

AN ORDINANCE 2009-05-07-0349

AUTHORIZING A DESIGN AND CONSTRUCTION FUNDING AGREEMENT WITH VTLM TEXAS LP FOR AN EAST/WEST ROADWAY PROJECT AT THE SITE OF TEXAS A&M UNIVERSITY – SAN ANTONIO IN ACCORDANCE WITH THE CITY’S \$15 MILLION COMMITMENT MADE AS PART OF A PREVIOUSLY APPROVED MEMORANDUM OF UNDERSTANDING.

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WHEREAS, in 2005, City Council approved a Resolution of Support for Texas A&M University System (“TAMUS”) to establish a San Antonio campus (the “Project”) and subsequently committed \$15 million in Certificates of Obligation to acquire land to support the Project; and

WHEREAS, the Texas A&M Board of Regents selected a location for the proposed campus along Loop 410 South and S. Zarzamora which was owned by Verano Land Group, LP (“Verano”) who has offered the property at no cost to TAMUS on the condition that an agreement be entered into by the City, Verano, TAMUS, and CPS Energy (the “Parties”) for the development of a San Antonio campus and mixed-use integrated university community urban village; and

WHEREAS, City Council approved the terms of a Memorandum of Understanding (“MOU”) that was entered into by the Parties on September 6, 2007 and whose terms included the City making available the \$15 million in Certificates of Obligation initially reserved for the acquisition of land for road improvements and infrastructure; and

WHEREAS, the City has made funds available to VTLM Texas LP through an Agreement to Use Funds and Developer Participation Contract for work associated with the North/South Roadway project and is prepared to make additional funds available through a Design and Construction Funding Agreement for the engineering, design and construction of an East/West Roadway Project thereby meeting the City’s financial commitment of \$15 million; **NOW THEREFORE:**

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

SECTION 1. The terms and conditions of a Design and Construction Funding Agreement to provide engineering, design and construction services for an East/West Roadway project at the site of the Texas A&M University – San Antonio are hereby approved. A copy of the Agreement in substantially final form is attached to this Ordinance as Exhibit A. A copy of the fully executed agreement will be substituted for Exhibit A upon receipt of all signatures.

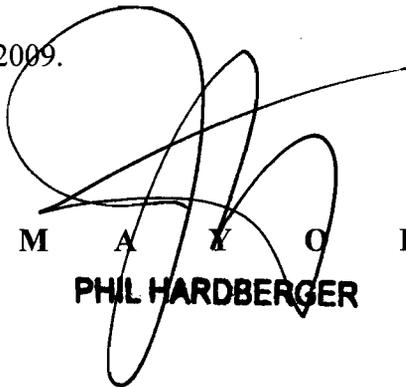
SECTION 2. The City Manager or her designee is hereby authorized to execute a Design and Construction Funding Agreement in accordance with Section 1 above.

SECTION 3. A funding agreement with VTLM Texas LP has been authorized for project 40-00164, Texas A&M Campus Infrastructure from previously appropriated funds. The Director of Finance is authorized to make the necessary transfers when the specific work orders are identified and assigned, in an amount not to exceed \$15,000,000.00.

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific Cost Centers, WBS Elements, Internal Orders, General Ledger Accounts, and Fund Numbers as necessary to carry out the purpose of this Ordinance.

SECTION 5. This Ordinance shall become effective immediately upon its passage by eight (8) affirmative votes and after the tenth (10th) day after passage if upon less than eight (8) affirmative votes.

PASSED AND APPROVED this 7th day of MAY 2009.


M A Y O R
PHIL HARDBERGER

ATTEST:



City Clerk

APPROVED AS TO FORM:



for City Attorney

Agenda Item:	13 (in consent vote: 8, 9, 13, 14, 18, 20, 21, 23)						
Date:	05/07/2009						
Time:	05:08:13 PM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing a Design and Construction Funding Agreement with Verano Triple L Management Texas, LP (VTLM) for an east/west roadway project at the site of Texas A&M University - San Antonio in accordance with the City's \$15 million commitment made as part of a previously approved Memorandum of Understanding. [Pat DiGiovanni, Deputy City Manager; Mike Frisbie, Director, Capital Improvements Management Services]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Phil Hardberger	Mayor	x					
Mary Alice P. Cisneros	District 1		x				
Sheila D. McNeil	District 2		x				
Jennifer V. Ramos	District 3		x				x
Philip A. Cortez	District 4		x				
Lourdes Galvan	District 5	x					
Delicia Herrera	District 6		x			x	
Justin Rodriguez	District 7		x				
Diane G. Cibrian	District 8		x				
Louis E. Rowe	District 9		x				
John G. Clamp	District 10		x				

STATE OF TEXAS

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**DESIGN AND CONSTRUCTION
FUNDING AGREEMENT**

COUNTY OF BEXAR

This DESIGN AND CONSTRUCTION FUNDING AGREEMENT (this “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 VTLM TEXAS, LP, a Texas limited partnership (“Project Manager”). The City and Project Manager are sometimes referred to herein individually as a “Party” and collectively as the “Parties”.

Recitals:

WHEREAS, the City is party to that certain Memorandum of Understanding (“MOU”) authorized by City Ordinance 2007-09-06-0947 passed and approved by the City Council of the City on September 6, 2007 regarding support for the establishment of a new Texas A&M University – San Antonio (“TAMU-SA”) campus by The Texas A&M University System (“TAMUS”); and

WHEREAS, pursuant to the MOU, the City would make up to Fifteen Million Dollars (\$15,000,000) available for the cost of public infrastructure to support development of the TAMU-SA campus site including, but not limited to, the design and construction of major roadways and utilities; and

WHEREAS, the City and Project Manager entered into that certain Agreement to use Funds of the City of San Antonio dated as of December 28, 2007 (the “Design Agreement”) for the procurement of engineering and design consulting services necessary for the future construction of two thoroughfare streets (the “Thoroughfare Streets”) to connect the TAMU-SA campus site with existing thoroughfares; and

