

AN ORDINANCE 2008 - 03 - 20 - 0222

APPROVING A \$30,000.00 ECONOMIC DEVELOPMENT PROGRAM GRANT AGREEMENT WITH INCELL CORP., LLC FOR TARGETED MANUFACTURING FACILITY EXPANSION.

* * * * *

WHEREAS, pursuant to Chapter 380 of the Texas Local Government Code the City is authorized to grant municipal funds in furtherance of public purposes for economic development projects; and

WHEREAS, through City Ordinance No. 100684, the City created an economic development program for the purpose of making such grants available; and

WHEREAS, Incell Corp., LLC (“Incell”) is engaged in an economic development project that will be located within the City and that will consist of real property improvements to expand its laboratory capacity; and

WHEREAS, the construction of the improvements will promote local economic development and stimulate business and commercial activity in the City of San Antonio; and

WHEREAS, Incell has requested an economic development grant for the purpose of deferring costs associated with the construction of improvements and the City has identified funds which it desires to grant Incell for these purposes; **NOW THEREFORE:**

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

SECTION 1. The terms and conditions of an Economic Development Program Grant Agreement with Incell Corp., LLC are hereby approved.

SECTION 2. The City Manager, or her designee, is authorized to execute an Economic Development Grant Agreement with Incell in an amount not to exceed \$30,000.00. A copy of the Agreement in substantially final form, is attached as “Attachment I” and made a part of this ordinance. A final copy of the Agreement will be attached when executed.

SECTION 3. The amount of \$30,000.00 is appropriated for this ordinance in Fund No. 29059000 Economic Development Initiative, Cost Center 1604010001 Economic Development Initiative, General Ledger No. 5202025, entitled Other Contract Services” and the FY 2008 budget is amended to reflect this change.

SECTION 4. Payment not to exceed \$30,000.00 is authorized to Incell Corp., LLC and shall be encumbered upon the issuance of a purchase order.

SECTION 5. The financial allocations in this ordinance are subject to approval by the Director of Finance for the 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 6. This ordinance shall become effective ten days following its passage.

PASSED AND APPROVED this 20th day of MARCH 2008.



M A Y O R

PHIL HARDBERGER

ATTEST:



City Clerk

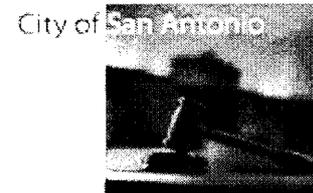
APPROVED AS TO FORM: _____



for City Attorney



Request for
COUNCIL



Agenda Voting Results - 17

Name:	17						
Date:	03/20/2008						
Time:	11:14:01 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance approving a \$30,000.00 Economic Development Program grant agreement with INCELL Corp., LLC. for targeted manufacturing facility expansion. [Pat DiGiovanni, Deputy City Manager; Robert Peche, Director, Economic Development]						
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				
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				x
John G. Clamp	District 10		x				

CITY COUNCIL ITEM: #17

Economic Development Grant
for INCELL Corporation, LLC.

Economic Development Department

March 20, 2008

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BACKGROUND

- Woman Owned/Small Business Certified Biotechnology Company founded in San Antonio in 1993
 - Develop clinical products in the field of Bioterrorism
- Planning to grow business in 2008
 - Developing Two New Manufacturing Clean Rooms
 - Potential doubling of staff from 8 to 16
 - Also considering relocation to College Station

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ECONOMIC DEVELOPMENT INCENTIVE FUND (EDIF) BACKGROUND

- In FY 2004, Council appropriated \$12 million into an Economic Development Incentive Fund (EDIF)
 - To be used to attract new companies and help local companies expand in San Antonio
- The \$12 million was committed as follows:
 - \$7.4M for economic development projects
 - \$600,000 for neighborhood revitalization
 - \$4.0M was returned to the Street Maintenance Fund
- Due to interest earned on still committed, but as yet unexpended funds, the EDIF has a current balance of approximately \$650,000 available for new projects.

