

AN ORDINANCE 2013 - 01 - 10 - 0012

AMENDING CITY ORDINANCE 2011-10-20-0846 BY REMOVING REQUIREMENTS TO ESTABLISH A SPECIAL ASSESSMENT DISTRICT AND/OR ACQUIRE PRIVATE SECTOR CONTRIBUTIONS; CLARIFYING THE COUNTY'S CONTRIBUTION OF \$55 MILLION; AND REMOVING THE REQUIREMENT TO DEVELOP AND APPROVE AN INTERLOCAL AGREEMENT WITH PARTNER FUNDING ENTITIES.

* * * * *

WHEREAS, on October 20, 2011, the City Council authorized city staff to negotiate and execute an interlocal funding agreement with VIA Metropolitan Transit (VIA) to provide \$40 million in City funds and capital improvements to develop and implement VIA's five-year Streetcar and Transit Improvement Plan (also referred to as VIA's Five Year Short Term Capital Improvement Plan); and

WHEREAS, City payment under the funding agreement was subject to the following five (5) contingencies:

- 1) approval and implementation of the City's East-North alternate streetcar route proposal or a comparable route providing East-North Streetcar mobility;
- 2) the creation, establishment, and approval of a Special Assessment District and/or private sector contributions that would total at least \$15,000,000.00;
- 3) the financial contribution to VIA's Transit Plan from the County of at least \$55,000,000.00;
- 4) approval and implementation of a downtown bus circulator route between the future Westside Multimodal Center and the Robert Thompson Transit Center; and
- 5) development and approval of an interlocal agreement with the City of San Antonio, Bexar County, VIA and any other partner funding entities regarding implementation and management of the multimodal plan defined within items 1 through 4 listed above; and

WHEREAS, to facilitate undertaking and completing the project in an efficient manner, City staff is recommending the removal of contingency Item #2 requiring the creation, establishment, and approval of a Special Assessment District and/or private sector contributions that would total at least \$15,000,000.00 and contingency Item #5 requiring the development and approval of an interlocal agreement with the City of San Antonio, Bexar County, VIA and any other partner funding entities; and

WHEREAS, VIA staff has recommended clarifying contingency item #3 by restating that the County will contribute or facilitate the contribution of \$55 million towards the CIP; and

WHEREAS, all other contingencies shall be met by VIA and the City shall not be obligated to provide any additional funding; **NOW THEREFORE**:

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

SECTION 1. The City Council authorizes the amendment of City Ordinance 2011-10-20-0846 by removing the following contingencies as a requirement prior to providing any City funding:

- A) Contingency Item #2, requiring the creation, establishment, and approval of a Special Assessment District and/or private sector contributions totaling at least an additional \$15,000,000.00; and
- B) Contingency Item #5, requiring the development and approval of an interlocal agreement among the City of San Antonio, Bexar County, VIA Metropolitan Transit and any other funding entities that are a party to the Plan, regarding its implementation and management.

SECTION 2. The City Council authorizes the amendment of City Ordinance 2011-10-20-0846 by deleting Contingency Item #3 and replacing with the following:

Contingency Item #3) Bexar County will contribute or facilitate the contribution of \$55,000,000.00 towards the CIP.

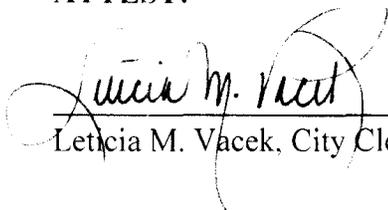
SECTION 3. The City Manager, or her designee, is authorized to negotiate and execute an Interlocal Funding Agreement to provide funding in the amount of \$32 million and capital improvements in the amount of \$8 million to VIA in accordance with the terms and conditions provided in this Ordinance. A copy of the Agreement in substantially final form is set out in this Ordinance as **“Attachment I.”**

SECTION 4. This ordinance is effective immediately upon the receipt of eight affirmative votes; or, if passed by less than eight affirmative votes, on the tenth day after passage.

PASSED AND APPROVED this 10th day of January, 2013.

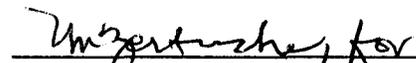

M A Y O R
Julián Castro

ATTEST:



Letícia M. Vacek, City Clerk

APPROVED AS TO FORM:

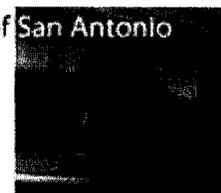


Michael D. Bernard, City Attorney



Request for
**COUNCIL
ACTION**

City of San Antonio



Agenda Voting Results - 16

Name:	16						
Date:	01/10/2013						
Time:	10:57:36 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing an amendment to the City's involvement in VIA's Five Year Streetcar and Transit Improvement Plan, specifically: (1) removal of the condition of establishing a Special Assessment District and the contribution of \$15,000,000.00 in private sector funds and replacing the funding with other non-City of San Antonio funds; (2) removal of the condition to develop and approve a tri-party interlocal agreement with all partnering funding entities and replacing the tri-party arrangement with two interlocal agreements—one between the City of San Antonio and VIA and one between Bexar County and VIA; and, (3) clarification of the County's \$55,000,000.00 contribution. [Peter Zaroni, Deputy City Manager; Mike Frisbie, Director, Capital Improvements Management Services]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x				
Ivy R. Taylor	District 2		x				
Leticia Ozuna	District 3		x				
Rey Saldaña	District 4		x				
David Medina Jr.	District 5		x				x
Ray Lopez	District 6		x			x	
Cris Medina	District 7		x				
W. Reed Williams	District 8			x			
Elisa Chan	District 9			x			
Carlton Soules	District 10			x			