WHEREAS, compensation under the Design Agreement was limited to Five Hundred Thousand Dollars (\$500,000), with the provision that any cost above that amount to engineer and design the Thoroughfare Streets could be reimbursed from the \$14,500,000 remaining to construct the Thoroughfare Streets; and

WHEREAS, the City entered into that certain Developer Participation Contract with Project Manager dated as of December 1, 2008 (the “Participation Contract”) wherein the City agreed to make up to Fourteen Million Five Hundred Thousand Dollars (\$14,500,000) available toward the cost of public improvements involved in the design and construction of the major north-south Thoroughfare Street (“University Way”) from South Loop 410 to the TAMU-SA campus site, with any portion of the funds in excess of the amount needed for University Way to remain available to Project Manager for public infrastructure improvements that benefit TAMU-SA (such residual funds referred to herein as the “City Funds”); and

WHEREAS, Project Manager has on January 20, 2009, through a best value competitive sealed proposal process in which representatives from the City, CPS Energy (“CPS”) and Bexar Metropolitan Water District (“BexarMet”) participated, selected Yantis Company (“Yantis”) as the general contractor to construct University Way according to the plans and specifications provided in the bid documents for that public competition; and

WHEREAS, pursuant to the MOU and separate funding support agreements authorized by their respective board of directors, CPS and BexarMet are also contributing to the funding of construction related to the Thoroughfare Streets; and

WHEREAS, Project Manager, after considering the cost data from Yantis, the funding offered by CPS and BexarMet, and all probable change order costs, projects that after the cost of construction for University Way, approximately Eight Million Dollars (\$8,000,000) will be available in the City Funds; and

WHEREAS, Project Manager and the City desire to take advantage of certain economies that may be realized by commencing design and construction of the major East-West Thoroughfare Street prior to completion of the University Way project; and

WHEREAS, the City wishes to engage Project Manager to cause to be performed the engineering and the construction services necessary to undertake and complete the East-West Thoroughfare Street in accordance with the terms and conditions of this Agreement; and

WHEREAS, the City’s funding of this Agreement for the purposes outlined below is consistent with the MOU and the use of certain Certificates of Obligations issued by CITY;

NOW, THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, do hereby covenant and agree 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 Project Administrative Costs” are defined in Section 5.3 of this Agreement.
- c. “Construction Documents” means the plans, specifications and estimates for the East-West Street 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.

- d. “Contractor” means a Texas licensed general contractor under contract with Project Manager to construct the East-West Street.
- e. “Engineer” means a Texas licensed professional engineer under contract with Project Manager to design and perform engineering services for the East-West Street.
- f. “Director” is the Director of the City’s Planning and Development Services Department or such other person as the Director may designate.
- g. “Development” means MDPP #011-08, the mixed-use urban community in the City South area of the City commonly known as Verano.
- h. “East-West Street” means a multi-way Thoroughfare Street of at least four lanes that begins at South Zarzamora and runs to, and across the northern boundary of, the TAMU-SA campus site, including all ancillary utilities and easements. The proposed location of the East-West Street is shown on Exhibit A.
- i. “Project” means the design and construction of the public works infrastructure improvements for the East-West Street and associated improvements to be constructed within the Development pursuant to the Construction Documents, including associated utilities (or coordination with the utility providers in cases where the utility provider itself performs the work).
- j. “Project Costs” means all costs and expenses incurred by Project Manager with respect to the Project in accordance with this Agreement, 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 necessary legal fees; (d) all costs and expenses to construct the East-West Street and any new storm drains; (e) a project management fee of ten percent (10%); and (f) other reasonable and necessary fees and expenses relating to the Project.
- k. “Project Manager” is defined in the preamble to this Agreement and includes its successors and assigns.
- l. “SmartCode” means Chapter 35 of the City Code of the City, entitled Unified Development Code, as amended to permit high density urban platting.
- m. “Work” means the design and/or 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. TERM

2.1 Unless sooner terminated in accordance with the provisions of this Agreement, the term of this Agreement (the "Term") shall commence on the Effective Date and terminate on the completion of the Project, but not later than December 31, 2010.

2.2 CITY is funding this Agreement through proceeds issued from certain Certificates of Obligation. This Agreement is subject to and contingent upon such funding or adequate appropriation for the Project.

III. ENGINEERING AND DESIGN

3.1 Selection. Project Manager shall, in accordance with Chapter 2254 of the Texas Government Code, contract with an Engineer for all engineering and design services necessary for the completion of plans and specifications that are suitable for use in the construction of the East-West Street (collectively, the "Engineering Services"). Selection of the Engineer shall be in Project Manager's sole discretion, provided that the Engineer selected is a registered professional engineer, licensed to practice in the State of Texas. Project Manager shall inform City of its selection of an Engineer ten (10) days following the selection date.

3.2 Service Requirements. Project Manager shall ensure that the Engineering Services are:

- a. suitable for producing engineering and design documents in accordance with the City's Uniform Development Code as amended by the SmartCode; and
- b. provided in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.

3.3 Deliverables. Project Manager shall cause the Engineer to:

- a. provide all required and customary engineering analysis (including surveys and geotechnical), construction drawings and plans and specifications as needed for the design and engineering of the East-West Street;
- b. prepare and provide a Statement of Probable Construction Costs of the East-West Street based on units costs;
- c. submit and obtain all required approvals of government entities necessary for the approval of the plans and specifications for the East-West Street; and
- d. provide construction plans and specifications stamped by the appropriate engineers and approved by the City in accordance with the UDC as amended by the Smart Code.

3.4 Availability. Project Manager shall ensure that the Engineer shall be available to:

- a. advise and consult with the City throughout the progress of the Project; and
- b. attend meetings of any official nature concerning the Project, including but not limited to scope meetings, review meetings, pre-bid meetings, and pre-construction meetings.

3.5 Oversight. Project Manager is permitted to hire a professional engineer, separate from the Engineer, to oversee and review all aspects of the design.