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COMMITMENT OF EDIF FUNDS

Project	Purpose	Year Committed	Jobs	Allocation
Washington Mutual	Training Grant	May 2005	3,000	\$3,000,000
Maxim Integrated Products	Training Grant	December 2004	500	\$1,500,000
DPT Laboratories – Brooks (grant and loan)	Brooks Infrastructure	April 2005	200	\$1,500,000
Toyota Suppliers	Training Grant	June 2005	1,000	\$1,000,000
Park Centre/Vidorra Condos	Marketing Loan	May 2005	N/A	\$300,000
Bio Med SA	Fund Nonprofit	May 2005	N/A	\$100,000
Neighborhood Improvement District	Neighborhood Revitalization	2005	N/A	\$600,000
Transfer to Street Maintenance	Council Action	2005	N/A	\$4,000,000
TOTAL			4,700	\$12,000,000

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Coordination Efforts

- This effort has also been coordinated with:
 - City Council Economic & Community Development Committee
 - City Attorney's Office
 - South Texas Business Fund

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RECOMMENDATION

- Staff recommends approval of this ordinance authorizing a \$30,000 economic development grant to help retain and grow INCELL, a local biotechnology firm, in San Antonio.

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CMS or Ordinance Number: CN4600007051

TSLGRS File Code:1000-25

Document Title:
CONT - EDIF Grant

Commencement Date:

4/1/2008

Expiration Date:

5/30/2010

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

**AGREEMENT TO USE FUNDS OF
THE CITY OF SAN ANTONIO**

This Agreement (“Agreement”) is hereby made and entered into by and between the CITY OF SAN ANTONIO (hereafter referred to as "CITY"), a Texas municipal corporation acting by and through its City Manager pursuant to Ordinance No. 2008-03-20-2022, dated March 20, 2008, and the INCELL CORPORATION, L.L.C. (hereinafter referred to as “INCELL”), acting by and through its President and Chief Executive Officer (collectively, the “Parties”), and pursuant to Article III, Section 52-a, of the Texas Constitution and Chapter 380.002 of the Local Government Code entitled “Economic Development Grants by Certain Municipalities”, both as amended, as well as the CITY’s Economic Development Program adopted February 27, 2003 by Ordinance No. 97248 and subsequently amended by Ordinance No. 99308 on June 3, 2004 and Ordinance No. 100884 on April 14, 2005.

WHEREAS, pursuant to Chapter 380 of the Texas Local Government Code, the CITY is authorized to grant and loan municipal funds in furtherance of public purposes for economic development projects; and

WHEREAS, the CITY adopted an Economic Development Program as required by Chapter 380.002 of the Local Government Code (the “Chapter 380 Program”), in order to be able to provide loans and other specified incentives for eligible economic development projects, by Ordinance No. 97248 on February 27, 2003; and

WHEREAS, as set forth in Ordinance No. 99308, passed and approved on June 3, 2004, the CITY’s Chapter 380 Program was modified to permit grants in accordance with the CITY’s Economic Development Incentive Fund (“EDIF”) Guidelines; and

WHEREAS, on April 14, 2005, CITY’s governing body further modified the 380 Program to expand the eligibility of projects with regard to grants; and

WHEREAS, INCELL submitted an application to the CITY for a grant from the EDIF for the purpose of expanding its biotechnology manufacturing capacity for an economic development project specified by INCELL; and

WHEREAS, the retention of INCELL, as a targeted biotechnology business, and its employees is an important economic development purpose of the CITY; and

WHEREAS, CITY has a grant amount of \$30,000.00 available in the EDIF to be used to carry out the project; and

WHEREAS, the City Council of CITY authorized the City Manager or designee to negotiate a grant agreement with INCELL for the project as reflected in Ordinance No. 2008-03-20-0222, passed and approved on March 20, 2008; **NOW THEREFORE:**

The Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described:

I. GENERAL PROVISIONS

1. INCELL is a Texas limited liability company. It has been formed for biotechnology manufacturing and research purposes.
2. INCELL represents, warrants, assures and guarantees that it possesses the legal authority to enter into this Agreement and to perform the responsibilities herein required.
3. The signer of this Agreement for INCELL represents, warrants, assures and guarantees that he or she has full legal authority to execute this Agreement on behalf of INCELL and to bind INCELL to all terms, performances and provisions herein contained.
4. In the event that a dispute arises as to the legal authority of either INCELL, or the person signing on behalf of INCELL, to enter into this Agreement, CITY shall have the right, at its option, to either temporarily suspend or permanently terminate this Agreement.
5. INCELL and CITY agree that INCELL is an independent contractor and that CITY shall in no way be responsible for the acts and omissions of INCELL. Neither the CITY nor INCELL has or will have authority to bind the other Party, or hold out to third parties that it has the authority to bind the other Party.
6. Either Party shall have the right to terminate this Agreement at any time by written notice to the other Party. Such notice shall specify the effective date of termination, which date shall not be sooner than the end of ten (10) days following the day on which such notice is sent. If either Party exercises the option of terminating this Agreement, any and all unused funds in the possession of INCELL, which were contributed by CITY to the INCELL under this Agreement, and the proceeds, if any, of such funds, whether allocated or unallocated, shall be the sole property of CITY and shall be promptly delivered by INCELL to CITY within ten (10) days of termination.
7. INCELL understands and agrees that this Agreement may be revised and updated by and at the discretion of the City Council of the City of San Antonio. Therefore, INCELL agrees that, when and if any revisions are so made during the Term hereof, this Agreement will be amended to include such revisions effective thirty (30) days after CITY gives written notice of the proposed revisions to INCELL. If INCELL does not agree to any of the CITY's proposed changes, INCELL shall promptly terminate this Agreement within thirty (30) days of receipt of the written notice from CITY of the proposed revisions.
8. In no event shall CITY be liable for any expense of INCELL not eligible or allowable hereunder, and in no event shall employees of INCELL be deemed to be employees of CITY.

9. By execution of this Agreement, INCELL acknowledges that this Agreement cannot be assigned without the express written consent of CITY.
10. INCELL shall not use funds from this Agreement for purposes other than those listed in Section III of this Agreement without prior written consent of the CITY's Department of Economic Development.

II. TERM AND TERMINATION OF AGREEMENT

1. This Agreement shall be effective upon execution and shall terminate on May 31, 2010 (the "Term"), unless sooner terminated by either Party. However, the documentation requirements in Article III, Paragraph 13 and Recapture Period in Article VI, Paragraph 1 shall survive termination of this Agreement.
2. This Agreement may be terminated for any reason or without reason by any Party at any time by written notice delivered by the terminating Party to the other Party. Upon termination of this Agreement, INCELL shall refund and deliver to CITY all funds (and net remaining proceeds thereof directly attributable to such funds) previously contributed by CITY to INCELL as described in Section III.

III. SCOPE OF SERVICES

1. CITY shall contribute thirty thousand dollars (\$30,000.00) to INCELL to be used exclusively to pay for costs associated with facility expansion of leased premises, including the establishment of a BSL-3 containment facility for manufacturing, as well as a new manufacturing area for regenerative medicine such as cancer and cell-tissue repair (the "Project").
2. The Project construction shall start approximately April 1, 2008 and be completed within one (1) year from start date.
3. Subject to appropriation, CITY shall transfer the grant funds to INCELL in two disbursements, as follows:
 - (a) The first disbursement in the amount of fifteen thousand dollars (\$15,000.00) shall be disbursed within thirty (30) days of the execution of this Agreement;
 - (b) The second disbursement of up to fifteen thousand dollars (\$15,000.00) shall be disbursed on or about May 30, 2008 upon the showing of matching funds received by INCELL from private sector funding sources.
4. For the purpose of this Article III, "matching funds" shall mean funds in an amount greater than thirty thousand dollars (\$30,000.00) and sufficient to cover the total construction costs of the Project. Should INCELL fail to meet the matching funds requirement, CITY in its sole discretion may choose to cancel the disbursement and reduce the grant by the amount of the scheduled disbursement (\$15,000.00).