Name:	16						
Date:	01/10/2013						
Time:	10:57:20 AM						
Vote Type:	Motion to Deny						

Description:		An Ordinance authorizing an amendment to the City's involvement in VIA's Five Year Streetcar and Transit Improvement Plan, specifically: (1) removal of the condition of establishing a Special Assessment District and the contribution of \$15,000,000.00 in private sector funds and replacing the funding with other non-City of San Antonio funds; (2) removal of the condition to develop and approve a tri-party interlocal agreement with all partnering funding entities and replacing the tri-party arrangement with two interlocal agreements—one between the City of San Antonio and VIA and one between Bexar County and VIA; and, (3) clarification of the County's \$55,000,000.00 contribution. [Peter Zanoni, Deputy City Manager; Mike Frisbie, Director, Capital Improvements Management Services]					
Result:		Failed					
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor			x			
Diego Bernal	District 1			x			
Ivy R. Taylor	District 2			x			
Leticia Ozuna	District 3			x			
Rey Saldaña	District 4			x			
David Medina Jr.	District 5			x			
Ray Lopez	District 6			x			
Cris Medina	District 7			x			
W. Reed Williams	District 8		x			x	
Elisa Chan	District 9		x				
Carlton Soules	District 10		x				x

ATTACHMENT I: INTERLOCAL FUNDING AGREEMENT

STATE OF TEXAS

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INTERLOCAL AGREEMENT FOR

§

FUNDING OF

COUNTY OF BEXAR

§

TRANSPORTATION PROJECTS

This INTERLOCAL AGREEMENT FOR FUNDING OF TRANSPORTATION PROJECTS (the "Agreement") is entered into as of the Effective Date provided on the signature page by and between the CITY OF SAN ANTONIO, TEXAS, a Texas municipal corporation (the "City"), and VIA METROPOLITAN TRANSIT, a metropolitan rapid transit authority created under Article 1118x of the Texas Revised Civil Statutes, Annotated, as amended by S.B. 971, 74th Legislature and now codified as Chapter 451, Texas Transportation Code, ("VIA"). The City and VIA may sometimes be referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, the City Charter of the City of San Antonio grants to the City the authority to establish, maintain, improve and regulate the use of streets, alleys, sidewalks and other municipal property within the City; and

WHEREAS, pursuant to Section 451.056 of the Texas Transportation Code, VIA may "acquire, construct, develop, own, operate and maintain a transit authority system in the territory of the Authority, including the territory of a political subdivision;" and pursuant to Section 451.058(a) of the Texas Transportation Code, "as necessary or useful in the construction, repair, maintenance or operation of the transit authority system, VIA may: (1) use a public way, including an alley; and (2) directly, or indirectly by another person, relocate or reroute the property of another person or alter the construction of the property of another person;" and

WHEREAS, pursuant to Section 451.058(e) of the Texas Transportation Code, unless the power of eminent domain is exercised, VIA may not begin an activity authorized under Section 451.058(a) or alter or damage the property of the City with having first received written permission from the City; and

WHEREAS, VIA has worked to develop the 2035 Long Range Comprehensive Transportation Plan (the "LRCTP") which outlines policies, guidelines, corridor improvements, service enhancements, transit technologies, bicycle and pedestrian improvements, timelines, cost impacts and funding options for the creation of a multimodal system by the year 2035 and which meets the needs of the growing Bexar County region; and

WHEREAS, in association with the LRCTP, VIA has proposed a Short Term Capital Improvement Plan ("the CIP") as the first phase of the LRCTP, which includes the recommendations derived from the Inner City Streetcar Feasibility Study along with other mobility enhancements that address the region's shorter term vision for transit development; and

WHEREAS, the City has reviewed the CIP and has suggested revisions relating to: a) an East-North alternate streetcar route proposal or a comparable route providing East-North Streetcar mobility; b) a financial contribution to VIA's transit plan by Bexar County in an

amount of at least \$55,000,000.00; and c) approval and implementation of a downtown bus circulator route between the future Westside Multimodal Center and the Robert Thompson Transit Center; and

WHEREAS, by City Ordinance 2011-10-20-0846 (the "Ordinance") and as amended by City Ordinance 2013-01-10-____, the City will provide financial support to VIA in the cumulative amount of FORTY MILLION DOLLARS AND 0 CENTS (\$40,000,000.00) consisting of available funds in the amount of THIRTY TWO MILLION DOLLARS (\$32,000,000.00) and provided that the chosen East-North streetcar route is through Alamo Street, City-Provided Services as further defined below, in the amount of EIGHT MILLION DOLLARS (\$8,000,000.00) for the CIP contingent upon VIA revising the CIP to address the City's recommendations as stated in said Ordinance; and

WHEREAS, by unanimous vote of its Board of Trustees, VIA has agreed to revise the CIP to include the City's recommendations; and

WHEREAS, Bexar County has recognized the City's contribution and has pledged its own financial support for the LRCTP and CIP by committing funding in excess of FIFTY FIVE MILLION DOLLARS AND 0 CENTS (\$55,000,000.00); and

WHEREAS, VIA wishes to proceed with implementation of the CIP, as revised (Exhibit A); and

WHEREAS, the City and VIA wish to set forth the terms and conditions by which the City will provide a cumulative amount of FORTY MILLION DOLLARS (\$40,000,000.00) in funding and City-Provided Services to VIA for the implementation of portions of the CIP; and

WHEREAS, it is, furthermore, the City's intent to provide consent in accordance with its policies and procedures for the alteration and use of its streets and properties for implementation of the CIP; and

WHEREAS, pursuant to Chapter 791 of the Texas Government Code, VIA and the City are authorized to enter into this Interlocal Agreement; and

NOW, THEREFORE, for and in consideration of the mutual covenants, agreements, and benefits to the parties herein named, it is agreed as follows:

I. DEFINITIONS

- 1.1 Specific Terms. As used in this Agreement, the following terms shall have meanings as set out below:
- a. "City" is defined in the preamble to this Agreement and includes its successors and assigns.
 - b. "City Codes and Regulations" shall mean those standards, rules, permitting

requirements and regulations applicable to the construction and maintenance of buildings and structures within the City, and subject to City enforcement and inspection, such as San Antonio's Unified Development Codes, and other building regulations.