IV. CONSTRUCTION

4.1 Construction Documents. Project Manager shall provide the City with a complete set of Construction Documents meeting the requirements of this Agreement and in conformance with applicable local, state and federal codes and regulations and customary engineering practices. The Construction Documents shall be prepared by and bear the seal of the Engineer. Construction of any part of the Project shall in no event commence prior to the City's approval of the Construction Documents for that part of the Project. Project Manager shall cause the Engineer to commence preparation of the Construction Documents promptly upon completion of engineering and design, and to diligently continue same to completion.

4.2 Permits and Bids. Project Manager shall cause construction of the Project to commence within sixty (60) days after the later of (i) approval of the Construction Documents by the Director, (ii) receipt by Project Manager of all governmental and regulatory permits and approvals required in connection with the construction of the Project (the "Permits"), and (iii) receipt of qualifying bids which enable the East-West Street to be fully constructed according to the construction documents. Project Manager's obligation to commence construction of the Project is conditioned upon the receipt by Project Manager of the Permits and construction bids on such terms and conditions as Project Manager may deem to be acceptable in Project Manager's reasonable discretion. The City agrees to use its best efforts (without cost or expense to the City) to obtain and shall assist Project Manager in obtaining the Permits. Without limiting the foregoing, Project Manager 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. In anticipation that Project Manager may not receive qualified bids within the cost estimates, Project Manager may bid the Project utilizing a base bid and add/alternate structure for portions of the Project which could be eliminated or redesigned to come within the budgeted costs estimates, and in the event the amount of the bids are greater than the City Funds, Project Manager will redesign and rebid the Project until it is within an acceptable budget. City shall be consulted if the need to eliminate or redesign portions of the Project becomes necessary due to the actual costs exceeding the cost estimates.

4.3 Construction Contract. Project Manager shall enter into a contract (the "Construction Contract") for construction of the Project with a Contractor selected by Project Manager. Project Manager shall inform City of its selection of a Contractor prior to executing the

Construction Contract. The Construction Contract and other documents between Project Manager and the Contractor are not required to be in any specific form, however, the Construction Contract must contain provisions to ensure that the City is not obligated to Contractor or third-parties for the construction in any way. The Construction Contract shall a) prohibit third-party beneficiaries other than the City, which shall be specifically designated as a third-party beneficiary; b) not be assignable by the Contractor; and c) provide the City access to the Project at all reasonable times for inspection purposes. The Contractor shall acknowledge therein that it has read this Contract and understands that the City has certain rights hereunder and pursuant to the Construction Contract.

4.4 Assurances. Prior to the commencement of construction, Project Manager shall cause the Contractor to provide the City with (i) a performance bond in a sufficient amount to ensure the completion of construction of the East-West Street and in accordance with and in satisfaction of Section 212.073 of the Texas Local Government Code, reflecting the City as beneficiary thereunder (it being understood and agreed that Project Manager itself shall have no obligation to provide any bond other than the bond to be provided by Contractor), (ii) a payment bond as security for all persons supplying labor and material in the performance of the construction contract, executed by a corporate surety, licensed pursuant to the Texas Insurance Code in the full amount of the contract price and attached thereto a Power of Attorney as evidence of the authority of the person executing the bond to bind the surety; and (iii) insurance certificates in accordance with Article VII of this Agreement. The foregoing shall remain in force and effect throughout the course of construction of the Project.

4.5 Construction Execution. Project Manager shall use commercially reasonable efforts to cause the construction of the Project in a diligent and continuous fashion by the Contractor until completion, as certified jointly by the Engineer and the Director. Construction of the Project shall at all times be performed in a good and workmanlike manner using only new, high-quality materials as shall be specified in the Construction Documents. The Director shall have the authority to accept the Project on behalf of the City, and the City shall accept ownership and maintenance of the Project upon approval of the completed Project by the Director. The Project may be designed and built in stages as the Project Manager may determine subject to the City's reasonable approval, provided that all stages must be completed to complete the Project. Project Manager will provide construction schedules pursuant to the procedures for the City's Program Management Portal as defined in Section 5.4. Project Manager's obligation to complete the Project shall be suspended or delayed as reasonably necessary as a result of any failure or delay in obtaining any of the easements, consents or approvals required for the Project. During construction of the Project, Project Manager 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, all in accordance with current project management practices using the Portal. In all cases it is Project Manager's sole responsibility to connect to the Portal at no cost to the City. "As-Built" Plans shall be provided to the City no later than sixty (60) days after completion of the Project, as jointly certified by the Engineer and the Director.

4.6 Prevailing Wage Rate. The provisions of Chapter 2258, Texas Government Code, shall expressly be made a part of the Construction Contract. In accordance therewith, the City will provide Project Manager/Contractor with a schedule of the general prevailing rate of per diem wages in this locality for each craft or type of workman needed to perform the Construction Contract and that schedule will become a part of the Construction Contract. Project Manager/Contractor shall forfeit as a penalty to the City Sixty Dollars (\$60.00) for each laborer, workman, or mechanic employed, for each calendar day, or portion thereof, that such laborer, workman or mechanic is paid less than the said stipulated rates for any work done under the Construction Contract by the Contractor or any subcontractor under it. The establishment of prevailing wage rates pursuant to Chapter 2258 of the Texas Government Code shall not be construed to relieve Project Manager/Contractor from its obligation under any Federal or State Law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed under the Construction Contract.

4.7 Modifications. Any variations from the Construction Documents shall require approval by the Director, which approval shall not be unreasonably withheld, conditioned or delayed. In the event change orders are necessary in connection with the construction of the Project, Developer shall submit the same to the Director for his review and approval, which approval shall not be unreasonably withheld, conditioned or delayed. Upon written approval of any change order by both Project Manager and the Director, the Project Costs shall be adjusted accordingly.

4.8 Construction Payments. Prior to submittal of the first construction draw, Project Manager will submit a schedule of values for payment to be approved by the City, which approval shall not be unreasonably withheld, conditioned or delayed. Any changes to the schedule of values once approved will be processed and approved as task orders through the Portal.

4.9 Inspections. The Project shall be accessible at all reasonable times to the Director or his/her designee for inspection. Project Manager 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 Project Manager as an approval by the City, a permit granted by the City, a waiver by the City, or used for any purpose by Project Manager, the Contractor or any third party. Project Manager further acknowledges that Project Manager and Contractor are required to perform their own inspections, and inspections by the City do not address any obligations of Project Manager or others. Subject to the foregoing, the City shall promptly notify Project Manager of any defects or non-conformances discovered during any City inspection.