5. INCELL shall hold all funds which it receives from CITY under this Agreement in a commercial bank account that shall be separate from all other funds of INCELL.
6. Neither CITY nor any City Agency shall have any obligation to monitor other contracts made by INCELL.
7. Prior to or simultaneously with the initial funding of the grant described in Paragraph 1 of this Section III, CITY may, by written notice to INCELL, prohibit INCELL from paying any expense incurred by INCELL before the CITY and INCELL have reached Agreement, satisfactory to CITY, concerning: (i) INCELL's compliance with the Charter of the City and its Ethics Code, (ii) INCELL's grievance procedures, or (iii) any other function, purpose or procedure of INCELL.
8. INCELL shall provide CITY's Economic Development Department with proper documentation verifying INCELL's receipt, in calendar year 2008 and any other year during the Term of this Agreement, of all funds and funding commitments for INCELL received from the CITY and all other sources.
9. All documents concerning the construction or retrofit of the facilities that are the subject of this Agreement shall be made available to the CITY by the INCELL upon written request by the CITY's Economic Development Department so that the CITY can review, copy and audit INCELL's expenditures and activities related to said construction.
10. INCELL shall provide documentation to CITY regarding the number of existing full-time, non-temporary employees for its local leased facility at the time of execution of this Agreement.
11. INCELL shall maintain/retain the same number of full-time, non-temporary employees listed in the documentation required by Article III, Paragraph 10 for the Project location during the Term of this Agreement and for four years thereafter. INCELL shall be subject to the recapture of all granted funds back to CITY if the number of employees documented as required by Article III, Paragraph 10 is not maintained, evidenced by the semi-annual documentation required by Article III, Paragraph 13. If INCELL fails to maintain the minimum number of non-temporary full-time employees in a given year then, at the option of City Council, this failure may be grounds for termination of this Agreement and the Term. Upon said terminations, all grant funds provided by CITY under this Agreement shall be recaptured (based on the table in Article IV, Paragraph 1 – [the “**Recapture Period**”]) and shall be paid to CITY within sixty (60) calendar days from the date of said termination notices to INCELL.
12. INCELL shall hire an additional seven (7) full-time, non-temporary employees at the Project location by December 31, 2009 and shall retain/maintain those additional seven (7) employees during the Term of this Agreement and for four (4) years thereafter. INCELL shall be subject to recapture of all granted funds back to CITY if the seven (7) additional employees required by this Paragraph 12 are not hired and retained/maintained, evidenced by the semi-annual documentation required by Article III,

Paragraph 13. If INCELL fails to retain/maintain the minimum number of non-temporary full-time employees in a given year then, at the option of City Council, this failure may be grounds for termination of this Agreement and the Term. Upon said terminations, all grant funds provided by CITY under this Agreement shall be recaptured (based on the table in Article IV, Paragraph 1 – [the “**Recapture Period**”]) and shall be paid to CITY within sixty (60) calendar days from the date of said termination notices to INCELL.

13. INCELL shall provide, on a semi-annual basis, documentation of the number of full-time, non-temporary employees hired and retained/maintained by INCELL during the Term of the this Agreement and for four (4) years thereafter.
14. The City’s Economic Development Department is assigned monitoring responsibility for this Agreement. INCELL shall provide CITY’s staff, including internal auditors, EEO officers and other persons as designated by CITY, such as independent public accountants and representatives of the federal 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 INCELL’s books, records and files that relate to this Agreement. INCELL understands that CITY may examine any and all books, records and files of INCELL applicable to this Agreement necessary to ensure INCELL’s compliance and use of generally-accepted governmental accounting principles.
 - a. All such records shall continue to be available for inspection and audit by the CITY for a period of four (4) years after the termination date hereof. However, if during the course of this four-year period, an audit or investigation of INCELL begins, then INCELL is required to maintain said records until such time as the audit or investigation is completely finished, and for three (3) years thereafter.
 - b. INCELL agrees that during the term of this Agreement, any duly authorized representative of CITY's Economic Development Department shall have the right, at its sole expense, to conduct on-site inspections at reasonable times and to interview INCELL personnel for the purposes of evaluating and monitoring INCELL’s compliance with this Agreement.
15. INCELL shall comply with the provisions of the Charter of the CITY and its Ethics Code that are applicable to this Agreement which prohibit a City officer or employee from having a financial interest in any contract made by INCELL. INCELL shall tender to the CITY any Discretionary Disclosure Statement requested at any time by the Economic Development Department or any other City Department in connection with this Agreement.
16. INCELL agrees to establish internal procedures that provide INCELL employees funded or partially funded by this Agreement with an established complaint and grievance policy. City may require INCELL to establish similar internal procedures satisfactory to CITY. Such grievance policy shall include procedures to receive, investigate and resolve complaints and grievances in an expeditious manner.