- c. "City Facilities" shall mean any structures, improvements, systems or other property under the jurisdiction of the City and shall include, but not be limited to, roadways, pavements, alleys, curbs, signage, and water and wastewater lines.
- d. "City Funds" shall mean the cumulative amount of THIRTY TWO MILLION DOLLARS AND 0 CENTS (\$32,000,000.00).
- e. "CIP" is defined in the recitals of this Agreement and is attached as Exhibit _____. The CIP was revised by VIA to include: a) an East-North alternate streetcar route proposal or a comparable route providing East-North Streetcar mobility; and b) approval and implementation of a downtown bus circulator route between the future Westside Multimodal Center and the Robert Thompson Transit Center.
- f. "City-Provided Services" shall mean capital improvements provided by the City in the amount of EIGHT MILLION DOLLARS AND 0 CENTS (\$8,000,000.00) to include design and construction services and infrastructure improvements comprised of the full street reconstruction of S. Alamo St. from Market St. to Cesar Chavez Blvd to include new curbs, sidewalks, driveways, traffic signals, medians, bike lanes, landscape, lighting, and storm drain system. Utilities will be relocated and/or adjusted as necessary. A map of the area where the City-Provided Services shall be provided is included as Exhibit A. The City-Provided Services are contingent upon the chosen East-North Streetcar route being through Alamo Street.
- g. "Construction Documents" shall mean the plans, specifications and estimates for the Projects covered by this Agreement which shall be designed and provided pursuant to the terms of this Agreement. The Construction Documents shall illustrate the dimensions, materials, methods of construction, and other details of the Project.
- h. "Contractor" shall mean a Texas licensed general contractor under contract with VIA to undertake construction of the Project.
- i. "Director" is the Director of the City's Capital Improvements Management Department or such other person as the Director may designate.
- j. "Engineer" shall mean a Texas licensed professional engineer under contract with VIA to design and perform engineering services for the Project.
- k. RESERVED.

- l. “Inner City Street Car Feasibility Study” is a technical analysis for the implementation and operation of specialized transit vehicles (street cars) along a dedicated route travelling north, south, east, and west of the San Antonio Central Business District.
- m. “Long Range Comprehensive Transportation Plan” is the transportation plan developed through technical analyses and public input that outlines policies, specific travel corridor improvements, transit technologies, timelines and funding options for public transportation improvements through the year 2035, which is to be used as a framework for the advancement of capital investments and operational enhancements for VIA Metropolitan Transit.
- n. “Project” shall mean the street improvements relating to the conversion of public rights-of-way that accommodate the East-North streetcar route approved by the Ordinance or a comparable route providing East-North Streetcar mobility and associated utilities (or coordination with the utility providers in cases where the utility provider itself performs the work).
- o. "Project Costs" shall mean all costs and expenses incurred by VIA with respect to the street improvements relating to the conversion of public rights-of-way that accommodate the East-North streetcar route approved by the Ordinance or a comparable route providing East-North Streetcar mobility, including, without limitation, (a) all costs to prepare the Construction Documents, including, but not limited to, all engineering fees and expenses for all studies, estimates of probable costs and other work performed by the Engineer; (b) all costs of preparing any necessary environmental reports; (c) all costs and expenses to construct the Project; (d) real estate acquisitions, and (f) other reasonable and necessary fees and expenses relating to the Project.
- p. “Project Facilities” shall comprise all structures, improvement systems, and other property which comprises the Project as defined herein.
- q. RESERVED.
- r. “VIA” is defined in the preamble to this Agreement and includes its successors and assigns.
- s. “Work” or "work" shall mean the design and construction of the Project as provided herein.

1.2 General. Any other term to which meaning is expressly given in this Agreement shall have such meaning.

1.3 Gender and Number, Other Terms. When the context permits, the singular shall include the plural, the plural the singular, and the masculine shall include the neuter and feminine.

II. PURPOSE

2.1 The purpose of this Agreement is to establish procedures for Project funding, to establish terms and conditions for managing the construction of Project Facilities and to grant VIA the City's consent for alteration of the City streets as necessary for the implementation of the Project.

2.2 VIA and the City agree that the Project constitutes a VIA transit project and not a joint enterprise, joint venture or any other type of joint undertaking between VIA and the City, nor is it a joint utility, roadway or infrastructure project.

2.3 Notwithstanding Section 2.2 above, VIA and City representatives will cooperate to ensure Project implementation in keeping with VIA's scope of work, schedule, and budget commitments and obligations.

III. RIGHT-OF-WAY AND CONSTRUCTION RIGHTS

3.1 Consent to Access Public Streets and Rights-of-Way for Construction Repair, Maintenance and Operations of the Project. Pursuant to Section 451.058 of the Texas Transportation Code, unless the power of eminent domain is exercised, VIA may not "alter or damage the property of this State, a political subdivision of this State, or a person providing a public service, or disrupt the provision of a public service without having first received written permission from the owner of the property." The City does hereby agree to expeditiously consider and promptly apply its policies and procedures for the granting of its consent to the construction, repair, maintenance and operation of the Project by VIA upon, over, under, across or within the City public streets and properties. Following completion of the Project, VIA will comply with City policies and procedures for any subsequent repair and maintenance, of Project facilities.