V. COMPENSATION

5.1 Acceptance. Both the design and construction of the Project shall be performed to the satisfaction of the City. The approval official shall be the Director.

- a. The City shall be under no obligation to pay for any work performed by Engineer and/or Contractor and submitted by Project Manager which is not satisfactory to the City. The City shall have the right to terminate this Agreement in whole or in part should Engineer's and/or Contractor's work not be satisfactory to Director; however, the City shall have no obligation to terminate.
- b. Acceptance of any work performed under the Agreement by the City shall not constitute nor be deemed a release of the responsibility and liability of Project Manager and/or Engineer or Contractor, their employees, associates, agents or subcontractors for the accuracy and competency of their designs, working drawings, specifications or other documents and work; nor shall such acceptance be deemed an assumption of responsibility or liability by the City for any defect in the designs, working drawings, specifications or other documents and work prepared by Engineer and/or Contractor, their employees, subcontractors, and agents.

5.2 Funding. In consideration of the performance of all engineering and construction services and activities set forth in this Agreement, the City agrees to provide funds to the Project Manager in an amount not to exceed the City Funds as total compensation for engineering and construction work performed in association with the Project. Payment will be made to Project Manager following written approval by Director of invoices submitted for the work, products and services. The City shall not be obligated or liable under this Agreement to any party other than Project Manager for the payment of any monies or the provision of any goods or services. Funding under this Agreement is contingent upon the completion of the work for any invoice submitted to the City for the Project, such work having been done to the satisfaction of the City.

5.3 City Administrative Costs. The "Total City Project Administrative Cost" for this Project shall not exceed two and one-half percent (2.5%) of the total amount submitted by the Project Manager in its draw requests under Section 5.5 of this Agreement. "Actual City Project Administrative Costs" will be calculated using the most recent cost allocation plan and indirect cost proposal for the Capital Improvements Management Services Department (CIMS). Currently the cost allocation plan is designed for the CIMS to recover costs from project work efforts based on the actual time spent on a project, plus markup of non-billable hours, plus the indirect cost rate. Actual City Project Administrative Costs will be charged in this manner to the Project on a monthly basis. CIMS will ensure that Actual City Project Administrative Costs do not exceed the Total City Project Administrative Cost. If, after all draw requests submitted by the Project Manager pursuant to Article 5 have been satisfied, the Actual City Project Administrative Costs total less than the Total City Project Administrative Cost, the difference shall remain available to the Project Manager for public infrastructure improvements that benefit TAMU-SA, including improvements to University Way.

5.4 Internet-Based Project Management Portal. The City will administer its design and construction management through an Internet-based program management portal (the "Portal"). Project Manager shall conduct communication through the Portal and perform all Project-related functions utilizing the Portal's database system. These functions include correspondence, submittals, requests for information, vouchers or payment requests and processing, amendment, change orders and other administrative activities. Notwithstanding, Project Manager shall also make information available to City through other means and maintain active correspondence when initiated by City.

- a. The City shall administer the software, provide training to applicable Project team members including, but not limited to, Project Manager, the Engineer and the Contractor, and make the software accessible via the Internet.
- b. Project Manager shall cause the Engineer and Contractor to submit a cost-loaded project schedule in Primavera Project Manager 5.x or Primavera Contractor 6.2 or above. This schedule will include the activities, both internal and external to the Engineer and Contractor that must be completed to accomplish the Project. The initial schedule ("Baseline") will be submitted at the beginning of the design and construction phases of the Project, respectively, with schedule updates submitted thereafter on the 10th day of every month until completion. The Baseline and changes to the Baseline will be approved by the City.

5.5 Method of Payment. With respect to Project Costs, Project Manager may, at its option, submit draw requests for payment on a periodic basis during the engineering and construction of the Project, for payment of that portion of the City Funds as may be attributable to the completed engineering or construction of the Project since the last draw request. All draws shall be submitted through and pursuant to Portal procedures. Project Manager must submit a written progress report detailing work performed for the billing period reflected in the draw requests. Payments by the City shall be in accordance with Portal procedures and shall be payable no later than thirty (30) days following acceptance by Director.

5.6 Use of Funds. The City agrees that the City Funds may be used to pay for public improvements required by the municipality in association with the East/West Street, including increased capacity of improvements in anticipation of future development in the area. Project Manager may expend funds for utility improvements, which expenditures may thereafter be reimbursed by contributions from CPS, BexarMet and other applicable utility providers. Any portion of the City Funds in excess of the amount needed for the Project and any portion reimbursed by utility providers shall remain available to Project Manager for public infrastructure improvements the benefit TAMU-SA, including improvements to University Way. In no event shall the City be required to pay more than the City Funds and Project Manager shall be required to complete the Project and to pay all Project Costs in excess of the City Funds.

5.7 Compliance. Project Manager understands that the funds provided it pursuant to this Agreement are funds which have been made available by the proceeds issued from certain Certificates of Obligation. Project Manager will therefore comply with all laws, regulations, policies and procedures applicable to these funds by the City and the State of Texas.

- a. Project Manager expressly agrees and understands that this is a cost reimbursement Agreement and that the City's liability hereunder is limited to making reimbursements for allowable expenditures made by Project Manager.
- b. In no event shall the City be liable for any expense of Project Manager not eligible or allowable for reimbursement under the terms or conditions of this Agreement.
- c. Should any expense or charge that has been reimbursed be subsequently disapproved or disallowed as a result of any site review or audit, Project Manager will immediately refund or repay such amount to the City.
- d. The City, as a public entity, has a duty to document the expenditure of public funds. Project Manager acknowledges this duty on the part of the City. To this end, Project Manager understands that failure of Project Manager to comply with the submittal of the statement and documents as required above shall constitute a waiver by Project Manager of any and all rights or claims to payment for services performed under this Agreement by Project Manager.