17. INCELL understands and agrees that if INCELL is a “business” and if the CITY’s \$30,000 contribution to the INCELL is a “public subsidy” as that term is defined in Chapter 2264 of Subtitle F, Title 10 of the Government Code (80 (R) HB 1196), then INCELL is required to refund money, pursuant to 80(R) HB 1196, INCELL has received from CITY through this Agreement, in the event of a conviction of knowingly employing an undocumented worker, with repayment required within six months of final conviction. Interest shall accrue at the rate of .5% per month until the time of such repayment from the date of final conviction.
18. Upon completion or termination of this Agreement, any unused funds contributed by CITY to INCELL and all related rebates or credits must immediately be returned by INCELL to CITY.

IV. RECAPTURE AND RECAPTURE PERIOD

1. Calculation of Grant Funds Subject to Recapture. If INCELL fails to comply with any of the terms of this Agreement, including those pertaining to hiring and retaining/maintaining the required number of full-time, non-temporary employees, then CITY shall have the right to recapture from INCELL a percentage of the funds granted pursuant to this Agreement based on the following table:

TERM YEAR	TOTAL FUNDS GRANTED SHALL BE MULTIPLIED BY:
1-2	100%
3	80%
4	60%
5	40%
6	20%

FORMULA: The recapture formula shall be:

$$\begin{array}{rcl}
 \text{Total Funds Granted} & \times & \text{Applicable Percentage} \\
 & & \text{from above Schedule} \\
 & = & \text{Amount to be Recaptured}
 \end{array}$$

V. FISCAL MANAGEMENT

1. INCELL shall use generally-accepted accounting principles for governmental entities which accurately reflects all payments made by INCELL pursuant to this Agreement.
2. INCELL 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. INCELL agrees that CITY shall be permitted to review INCELL’s system of internal administrative and accounting controls, as CITY deems necessary to ensure financial responsibility.

VI. INDEMNITY

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

2. **The provisions of this INDEMNITY are solely for the benefit of the Parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. INCELL shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or INCELL that is known to INCELL, related to or arising out of INCELL's activities under this AGREEMENT and shall see to the investigation and defense of such claim or demand at INCELL's cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving INCELL of any of its obligations under this paragraph.**

VII. INSURANCE REQUIREMENTS

1. Prior to the commencement of any work under this Agreement, INCELL shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the CITY's Economic Development Department, which shall be clearly labeled "INCELL Project/Agreement" in the Description of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept Memorandum of Insurance or Binders as proof of insurance. The original certificate(s) or form must have the agent's original signature, including the signer's company affiliation, title and phone number and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this Contract until such certificate and endorsements

have been received and approved by the CITY's Economic Development and Risk Management Departments. No officer or employee, other than the CITY's Risk Manager, shall have authority to waive this requirement.