3.2 Right of Entry. Upon the City's grant of consent under Section 3.1 above, it shall specify whether such consent includes its consent to entry upon, over, under, across or within any adjacent City properties on a temporary basis for any such purposes, provided in the case of such temporary entry upon adjacent properties that such entry (a) does not permanently and negatively impact any City use of such properties or any further use by the City of such properties that is approved and in existence at the time notice of such entry is given and (b) VIA has first given City at least five (5) Business Days' notice of its need for temporary use, setting forth the nature, extent and duration of the temporary use. Should VIA be given consent of entry by the City, VIA shall agree to restore all property affected to a condition at least as good as that existing before VIA's entry thereon.

3.3 Acquisitions of Additional Right-of-Way for the City. Should it become necessary

for VIA to acquire additional right-of-way for street improvements, VIA shall notify the City of VIA's intent to acquire the additional right-of-way. VIA will then undertake to acquire such additional right-of-way by purchase, gift, donation or exercise of the power of eminent domain. Should VIA determine that it is necessary to condemn property; it will consult with the City prior to the exercise of such power. VIA may use monies identified in this Agreement for payment of the costs associated with the acquisition of such additional right-of-way.

3.3.1 Upon the approval and direction of the Director, VIA shall transfer to the City, and the City shall accept title to such additional right-of-way. Upon acceptance of title, the City shall maintain the right-of-way in the same manner as other City right-of-way. In conjunction with such transfer of title, VIA shall provide the City with all surveys, geotechnical test results, environmental assessments and any other information or data in VIA's possession regarding the additional right-of-way.

3.4 No Charge for Consent. The use by VIA of streets and properties for the Project is a public use of the streets and properties that inures to the benefit of the people of the State. No charge or fee for such consent is authorized by law and none shall be charged or imposed.

IV. TERM

4.1 Term. The term of this Agreement (the "Term") shall commence upon execution by the Parties and, unless sooner terminated in accordance with the provisions of this Agreement, terminate upon the completion of the Project. The City and VIA acknowledge that the City's funding obligations are contingent upon the following:

- a.) approval and implementation of the City's East-North alternate streetcar route proposal or a comparable route providing East-North Streetcar mobility as described in the Ordinance;
- b.) RESERVED.
- c.) a financial contribution or facilitation of contributions to VIA's Transit Plan from Bexar County in an amount of at least \$55,000,000.00;
- d.) approval and implementation of a downtown bus circulator route between the future Westside Multimodal Center and the Robert Thompson Transit Center; and
- e.) RESERVED. .

4.2. Satisfaction of Contingencies. Sufficient progress has been made to meet these contingencies so that City and VIA may proceed with the Project.

V. CONSENT TO USE CITY STREETS

5.1 Duration. The City's consent to access the City streets for the construction, maintenance, repair and operation of the Project shall be effective for the time period described in the

document providing such consent by City.

VI. CITY'S FUNDING OBLIGATION

6.1 Use of Funds. The City shall pay to VIA THIRTY TWO MILLION DOLLARS AND 0 CENTS (\$32,000,000.00, the "City Funds") and provided that the chosen East-North streetcar route is through Alamo Street, undertake and complete the City-Provided Services valued at EIGHT MILLION DOLLARS AND 0 CENTS (\$8,000,000.00) for a cumulative total of up to FORTY MILLION DOLLARS AND 0 CENTS (\$40,000,000.00) to be used for the costs of the Project and for no other purpose. It is understood by the Parties that the funds shall be used only for street improvements associated with the Project. The City's funding obligation shall terminate on the completion of the Project, but not later than, _____, 201_.

6.2 Debt Issuance. City intends to finance the City Funds provided under this Agreement through proceeds from the issuance of debt. This Agreement is subject to and contingent upon such funding or adequate appropriation of funds by City for payment of Project costs. During the term of this Agreement, until completion of the Project, on the first day of each fiscal year of the City, City shall send written notice to VIA of the amount of funds available for payment of Project costs so that VIA can adequately plan for the progress of the Work.

6.3 Cost Savings. Should VIA realize any material Project Cost-savings through its Project management, then the Parties agree that such Project Cost-savings shall be applied to other portions of the Project.

VII. PROJECT MANAGEMENT

7.1 Project Management. VIA will manage, oversee, administer and carry out all of the activities and services required for construction of the Project. VIA will use its best efforts to ensure that the Project Facilities are constructed and completed with quality materials in a good and workmanlike manner, in accordance with the terms of this Agreement and the design and construction documents. VIA will be responsible for meeting all applicable legal, regulatory, and code requirements for the Project.

7.2 Timely Performance. VIA and City herein acknowledge that the Project has time performance requirements. VIA and City will work together in good faith and cooperation to carry out the work expeditiously and to timely perform their respective duties.

7.3 RESERVED.

7.4 CIP Committee. A committee with membership representing VIA, the City of San Antonio and Bexar County shall be established to review all aspects of the Project as needed. The purpose of the committee is to continue the collaborative effort between the entities in the construction of the Project.

7.5 Accessibility. During construction, all Project structures and facilities upon, over, under, across or within City rights-of-way and property shall be designed and constructed in such a manner which will permit access by the City's employees, agents, contractors, and their employees and subcontractors, to City Facilities for the purpose of their inspection, by the City. City representatives will comply with all safety requirements of VIA or its Contractors at the site.