5.8 Additional Fees. No additional fees or expenses of Project Manager beyond the Project Costs shall be charged by Project Manager nor be payable by City under this Agreement. The Parties hereby agree that all compensable expenses of Project Manager under this Agreement have been provided for in the Project Costs which shall in no case exceed the City Funds. Project Manager is responsible for any overages or amounts necessary to fully complete the Project to the satisfaction of City.

VI. TERMINATION

6.1 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) 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 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 ten (10) day period to cure the default.

6.2 Procedures following Receipt of Notice of Termination

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

b. Copies of all completed or partially completed specifications and all reproductions of all completed or partially completed designs and plans prepared under this Agreement prior to the effective date of termination shall be delivered to the City, in the form requested by the City, as a pre-condition to final payment.

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

6.3 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.

VII. FISCAL MANAGEMENT

7.1 In consideration of services provided, City will reimburse Project Manager for expenses incurred pursuant hereto. It is specifically agreed that the reimbursement hereunder shall not exceed the amount of the City Funds.

7.2 Project Manager shall not be relieved of liability to City for damages sustained by City by virtue of any breach of this Agreement and City may withhold funds which may be otherwise due as damages.

7.3 Audit Conditions and Requirements:

a. Following 30 days after a written request by City, Project Manager 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.

b. It is imperative any auditor performing an audit of Project Manager read the entire contract, including all attachments, between the City and Project Manager, since the budget and financial compliance of the contract is only a portion of the total contractual obligation.

c. 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 both the Project Manager, Engineer and Contractor related to this project.

d. Project Manager shall cause the Contractor to furnish City with audited financial statements prepared by an independent auditor (CPA), within one hundred and twenty (120) days of the close of the Contractor's fiscal year or within thirty (30) days of the completion of any audit performed. In addition to the audited financial statements, a copy of any internal controls review, audit exceptions, and management letter should be submitted. The audited financial statements must include a schedule of receipts and disbursements by budgeting cost category and a certification from the Project Manager stating whether or not the terms and conditions of the contract were met. If the City determines, in its sole discretion, that Contractor is in violation of the above requirements, the City shall have the right to dispatch auditors of its choosing to conduct the required audit and to have the Project Manager pay for such audit.

7.4 Project Manager understands and agrees to abide by and adhere to applicable federal and state laws and City ordinances.

7.5 Project Manager shall establish and use internal accounting and administrative controls to preclude theft, embezzlement, improper inducement, obstruction of investigation or other criminal action and to prevent frauds and program abuse.

7.6 City's Capital Improvement Management Services Department ("CIMS") is assigned monitoring responsibility to evaluate the accountability of the Project and to insure project objectives are met. Project Manager 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 Project Manager's books, records and files on the Project.

a. 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 the Project Manager commences, then Project Manager is required to maintain said records until such time as the audit or investigation is concluded.

b. Project Manager agrees that during the term of this Agreement, any duly authorized representative of City shall have the right to conduct on-site inspections at reasonable times and to interview personnel and clients for the purposes of evaluating and monitoring the Project for compliance with this Agreement.

c. The submission of falsified information or the failure to timely submit all information by Project Manager as requested by City is grounds for termination of this Agreement.

7.7 Project Manager further represents and warrants that:

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

b. Any supporting financial statements heretofore or hereafter provided to City are, shall be and shall remain complete, accurate and fairly reflective of the financial condition of Project Manager on the date shown on said statements and during the period covered thereby, and that since said date shown, except as provided by written notice to City, there has been no material change, adverse or otherwise, in the financial condition of Project Manager;

c. No litigation or proceedings are presently pending or threatened against Project Manager or if pending have been disclosed by Project Manager in writing to City;

d. None of the provisions contained herein contravene or in any way conflict with the authority under which Project Manager is doing business or with the provisions of any existing indenture or agreement of Project Manager;

e. None of the assets of Project Manager are subject to any lien or encumbrance of any

character, except as shown in the financial statements provided by Project Manager to City.

VIII. DOCUMENTS

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

8.2 Seal and Signature. All completed documents submitted for final approval or issuance of a permit shall bear the seal with signature and date adjacent thereto of the Engineer.

8.3 City Copies. Copies of documents that may be relied upon by the City are limited to the printed copies (also known as hard copies) and PDF electronic versions that are sealed and signed by Engineer. Files in editable electronic media format of text, data, graphics, or other types, (such as DWG) that are furnished by Project Manager, Engineer and/or Contractor to the City are only for the convenience of the City. Any conclusion or information obtained or derived from such editable electronic files will be at the City's sole risk.

8.4 Proprietary Rights. Project Manager agrees and covenants to protect any and all proprietary rights of the City in any materials provided to Project Manager. Such protection of proprietary rights by Project Manager shall include, but not be limited to, the inclusion in any copy intended for publication of copyright mark reserving all rights to the City. Additionally, any materials provided to Project Manager by the City shall not be released to any third party without the consent of the City and shall be returned intact to the City upon termination or completion of this Agreement or if instructed to do so by the Director.

8.5 Records Retention. Project Manager, Engineer and/or Contractor shall retain any and all documents produced as a result of services provided under this Agreement for a period of three (3) years from the date of 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 services provided hereunder, Project Manager, Engineer and/or Contractor shall retain the records until the resolution of such litigation or other such questions. Project Manager, 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.

IX. INSURANCE

9.1 Certificates. Prior to the commencement of any work under this Agreement, Engineer and/or Contractor shall furnish original completed Certificates of Insurance (“Certificates”) and all required endorsements to the City’s CIMS Department and City Clerk’s Office, each of which shall be clearly labeled “East-West Street” in the Description of Operations block of the Certificates. The original Certificates shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon and must have the agent’s original signature, including company affiliation, title, and phone number. All Certificates must be mailed directly from the agent to the City. The City shall have no duty to pay or perform under this Agreement until such Certificates shall have been delivered to the City’s CIMS Department and the Clerk’s Office, and no officer or employee, other than the City’s Risk Manager, shall have authority to waive this requirement.