2. 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 CITY's Risk Manager based upon changes in statutory law, court decisions or circumstances surrounding this Agreement. In no instance will CITY allow modification whereupon CITY may incur increased risk.
3. INCELL's financial integrity is of interest to the CITY; therefore, subject to INCELL's right to maintain reasonable deductibles in such amounts as are approved by the CITY, INCELL shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at INCELL's sole expense, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M. Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed:

<u>TYPE</u>	<u>AMOUNT</u>
a. Workers' Compensation	Statutory
b. Employers' Liability	\$500,000.00/\$500,000.00/\$500,000.00
c. Commercial General Liability Insurance to include coverage for the following:	Bodily Injury and Property Damage of \$1,000,000.00 per occurrence
(1) Premises/Operations	
(2) Independent Contractors	
(3) Products/completed operations	
(4) Contractual liability	
(5) Broad form property damage, to include fire legal liability	
(6) Personal Injury	
d. Excess Liability (umbrella form) (Excess liability insurance shall follow the form of the Primary insurance).	\$1,000,000.00 each occurrence and \$1,000,000.00 aggregate
e. Business Automobile Liability	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence or its equivalent
(1) Owned/leased vehicles	

- (2) Non-owned vehicles
- (3) Hired vehicles
- f. Errors and Omissions Policy \$1,000,000.00

4. The CITY shall be entitled, upon request and without expense, to receive copies of the policies, declarations page 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 hereto or the underwriter of any such policies). INCELL shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to CITY at the address provided below within 10 days of the requested change. INCELL shall pay any costs incurred resulting from said changes.

City of San Antonio
Attn: Economic Development Department
P.O. Box 839966
San Antonio, Texas 78283-3966

5. INCELL agrees that with respect to the above-required insurance, all insurance policies are to contain or be endorsed to contain the following required provisions:
- Name the CITY and its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY, with the exception of the workers' compensation and professional liability policies;
 - Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the CITY is an additional insured shown on the policy;
 - Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the CITY; and
 - Provide thirty (30) calendar days advance written notice directly to CITY of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.

6. Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, INCELL shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend INCELL's performance should there be a lapse in coverage at any time during this Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.
7. If INCELL fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, the CITY may obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under this Agreement; however, procuring of said insurance by the CITY is an alternative to other remedies the CITY may have and is not the exclusive remedy for failure of INCELL to maintain said insurance or secure such endorsement. In addition to any other remedies the CITY may have, upon INCELL's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order INCELL to stop work hereunder and/or withhold any payment(s) which become due to INCELL hereunder until INCELL demonstrates compliance with the requirements hereof.
8. Nothing herein contained shall be construed as limiting in any way the extent to which INCELL may be held responsible for payments of damages to persons or property resulting from INCELL's or its subcontractors' performance of the work covered under this Agreement.
9. It is agreed that INCELL's insurance shall be deemed primary with respect to any insurance or self-insurance carried by the CITY of San Antonio for liability arising out of operations under this Agreement.
10. It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement.

VIII. EQUAL EMPLOYMENT OPPORTUNITY POLICY

1. INCELL agrees to post in a conspicuous place, available to employees and applicants for employment funded or partially-funded under this Agreement, notices to be provided by the contracting officer setting forth the provisions of this Nondiscrimination Clause.
2. INCELL shall, in all solicitations or advertisements for employees to be funded or partially-funded under this Agreement placed by or on behalf of INCELL, state that all qualified applicants will receive fair consideration for employment without regard to race, color, national origin, religion, sex, age, disability or political belief or affiliation.
3. INCELL agrees to affirmatively abide by and cooperate in the implementation of the policies and practices set forth in this Nondiscrimination Clause and any additional policies as may be required as a result of local, state or federal initiatives. INCELL shall furnish all information and reports requested by CITY and shall permit access to books,

records and accounts for purpose of review and investigation to ascertain compliance with such rules and regulations.

4. In the event of INCELL's failure or refusal to comply with this Nondiscrimination Clause, this Agreement may be cancelled, terminated or suspended in whole or in part and INCELL may be debarred from further contracts with CITY and may be subject to recapture of the grant funds governed by this Agreement.