7.6 Corrective Actions. If the City reasonably determines that there are any significant deviations from the City Codes and Regulations or the intended scope of work as set out in the construction plans or if VIA determines that there are any significant deviations from industry standards of care, in the design, construction or post-construction phases of the Project, VIA shall promptly correct such deviations to comply with City Codes, the approved construction plans or applicable industry standards.

VIII. DESIGN AND ENGINEERING

8.1 Selection. VIA shall enter into contract(s) with such professional consultants, engineers, firms and other persons as are necessary for design and engineering services (collectively "Engineers"), for development of designs, plans and specifications, and such studies, reports and analyses that are preliminary to construction of the Project (collectively "Engineering Services"). VIA shall select the providers of Engineering Services in accordance with its usual and customary procurement procedures. VIA shall inform City of its selection(s) within ten (10) business days following the selection date. VIA will forward a copy of the fully-executed contract(s) to the City within ten (10) days of contract execution.

8.2 Review of Project Design Documents. VIA shall provide the City access to VIA's complete Project Design Documents through a web-based documentation control system. VIA shall notify the City of such design posting if it is intended for review and approval by the City. The City will review the Project Design Plans for compliance with City Codes and Regulations within twenty (20) business days of submission by VIA. VIA shall not proceed to construct any part of the Project until the City has determined that VIA's designs for such part are compliant with the City's Codes and Regulations. If there are any deviations from the City Codes and Regulations that require corrective action, the City shall promptly notify VIA. The forgoing notwithstanding, the City's failure to notify VIA within twenty (20) business days after VIA makes available to City complete Project Design Plans shall constitute approval by the City of such designs and VIA may proceed with construction in accordance with the Project design documents as submitted.

IX. CONSTRUCTION

9.1 Selection. VIA shall enter into contract(s) (the "Construction Contract") for construction of the Project. VIA shall be solely responsible for the selection of Contractor(s) for construction of the Project in accordance with its usual and customary procurement procedures. VIA shall inform City of its selection within ten (10) business days following the selection date and forward to City a copy of the fully executed construction contract(s) within ten (10) days of

contract execution. If VIA does not receive qualified bids within the cost estimates, VIA may redesign and rebid the Project until it is within an acceptable budget. City shall be consulted if the need to eliminate or redesign material portions of the Project becomes necessary due to the actual costs exceeding the cost estimates.

9.2 Construction Documents. VIA shall provide the City with a complete set of Project Construction Documents through a web-based documentation control system. VIA shall notify the City of such construction posting if it is intended for review and approval by the City. Upon submission by VIA of the complete set of Project Construction Documents, the City will promptly review within twenty (20) business days for compliance with City Codes and Regulations. If there are any deviations from the City Codes and Regulations that require corrective action, the City shall promptly notify VIA. The foregoing notwithstanding, the City's failure to notify VIA within twenty (20) business days after City's receipt of the complete Project Construction Documents shall constitute approval by the City of such documents and VIA may proceed with construction in accordance with the Project construction documents as submitted.

9.3 Permits and Approvals. VIA's obligation to commence construction of the Project is conditioned upon the timely receipt by VIA of applicable City Permits and approvals. Without limiting the foregoing, VIA agrees to use its best efforts (without cost or expense to the City) to apply for and obtain all requisite approvals from any regulatory authority, in connection with the construction of the Project.

9.4 Construction Execution. VIA shall use its best efforts to cause the Contractor to construct the Project in a diligent and continuous fashion until completion. Construction of the Project shall at all times be performed in a good and workmanlike manner using only quality materials as shall be specified in the Construction Documents. The Project may be designed and built in stages as VIA may determine. During construction of the Project, VIA shall provide the Director, upon request, status reports showing the percentage of completion of the Work and expenditures incurred in connection with the construction of the Project. The Director shall have the authority to approve completion of the Project on behalf of the City. "As-Built" Plans shall be provided to the City no later than sixty (60) days after completion of the Project.

9.5 Change Orders and Modifications. As part of its reporting requirement to the City, VIA shall notify the CITY of any variations from the Construction Documents with cost impacts of \$300,000.00 or more.

9.5.1 City-Requested Changes. The City shall pay all costs for any changes or modification to the Project that are made at the City's sole request. The funds paid by the City for City – requested changes shall be funds in addition to the City's contribution of City Funds and City-Provided Services. VIA will not commence design and/or construction of any City – requested changes or modifications until City has first forwarded to VIA the funds necessary to pay the full costs of the work.

9.6 Inspections. The Project shall be accessible at all reasonable times to the Director or

his/her designee for inspection. VIA acknowledges that any inspections performed by City during the course of construction for purposes of this Agreement (as opposed to routine building and construction inspections performed by City for permitting and acceptance purposes common to all similar construction projects) are for the benefit of the City only and may not be relied upon by others, be claimed by VIA as an approval by the City, a permit granted by the City, a waiver by the City, or used for any purpose by VIA, the Contractor or any third party. VIA further acknowledges that VIA and Contractor are required to perform their own inspections, and inspections by the City do not address any obligations of VIA or others. Subject to the foregoing, the City shall promptly notify VIA of any defects or non-conformances discovered during any City inspections.

9.7 Prevailing Wage Rate. VIA shall ensure that no less than the City's Prevailing Wage is paid to all workmen on its construction contract(s).

X. FUNDING TRANSFERS

10.1 Funding. The City agrees to pay VIA an amount of not less than THIRTY TWO MILLION DOLLARS AND 0 CENTS (\$32,000,000.00), as City's total funding contribution for work performed by VIA in association with the Project. The City shall not be obligated or liable under this Agreement to any party other than VIA for the payment of any monies or the provision of any goods or services. City will submit payment in such amount, as determined by VIA, for the anticipated Project costs that VIA will incur based upon quarterly submittals from VIA.