9.2 Coverage. Project Manager shall ensure that Engineer and Contractor obtain and maintain in full force and effect for the Term and any extension thereof, at Engineer’s or Contractor’s sole expense, but subject to reasonable deductibles, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to the City, in the following types and amounts:

INSURANCE REQUIREMENTS	
1. Workers’ Compensation ** Employers’ Liability **	Statutory \$1,000,000/\$1,000,000/\$1,000,000
2. Commercial General (Public) Liability Insurance to include coverage for the following: a. Premises operation b. Independent contractors* c. Products/completed operations d. Personal Injury e. Contractual Liability f. Explosion, collapse, underground* g. Broad form property damage, to include fire legal liability*	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 \$50,000
3. 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

4. Professional Liability (Claims Made Form)	\$1,000,000 per claim to pay on behalf of the insured all sums, which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error or omission in professional services.
* If Applicable	
** Alternate Plans Must Be Approved by Risk Management	

9.3 Required Provisions. Project Manager shall cause Engineer and/or Contractor to provide the following required provisions with respect to the above required insurance, all insurance contracts and Certificates:

- a. Name the City and its officers, employees, volunteers, and elected representatives as additional insureds as respects operations and activities of, or on behalf of, the named insured performed under contract with the City, with the exception of the workers' compensation and professional liability policies.
- b. Provide for an endorsement that the "other insurance" clause shall not apply to the City where the City is an additional insured shown on the policy.
- c. Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the City.

9.4 Copies. The City shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements thereto as they apply to the limits required by the City, 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 or the underwriter of any such policies). Engineer and/or Contractor shall be required by Project Manager to comply with any such requests and shall submit a copy of the replacement Certificates to the City at the notice address provided herein within ten (10) days of the requested change.

9.5 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 to modify insurance coverages 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.

9.6 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, Project Manager 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 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.

9.7 Primary Policy. It is agreed that Engineer's and/or Contractor's insurance shall be deemed primary with respect to any insurance or self insurance carried by the City for liability arising out of operations under this Agreement.

X. INDEMNIFICATION

10.1 By Project Manager. **Project Manager covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, the City and the elected officials, employees, officers, directors, volunteers and representatives of the City, individually or 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, property damage or environmental claims made upon the City directly or indirectly arising out of, resulting from or related to Project Manager's activities under this Agreement, including any acts or omissions of Project Manager, any agent, officer, director, representative, employee or subcontractor of Project Manager, and their respective officers, agents, employees, directors and representatives while in the exercise of performance of the rights or duties under this Agreement, and in the case of any environmental claim without limitations to whether such claim results from the acts or omissions of Project Manager, all without however, waiving any governmental immunity available to the City under Texas law and without waiving any defenses of the Parties under Texas law. THE INDEMNITY PROVIDED FOR IN THIS SECTION SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF THE CITY, ITS OFFICERS OR EMPLOYEES, IN INSTANCES WHERE SUCH NEGLIGENCE CAUSES PERSONAL INJURY, DEATH, OR PROPERTY DAMAGE. IN THE EVENT PROJECT MANAGER AND THE CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. The provisions of this indemnity are solely for the benefit of the Parties and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Project Manager shall advise the City in writing within twenty-four (24) hours of any claim or demand against the City or Project Manager known to Project Manager related to or arising out of Project Manager's activities under this Agreement and shall see to the investigation and defense of such claim or demand at Project Manager's cost. The City shall have the right, at its option and at its own expense, to participate in such defense without relieving Project Manager of any of its obligations under this section.**

10.2 By Engineer and Contractor. Project Manager 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 Project Manager pursuant to Section 10.1 above.

10.3 By City. To the extent provided by law, the City shall be responsible for all claims, demands, and causes of action against the City arising in favor of any person because of personal injuries or death or damage to property occurring, growing out of, incident to, related to or resulting directly or indirectly from, the occurrence of activities or omission of activities contemplated by the Agreement, caused by the negligence of the City and/or any of its elected officials, employees, officers, directors, volunteers or representatives, individually or collectively.

XI. WARRANTY

11.1 Engineering Warranty. Project Manager warrants 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.

11.2 Construction Warranty. 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 Project Manager written notice thereof specifying the defect and/or non-conforming Work with particularity. Project Manager shall correct such defective or non-conforming Work within thirty (30) days of notice thereof given by the City; or within such longer time as may be reasonably necessary, provided Project Manager is working diligently and continuously toward a cure. If Project Manager fails to so cure such defective or non-conforming Work, then the City may, at its own expense, correct such defective or non-conforming Work by the City's own crews or by outside contractors, at the City's option, and the reasonable cost of such correction shall be deemed to be sums due the City of Project Manager, and may be offset against any outstanding sums due by the City to Project Manager under this Agreement. The cost of the City crews shall be determined by prevailing market rates for performing the work required to correct such defects and/or non-conforming work. At the end of said 12-month period, all available produce and workmanship material warranties, including all warranties given by Contractor, shall be assigned to the City, to the extent assignable. This provision shall survive termination of this Agreement.

XII. SBEDA

12.1 SBEDA Program. The City has adopted a Small Business Economic Development Advocacy Ordinance (the "SBEDA Program"), which is posted on the City's Economic Development Department website and is also available in hard copy form upon request to the City office that administers the SBEDA Program (the "SBEDA Program Office"). The SBEDA Program implements the policy of the City to assist in increasing the competitiveness of and opportunities for business enterprises that are small ("SBE"), women-

owned (“WBE”), African-American owned (“AABE”) and minority-owned (“MBE”). Ordinance 2007-04-12-0396 (the “SBEDA Amendment Ordinance”) amended the standards of the SBEDA Program for Alternative Construction Delivery Methods.