IX. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

1. INCELL further represents and warrants that:
 - a. All information, data or reports heretofore or hereafter provided to CITY 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 INCELL 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 INCELL;
 - c. No litigation or proceedings are presently pending or threatened against INCELL or if pending have been disclosed by INCELL in writing to CITY;
 - d. None of the provisions contained herein contravene or in any way conflict with the authority under which INCELL is doing business or with the provisions of any existing indenture or agreement of INCELL;
 - e. INCELL has the legal authority to enter into this Agreement and accept payments hereunder, and has taken all necessary measures to authorize execution of this Agreement and acceptance of payments pursuant to the terms and conditions hereof; and
 - f. None of the assets of INCELL are subject to any lien or encumbrance of any character, except as shown in any financial statements provided by INCELL to CITY.

X. LEGAL/LITIGATION EXPENSES

1. Under no circumstances will the funds received under this Agreement or any other funds received from CITY be used by INCELL to pay costs or attorney's fees incurred by INCELL in any adversarial proceeding against the CITY. INCELL must obtain the written approval of the City Attorney's Office before any funds received under this

Agreement may be used by INCELL in any adversarial proceeding against any other governmental entity or any other public entity.

2. During the term of this Agreement, if INCELL files and/or pursues an adversarial proceeding against the CITY then, at the CITY's option, this Agreement and all access to the funding provided for hereunder may terminate if it is found that INCELL has violated this Article.
3. INCELL, at the CITY's option, may be ineligible for consideration to receive any future funding while any adversarial proceedings against the CITY remain unresolved.
4. For purposes of this Article, "adversarial proceedings" include any cause of action filed by INCELL in any state or federal court, as well as any state or federal administrative hearing, but does not include Alternative Dispute Resolution proceedings.

XI. CHANGES AND AMENDMENTS

1. Except when the terms of this Agreement expressly provide otherwise, any alterations, additions or deletions to the terms hereof shall be by amendment in writing executed by both CITY and INCELL.
2. It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this Agreement and that any such changes that apply to INCELL shall be incorporated into this Agreement without written amendment hereto, and shall become a part of this Agreement as indicated in Article XI, below.
3. INCELL agrees to notify CITY in writing of any proposed change in physical location for work to be performed pursuant to the terms of this Agreement. Such notice shall be provided by INCELL to CITY at least thirty (30) calendar days in advance of the proposed change.

XII. SEVERABILITY OF PROVISIONS

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

XIII. NON-WAIVER OF PERFORMANCE

1. No waiver by CITY of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of CITY 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 or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either Party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.
2. No act or omission of CITY shall in any manner impair or prejudice any right, power, privilege or remedy available to CITY hereunder or by law or in equity, such rights, powers, privileges or remedies to be always specifically preserved hereby.
3. No representative or agent of CITY may waive the effect of the provisions of this Article.

XIV. ENTIRE AGREEMENT

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

XV. NOTICE

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

CITY:

Director
Economic Development Dept.
P.O. Box 839966
San Antonio, Texas 78283-3966

INCELL:

INCELL Corporation, LLC
c/o Mary Pat Moyer, Ph.D.
12734 Cimarron Path
San Antonio, TX 78249

CITY ATTORNEYS OFFICE:

Commerce & Visitors Services Division
City Hall, 3rd Floor

P.O. Box 839966
San Antonio, Texas 78283-3966

2. Notice of change of address by any Party must be made in writing and delivered (or mailed registered or certified mail, postage prepaid) to the other Party's last known address within five (5) business days of such change.

XVI. PARTIES BOUND

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

XVII. GENDER

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

XVIII. RELATIONSHIP OF PARTIES

Nothing contained herein shall be deemed or construed by the Parties hereto, or by any third party, as creating the relationship of principal and agent, partners, joint venturers or any other similar such relationship between the Parties hereto.

XIX. GOVERNING LAW AND VENUE

This Agreement shall be governed by the laws of the State of Texas. Venue and jurisdiction arising under or in connection with this Agreement shall lie exclusively in Bexar County, Texas.

XX. 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.

[SIGNATURES APPEAR ON FOLLOWING PAGE]



CMS or Ordinance Number: OR00000200803200222

TSLGRS File Code: 1000-05

Document Title:
ORD - EDIF Grant

Ordinance Date:
3/20/2008