10.1.1 **VIA** will prepare and submit to **CITY** initial estimates of necessary and reasonable funds "the ADVANCE" needed for 90 days of cash flow at the beginning of the Design and Construction Phases, for the PROJECT. These initial estimates will reflect approved PROJECT costs based on PROJECT SCHEDULES and BUDGETS. Upon review and approval by **CITY**, and subject to the City's availability of funds in accordance with Section 6.2 of this Agreement, **CITY** will provide a funds advance for the PROJECT to **VIA** equal to said estimates and **VIA** will place all ADVANCE funds in an interest-bearing bank account and interest earned will be used for the PROJECT. **VIA** will use COSA PRIME Link to invoice **CITY** for actual expenditures on a monthly basis. Each monthly invoice shall include copies of paid invoices and evidence of **VIA** payment. **CITY** will make monthly payments to **VIA** upon approval of the monthly invoice.

10.1.2 Upon completion of the Design Phase (100% construction documents) for the PROJECT, **CITY** will work with **VIA** to reconcile the net ADVANCE. Any remaining ADVANCE funds will be deducted from the estimates needed for the Construction Phase ADVANCE. Ninety (90) days prior to the final inspection for the Construction Phase of the PROJECT, **CITY** will work with **VIA** to reconcile the net ADVANCE and use up the ADVANCE through final completion and closeout of the PROJECT. **VIA** shall continue to submit monthly invoices through the end of the PROJECT even if expenses are paid from the ADVANCE.

10.1.3 CITY will only provide funds in the amount of THIRTY TWO MILLION DOLLARS AND 0 CENTS (\$32,00,00.00) (\$32,000,000.00) less amount withheld for project oversight by City not to exceed \$80,000.00 annually not including required fees and permits which will be paid by VIA. Any ADVANCE (including interest earned on the ADVANCE and not expended on the PROJECT) held by VIA upon project completion and close-out shall be returned to CITY.

10.2 Wiring Instructions. VIA must provide written instructions to City should City desire to electronically transfer funds in payment of submittals.

10.3 Use of Funds. The Parties agree that the City Funds shall be used only to pay for Project Costs. Subject to Section 9.5.1, the City shall not be required to pay more than the City Funds.

10.4 Compliance. VIA understands that all or a portion of the funds provided pursuant to this Agreement are funds which have been made available by the proceeds issued from the issuance of debt. In no event shall the City be liable for any expense of VIA that is not eligible or allowable as "Project Costs" under the terms or conditions of this Agreement.

10.5 Additional Fees. No additional fees or expenses of VIA beyond the Project Costs shall be charged by VIA nor be payable by City under this Agreement. The Parties hereby agree that all compensable expenses of VIA under this Agreement have been provided for in the Project Cost.

10.6 Contributions by Utility Providers. CPS, SAWS and other utility providers may contribute funds for the costs of the Project. The City may deduct from its contributions an amount equal to any monetary amount contributed by said utility providers. However, the City shall not deduct from its contributions an amount equal to the value of any "in-kind" contributions from utility providers.

XI. FUNDS PLACED IN SEPARATE ACCOUNT

11.1 Accounting. Funds paid to VIA by City in accordance with Article X above will be placed in a separate interest-bearing account to be used by VIA to pay the Project Costs and for no other purpose. Funds not needed to be actually expended will be invested in accordance with VIA's then current investment policy. Within twenty (20) business days of the end of each quarter during the term of this Agreement, VIA will prepare a report setting forth all expenditures of funds contributed by City and any interest earned on the City's contribution(s). Upon completion of the Project, VIA will perform a final report of the expenditure of funds paid by City and an accounting of all interest earned. In the event that the City's share of final Project Costs are less than THIRTY TWO MILLION DOLLARS and 0 CENTS (\$32,000,000.00) any excess funds will be immediately returned to City.

XII. IMPLEMENTATION AND MANAGEMENT

12.1 RESERVED.

XIII. TERMINATION

13.1 Right of Either Party to Terminate for Breach or Default

- a. Upon a breach of this Agreement, the non-breaching Party may terminate this Agreement upon the issuance of a written notice of breach (citing this paragraph) and a declaration that the other Party is in breach along with a statement describing the breach in the notice. Upon receipt of such notice, the breaching Party shall have thirty (30) calendar days to cure the breach.
- b. This Agreement may also be terminated for default by either Party if there is a substantial failure to perform by either Party (through no fault of the terminating Party). In order to terminate for default, the non-defaulting Party must issue a written notice of default (citing this paragraph) and a declaration that the other Party is in default along with a statement describing the default in the notice. Upon receipt of such notice, the Parties may agree to a thirty (30) calendar day period to cure the default.

13.2 Continuation of Project. If this Agreement is terminated for any reason, and subject to the City's continuing consent for VIA's use of the City's streets under Article III of this Agreement, VIA may continue with the development and implementation of its CIP which, at VIA's sole discretion, may be modified, altered, adjusted or revised, as needed, to accommodate the funding resources then available to enable completion.

13.3 Nonwaiver. Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver of relinquishment for the future of such covenant or option. No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges or remedies to be always specifically preserved hereby; provided that it is expressly agreed that neither Party shall have the right to seek consequential, special or punitive damages against the other for any default under this Agreement.