12.2 Definitions. In addition to the definitions provided in the SBEDA Program, the following definitions will apply pursuant to SBEDA Program requirements and this Agreement:

a. “Alternative Construction Delivery Methods” (“ACDM”) are processes which result in agreements with general contractors that do not conform to the traditional lowest bid evaluation criteria. The competitive sealed proposal method under which the Contractor will be chosen under this Agreement is a form of ACDM.

b. “SBEDA Enterprise” (“SE”) means a corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed, as applicable, and otherwise authorized to do business in the state of Texas and certified pursuant to SBEDA Program requirements. SEs include SBEs, WBEs, AABEs and MBEs.

c. “Commercially Useful Function” means a function performed by an SE when it is responsible for supplying goods or for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether an SE is performing a Commercially Useful Function, the amount of work subcontracted, industry practices and other relevant factors shall be evaluated. Commercially Useful Function is measured for purposes of determining participation on a contract, not for determination of certification eligibility.

d. “Conduit” means an SE that knowingly agrees to pass the scope of work for which it is listed for participation, and is scheduled to perform or supply on the contract, to a non-SE firm. In this type of relationship, the SE has not performed a Commercially Useful Function and the arranged agreement between the two parties is not consistent with standard industry practice. This arrangement does not meet the Commercially Useful Function requirement and therefore the SE’s participation does not count toward the SE utilization goal.

12.3 Compliance with SBEDA Program. The Program Manager shall:

a. Utilize the narrative statement submission and scoring criteria of the SBEDA Amendment Ordinance (in lieu of a Good Faith Effort Plan) when soliciting and evaluating competitive sealed proposals from potential Contractors under this Agreement.

b. Make every effort to ensure that the Contractor for construction of the East-West Street utilizes businesses for subcontracting and supplying which will meet the SE utilization goals of the SBEDA Amendment Ordinance.

c. Ensure that the Contractor:

(1) utilizes the SEs that were originally listed in its competitive sealed proposal to perform their Commercially Useful Functions or, if termination of an original SE is necessary, replaces such SE with another SE performing the same Commercially Useful Function; and

(2) does not enter into a Conduit relationship with an SE scheduled to perform services or provide materials that are the subject of this Agreement; and

(3) provides any documentation or written submissions required by the City or SBEDA Program Office pursuant to the SBEDA Program within the time period set forth by the SBEDA Program Office.

XIII. CONFLICT OF INTEREST

13.1 Policy. Project Manager 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.

13.2 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.

XIV. NOTICES

14.1 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
Planning and Development Services
1901 S. Alamo
San Antonio, Texas 78204
Attn: Rod Sanchez
FAX: _____

and to: 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 Project Manager at: VTLM Texas, LP
c/o Kestrel Development LLC
3611 Paesano's Parkway, Suite 201
San Antonio, Texas 78231
Attn: Chris Lindhorst
FAX: (210) 249-0929

with a copy to: Verano Land Group, LP
3157 N. Rainbow, Suite 305
Las Vegas, Nevada 89108
Attn: Ralph Lampman
FAX: (702) 973-4971

and with copy to: Fulbright & Jaworski L.L.P.
300 Convent Street, Suite 2200
San Antonio, Texas 78205
Attn: Jane H. Macon
FAX: (210) 270-7205

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

XV. MISCELLANEOUS

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

15.2 Assignment. Except as herein provided, Project Manager 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, Project Manager 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 Project Manager or one of its affiliates.

15.3 Force Majeure. In the event Project Manager 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 event shall likewise constitute *force majeure* with respect to Project Manager.

15.4 Entire Agreement. This Agreement, along with the MOU, Funding Agreement and Developer Participation Agreement, constitute 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.

15.5 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.

15.6 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.

15.7 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.

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

15.9 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.

15.10 Attorneys' Fees. Both Parties agree that if either Party should default on any of the conditions and covenants hereunder or should threaten to do so, or if it be necessary for any reason for either to hire or retain an attorney to represent it in connection with this Agreement, the Party found by a court of law having jurisdiction over the Parties to be responsible for said default shall pay, if awarded by said court of law, to the prevailing Party a reasonable amount for the prevailing Party's costs, litigation expenses and attorneys' fees.

15.11 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.

15.12 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.

15.13 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.

[Signatures of Parties on following page]

This Agreement is executed to be effective as of the date of the signature of the City Manager or designee (the "Effective Date").

CITY

CITY OF SAN ANTONIO, TEXAS

By: _____

Name: _____

Title: _____

Date: _____

ATTEST

By: _____

Name: _____

City Clerk

APPROVED AS TO FORM

By: _____

Name: _____

City Attorney

PROJECT MANAGER

VTLM TEXAS, LP

a Texas limited partnership

By: Texas Manager, LLC, a Nevada Limited Liability Company, its General Partner

By: Triple L. Management, LLC a Nevada Limited Liability Company, its Manager

By: The Fidelity Trust, dated 6/26/1992, its Manager

By: _____

Ralph J. Lampman

Trustee

EXHIBIT A
to Design and Construction Funding Agreement

Proposed Location of East-West Street

[*See attached*]

City of San Antonio
Discretionary Contracts Disclosure

*For use of this form, see Section 2-59 through 2-61 of the City Code (Ethics Code)
Attach additional sheets if space provided is not sufficient.*

(1) Identify any individual or business entity¹ that is a party to the discretionary contract:

VTLM Texas, LP

(2) Identify any individual or business entity which is a *partner, parent* or *subsidiary* business entity, of any individual or business entity identified above in Box (1):

No partner, parent or subsidiary; or

List partner, parent or subsidiary of each party to the contract and identify the corresponding party:

Texas Manager, LLC, General Partner

Triple L. Management, Limited Partner

(3) Identify any individual or business entity that would be a *subcontractor* on the discretionary contract.

No subcontractor(s); or

List subcontractors:

(4) Identify any *lobbyist* or *public relations firm* employed by any party to the discretionary contract for purposes related to seeking the discretionary contract.

No lobbyist or public relations firm employed; or

List lobbyists or public relations firms:

¹ A *business entity* means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, unincorporated association, or any other entity recognized by law. A sole proprietor should list the name of the individual and the d/b/a, if any.

