

AN ORDINANCE 2008-11-06-0992

AUTHORIZING THE EXECUTION OF A PROFESSIONAL SERVICES AGREEMENT WITH CONSULTECON, INC., IN AN AMOUNT NOT TO EXCEED \$67,000.00, FOR A FEASIBILITY STUDY TO REVIEW OPPORTUNITIES FOR NEW VISITOR INFORMATION CENTER FACILITIES.

* * * * *

WHEREAS, the current Visitor Information Center (“VIC”) is located at 317 Alamo Plaza, directly in front of the Alamo, and the primary mission of the VIC is to maximize the San Antonio visitor experience by providing accurate and helpful information on events, services, attractions and cultural sites; and

WHEREAS, the VIC annually serves more than 300,000 local, national and international visitors; and

WHEREAS, the City is considering whether to renovate the current VIC and/or opening additional VIC facilities and issued a Request for Proposals for a Visitor Information Center Feasibility Study (“RFP”) to obtain services to assist in the decision making process; and

WHEREAS, the City received one proposal in response to the RFP from ConsultEcon, Inc. and staff now recommends contracting with ConsultEcon, Inc. to conduct a feasibility study which shall include analysis of local visitation patterns and issues, existing visitor industry infrastructure and market opportunities and estimates of visitation, sizing and key costs and benefits related to a potential new VIC; **NOW THEREFORE:**

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

SECTION 1. The terms and conditions of a Professional Services Agreement with ConsultEcon, Inc., in an amount not to exceed \$67,000, for a feasibility study to review opportunities for new Visitor Information Center facilities are authorized and approved.

SECTION 2. The City Manager or her designee is authorized to execute a Professional Services Agreement with ConsultEcon, Inc. A copy of the Agreement, previously executed by ConsultEcon, Inc. is attached to this Ordinance as Exhibit I.

LB
11/06/08
Item #35

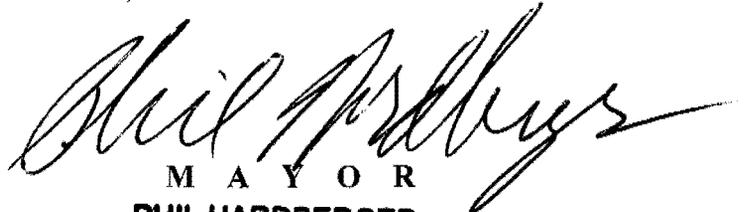
SECTION 3. Funding for this Ordinance is available in Fund 29006000 Hotel Motel Tax Fund, Cost Center 4302010001 Finance and Administration, General Ledger 5201040 Fees to Professional Contractors as part of the Fiscal Year 2009 Budget.

SECTION 4. Payment not to exceed \$67,000.00 is authorized to ConsultEcon, Inc. and shall be encumbered with a purchase order.

SECTION 5. 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 6. This Ordinance shall be effective on and after the tenth day after passage.

PASSED AND APPROVED this 6th day of November, 2008.


M A Y O R
PHIL HARDBERGER

ATTEST:


City Clerk

APPROVED AS TO FORM:

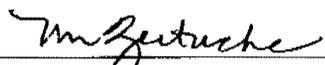

for City Attorney

Exhibit
I

PROFESSIONAL CONSULTING SERVICES AGREEMENT

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This Agreement is entered into by and between the City of San Antonio, a Texas Municipal Corporation (hereinafter referred to as "CITY") acting by and through its City Manager, pursuant to Ordinance No. _____ passed and approved on _____, 2008 and ConsultEcon, Inc., (hereinafter referred to as "CONSULTANT"), both of which may be referred to herein collectively as the "Parties."

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. DEFINITIONS

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

"CITY" is defined in the preamble of this Agreement and includes its successors and assigns.

"CONSULTANT" is defined in the preamble of this Agreement and includes its successors.

"Director" shall mean the director or acting director of CITY's Convention and Visitors Bureau ("CVB").

II. TERM

2.1 Unless sooner terminated in accordance with the provisions of this Agreement, the term of this Agreement shall commence on final execution of this Agreement and terminate upon the earlier of March 15, 2009 or satisfactory completion of required scope of services.

2.2 If funding for the entire Agreement is not appropriated at the time this Agreement is entered into, CITY retains the right to terminate this Agreement at the expiration of each of CITY's budget periods, and any subsequent agreement period is subject to and contingent upon such appropriation.