XIV. FISCAL MANAGEMENT AND AUDIT RIGHTS

14.1 Audit Conditions and Requirements:

14.1.1 All City-funded projects and programs, including this Project, are subject to periodic audits at any reasonable hour of the day by City's auditors or other City staff as designated by the Director. This includes the auditing of records in the possession of the VIA, Engineer and Contractor that are related to this Project.

14.1.2 Following 30 days after a written request by City, VIA shall submit a written

report stating what has been accomplished to date and the most current percentage of completion of the total contract that has been performed.

14.1.3 Upon the City's written request, VIA shall cause the Contractor to furnish City with audited financial statements prepared by an independent auditor (CPA). The audited financial statements must include a schedule of receipts and disbursements by budgeting cost category and a certification from VIA stating whether or not the terms and conditions of the contract were met.

14.2 Access to Records. VIA will provide City's staff, including internal and external auditors and other persons as designated by City, such as independent public accountants and representatives of the federal or state government, access during regular business hours, as deemed necessary by City for the purposes of auditing, monitoring, evaluating, coordinating, investigating and making excerpts and/or copies of any and all of VIA's books, records and files related to the Project.

14.2.1 All such records shall continue to be available for inspection and audit for a period of three (3) years after the termination date hereof. However, if during the course of this three-year period, an audit or investigation of VIA commences, then VIA is required to maintain said records until such time as the audit or investigation is concluded.

14.2.2 The submission of falsified information or the failure to timely submit to City such records, reports and financial statements as requested by City pursuant to this Article XIV may constitute a breach of this Agreement and grounds for termination under Article XIII above.

XV. DISPUTE RESOLUTION

15.1 Procedures. In the event of any dispute(s) regarding the Project, such dispute(s) may be referred, in writing, by VIA or City to the committee created pursuant to Section 7.4 herein. For purposes of this Section 15.1, the committee shall be composed of three (3) members, with one member representing VIA, one member representing the City and one member representing Bexar County. VIA and City shall continue with their respective obligations pursuant to this Agreement pending receipt of the written findings of the Oversight Committee.

XVI. DOCUMENTS

16.1 Access. All Project documents, including the original drawings, estimates, specifications, and all other documents and data owned by VIA, Engineer and/or Contractor will remain the property of VIA, Engineer and/or Contractor as instruments of service. However, it is understood that the City shall have access to all such information relating to the Project with the right, at the City's sole expense, to make and retain copies of drawings, estimates, specifications and all other documents and data. Any reuse without specific written verification or adaptation by VIA, Engineer and/or Contractor will be at the City's sole risk and without liability or legal exposure to VIA, Engineer and/or Contractor.

16.2 Records Retention. VIA, Engineer and/or Contractor shall retain any and all documents produced as a result of the Work performed under this Agreement for a period of three (3) years from the date of Project completion or termination (the Retention Period). If, at the end of the Retention Period, there is litigation or other questions arising from, involving or concerning this documentation or the work performed hereunder, VIA, Engineer and/or Contractor shall retain the records until the resolution of such litigation or other such questions. VIA, Engineer and/or Contractor acknowledge and agree that the City shall have access to any and all such documents at any and all times, as deemed necessary by the City, during the Retention Period.

XVII. INSURANCE

17.1 Certificates. Prior to the commencement of any work under this Agreement, VIA shall deliver to City copies of Certificates of Insurance ("Certificates") and all required endorsements.

17.2 Coverage. VIA will ensure that Engineer and Contractor name the City of San Antonio as an Additional Insured on its' Insurance Policies for this Project, excluding Workers Compensation, Employer's Liability, Professional Liability and any other coverage which, because of the type of coverage would preclude doing so.

17.3 Modifications. The City reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and, if deemed necessary by City, to recommend modifications to the insurance coverage's and their limits when deemed necessary and prudent by the City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement, but in no instance will the City allow modification whereupon City may incur increased risk.

17.4 Other Changes. When there is a cancellation, non-renewal or material change in coverage which is not made pursuant to a request by the City, VIA shall require Engineer and/or Contractor to notify the City of such and shall give such notices not less than thirty (30) days prior to the change, if Engineer and/or Contractor knows of said change, cancellation or non-renewal in advance, or ten (10) days notice after the change, if Engineer and/or Contractor did not know of the change in advance. Such notice must be accompanied by a replacement Certificate.

XVIII. INDEMNIFICATION PROVISIONS

18.1 General Indemnification

VIA AND THE CITY ACKNOWLEDGE THEY ARE POLITICAL SUBDIVISIONS OF THE STATE OF TEXAS AND THAT THEY ARE SUBJECT TO AND SHALL COMPLY WITH THE APPLICABLE PROVISIONS OF THE TEXAS TORT CLAIMS ACT, AS SET OUT IN CIVIL PRACTICES AND REMEDIES CODE, SECTION 101.001 et seq., INCLUDING BUT NOT LIMITED TO THE REMEDIES AUTHORIZED THEREIN REGARDING CLAIMS OR CAUSES OF ACTION THAT MAY BE ASSERTED BY THIRD PARTIES FOR ACIDENT, INJURY OR DEATH.

18.2 By Engineer and Contractor. VIA shall cause Engineer and Contractor, whose work product is the subject of this Agreement, to agree to indemnify the City in substantially the same manner as said Engineer and Contractor indemnify VIA.

XIX. QUALITY OF WORK

19.1 Engineering Services. VIA will use its best efforts to ensure that the Engineering Services required under this Agreement will be performed with the same degree of professional skill and care that are typically exercised by similar professionals performing similar services in Bexar County, Texas.