(5) Political Contributions

List all political contributions totaling one hundred dollars (\$100) or more within the past twenty-four (24) months made to any *current* or *former member* of City Council, any *candidate* for City Council, or to any *political action committee* that contributes to City Council elections, by any individual or business entity whose identity must be disclosed under Box (1), (2), (3) or (4) above, or by the officers, owners of any business entity listed in Box (1), (2) or (3):

No contributions made; If contributions made, list below:

By Whom Made:	To Whom Made:	Amount:	Date of Contribution:
Triple L Management	Diane Cibrian	\$1,000.00	1/08/09

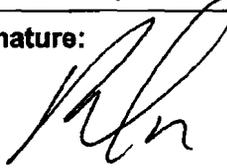
(6) Disclosures in Proposals

Any individual or business entity seeking a discretionary contract with the city must disclose any known facts which, reasonably understood, raise a question² as to whether any city official or employee would violate Section 2-43 of the City Code (Ethics Code), ("conflicts of interest") by participating in official action relating to the discretionary contract.

Party not aware of facts which would raise a "conflicts-of-interest" issue under Section 2-43 of the City Code; or

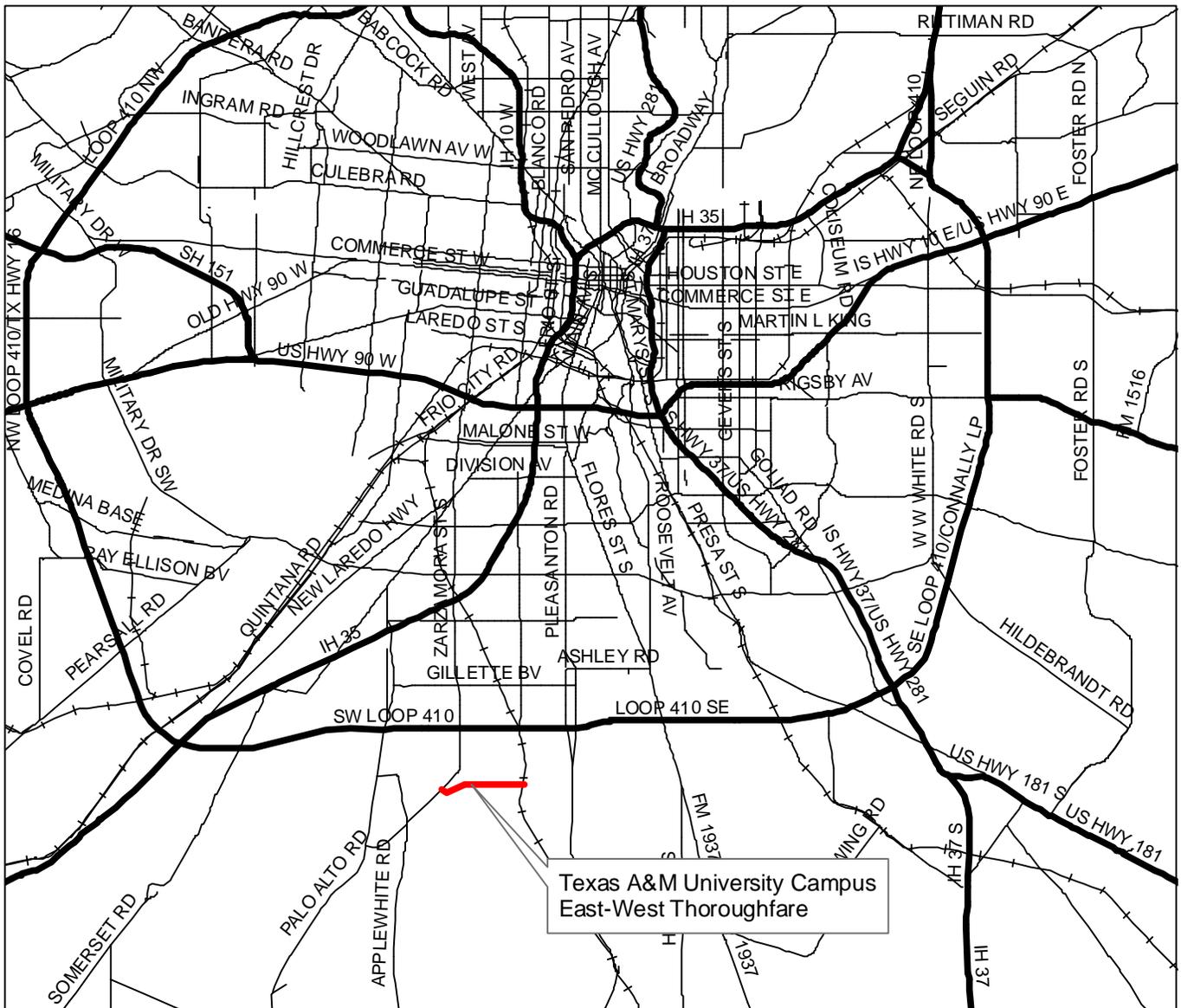
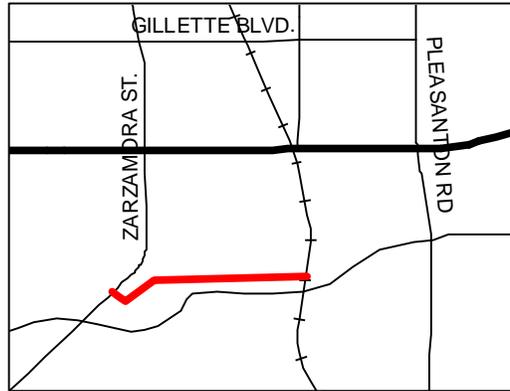
Party aware of the following facts:

This form is required to be supplemented in the event there is any change in the information before the discretionary contract is the subject of council action, and no later than five (5) business days after any change about which information is required to be filed, whichever occurs first.

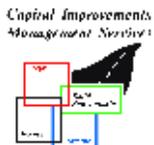
Signature: 	Title: Company or D/B/A: VTLM Texas, LP	Date: 5/4/09
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² For purposes of this rule, facts are "reasonably understood" to "raise a question" about the appropriateness of official action if a disinterested person would conclude that the facts, if true, require recusal or require careful consideration of whether or not recusal is required.

Texas A&M University Campus



Texas A&M University Campus
East-West Thoroughfare



CITY OF SAN ANTONIO
DEPARTMENT OF CAPITAL IMPROVEMENTS MANAGEMENT SERVICES
HORIZONTAL DIVISION