YORK MELLON TRUST COMPANY

By: _____

Name: Terence P. Burke

Title: Managing Director

APPROVED AS TO FORM:

_____

Robert K. Nordhaus

Assistant City Attorney