19.2 Construction Work. If the Work is found to be defective, either wholly or in part, and/or found to be non-conforming with the Contract Documents and/or the Construction Documents during the 12-month period following completion of the Project as defined in the Construction Contract, the City shall immediately give VIA written notice thereof specifying the defect and/or non-conforming Work with particularity. In accordance with Section 7.6 of this Agreement VIA shall promptly pursue all reasonable steps to correct such defective or non-conforming Work at no additional costs to City, within thirty (30) days of notice thereof given by the City, or within such longer time as may be reasonably necessary, provided VIA is working diligently and continuously toward a cure. This provision shall survive termination of this Agreement.

XX. SBEDA (RESERVED)

XXI. CONFLICT OF INTEREST

21.1 Policy. VIA acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined in Part B, Section 10 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as City-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a City officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his 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.

21.2 Warranty. Pursuant to the subsection above, Contractor warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the City. Contractor further warrants and certifies that it has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City's Ethics Code.

XXII. AS BUILT DRAWINGS

22.1 Delivery to City. VIA shall maintain a set of "as built" drawings of the Project Facilities constructed by VIA during the progress of the Work. Within sixty (60) days of completion of the Project, VIA shall furnish the City with copies of "as built" drawings showing all elements of the completed work.

XXIII. NOTICES

23.1 Formal Notice. Any notice, demand, or other communication required to be given or to be served upon any Party under this Agreement shall be in writing and delivered to the person to whom the notice is directed, either: (i) in person with confirmation; (ii) by United States Mail, as a registered or certified item with return receipt required; (iii) delivered by delivery service (including any express mail or overnight delivery service); or (iv) by confirmed facsimile, notices, demands, or other communications delivered by mail shall be deemed given and received when deposited in a post office or other depository under the care or custody of the United States Postal Service, enclosed in a wrapper, addressed properly, with proper postage affixed. Any notice, demand, or other communication given other than by certified or registered mail, return receipt requested, shall be deemed to have been given and received when delivered to the address of the Party to whom it is addressed as stated below:

To City at: City of San Antonio
 CIMS Department
 P.O. Box 839966
 San Antonio, Texas 78283-3966 Attn: Mike Frisbie
 FAX: _____

with a copy to: City of San Antonio
 City Attorney
 P.O. Box 839966
 San Antonio, Texas 78225 Attn:
 Michael Bernard FAX:

To VIA at: Main Administrative Office 800
 W. Myrtle
 San Antonio, TX 78212 Attn:

23.2 Changes. A change of address or other contact information for any Party may be given by written notice as provided above.

XXIV. MISCELLANEOUS

24.1 Recitals. The recitals are incorporated herein as matters of contract and not mere recitals.

24.2 Assignment. Except as herein provided, VIA may not assign its rights or obligations under this Agreement without the prior written consent of the City. Any such assignment, whether voluntary or involuntary, by operation of law, under legal process or proceedings, by receivership, in bankruptcy or otherwise, without the prior written consent of the City shall, at the City's option, be of no force and effect whatsoever. Any consent to any such assignment or transfer shall not constitute a waiver of any of the restrictions of this section, and the provisions of this section shall apply to each successive assignment or other transfer hereunder, if any. Notwithstanding the above, VIA may assign this Agreement without obtaining the City's consent to (i) one or more of its affiliates, or (ii) an entity which acquires fee title to a portion of the Development from VIA or one of its affiliates.

24.3 Force Majeure. In the event VIA or the City is unable in whole or in part by force majeure to carry out any covenant, agreement, obligation or undertaking to be kept or performed under this Agreement, the time for the performance of such covenant, agreement, obligation or undertaking so delayed shall be extended for the period of such delay. The Party claiming force majeure will make reasonable attempts to remedy the effects of the force majeure and continue performance under this Agreement with all reasonable dispatch. The term "force majeure" as employed in this section shall include acts of God, acts of terrorism, strikes, lockouts, or other industrial disturbances, acts of a public enemy, war, blockades, riots, epidemics, earthquakes, explosions, accidents, or repairs to machinery or pipes; the delays of carriers, or inability by reason of governmental regulation to obtain materials, acts of public authorities, or other causes, whether or not of the same kind as specifically enumerated, not within the control of the Party claiming suspension and which by the exercise of due diligence such Party is unable to overcome. If Contractor suffers any event of force majeure, such even shall likewise constitute force majeure with respect to VIA.

24.4 Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any prior oral or written agreement. Any alterations, additions or deletions to the provisions herein shall only be by amendment in writing executed by both Parties.

24.5 Binding Agreement. This Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, and successors and assigns.

24.6 No Joint Venture; No Partnership. Nothing contained in this Agreement is intended by the Parties to create any form of joint venture or partnership, and any implication to the contrary is hereby expressly disavowed by both Parties. It is understood and agreed that this Agreement does not create a joint enterprise of any kind.

24.7 Independent Contractors. It is expressly understood and agreed that both Engineer and Contractor are and shall be deemed to be independent contractors and operators. The City is not responsible for any acts or omissions by the Engineer or Contractor.

24.8 Third Party Beneficiaries. There shall be no third-party beneficiaries to this Agreement.

24.9 Governing Law; Venue. This Agreement will be governed by and construed in accordance with the laws of the State of Texas. Proper venue for any dispute or litigation shall be only in Bexar County, Texas.

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

24.11 Invalid Provisions. If any clause or provision of this Agreement is held invalid, illegal or unenforceable, then it is the intention of the Parties that such invalidity, illegality or unenforceability shall not affect any other clause or provision herein and that the remainder of this Agreement shall be construed as valid.

24.12 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, all of which taken together shall constitute one single Agreement among the Parties.

This Agreement is executed to be effective as of the _____ day of _____, 2012 (the "Effective Date").