III. SCOPE OF SERVICES

3.1 CONSULTANT shall be responsible for providing the following services set forth in CITY's Request for Proposals for Visitor Information Center ("VIC") Feasibility Study, which is attached hereto and incorporated herein as Exhibit A:

3.1.1 Situation Analysis and Local Conditions:

- A. Provide existing inventory of key visitor amenities/infrastructure within the greater market of San Antonio (with a focus on the VIC adjacent to the Alamo) and evaluate programmatic components including square footage, amenities, themeing, technology needs-electronic communications tools, traffic/patronage counts, nearby infrastructure and any available research data.
- B. Identify and study both metropolitan public bus transportation and parking accessibility to the VIC adjacent to the Alamo and the potential new VIC location.
- C. Explore and evaluate potential partnership opportunities the San Antonio CVB may have with regional convention and visitors bureaus, the Texas Department of Transportation and other public or private entities.
- D. Collect and analyze historical visitation data pertaining to the greater market of San Antonio area, including existing attractions and demand generators. The analysis shall focus on estimates and trend data pertaining to total visitors, room nights, market segmentation, length of stay, reason for visit, age, origin and activities.
- E. Analyze the destination's existing supply of visitor industry support products and capacity, including transportation accessibility and services, hotels, cultural and entertainment attractions, convention and event facility products, destination marketing resources, and recreation and leisure offerings.
- F. Review historical, current and planned development plus marketing initiatives as they relate to San Antonio's visitor industry and, in particular, hospitality, entertainment and leisure infrastructure.

3.1.2 Comparable Facility Analysis:

- A. Identify a set of comparable visitor/welcome centers throughout the country that may offer some element of comparable insight to the analysis.
- B. Assemble and review the programmatic and operational elements of each project.
- C. As available, obtain information concerning traffic counts, marketing methods, themeing, amenities, connectivity with other destination attractions and operational characteristics.

D. Develop case studies that focus on the successes and failures associated with the comparable facilities, as well as creative approaches to product development that could be informative to a potential new VIC in San Antonio.

3.1.3 In addition to the services set forth in CONSULTANT's Proposal, attached hereto and incorporated herein as Exhibit B, CONSULTANT shall make one additional site visit upon request by CITY.

3.1.4 If supported by the findings from Subsections 3.1.1 and 3.1.2 above, CONSULTANT shall determine the best approach to opening a new VIC, including the following services:

A. Provide a list of recommendations for a new VIC plus improvements to the current VIC.

B. Provide cost estimates to include a new VIC as well as improvements to the current VIC.

C. Provide an optimal timeline to include establishing a new VIC and improvements to the current VIC.

D. Determine if current, under-construction and planned airport services will support a new VIC.

3.1.5 CONSULTANT shall provide a draft Feasibility Study Findings Report to CITY for review and final approval prior to finalization.

3.1.6 CONSULTANT shall deliver twelve (12) copies of the final Feasibility Study Findings Report summarizing all findings, conclusions, and recommendations and one (1) copy on a CD.

3.1.7 CONSULTANT shall make a presentation(s) of the final Feasibility Study Findings Report to key stakeholder groups and/or City Council.

3.1.8 All work provided by CONSULTANT hereunder shall be accomplished in a manner consistent with Exhibit B.

3.2 All work performed by CONSULTANT hereunder shall be performed to the satisfaction of Director. The reasonable determination made by Director shall be final, binding and conclusive on all Parties hereto, but subject to judicial review. CITY shall be under no obligation to pay for any work performed by CONSULTANT, which is not approved and satisfactory to Director. CITY shall have the right to terminate this Agreement, in accordance with Article VII, in whole or in part, should CONSULTANT's work not be satisfactory to Director; however, CITY shall have no obligation to terminate and may withhold payment for any unsatisfactory work, as stated herein, should CITY elect not to terminate.

IV. COMPENSATION TO CONSULTANT

4.1 In consideration of CONSULTANT's performance in a satisfactory and efficient manner, as determined solely by Director, of all services and activities set forth in this Agreement, CITY agrees to pay CONSULTANT an amount not to exceed sixty- seven thousand dollars (\$67,000.00) as total compensation, to be paid to Contractor as follows:

4.1.1 CITY shall pay CONSULTANT sixteen thousand seven hundred and fifty dollars (\$16,750.00) within thirty (30) days of the receipt of an invoice following the final execution of this Agreement.

4.1.2 CITY shall pay CONSULTANT sixteen thousand seven hundred and fifty dollars (\$16,750.00) within thirty (30) days of the receipt of an invoice following December 31, 2008.

4.1.3 CITY shall pay CONSULTANT sixteen thousand seven hundred and fifty dollars (\$16,750.00) within thirty (30) days of the receipt of an invoice following January 31, 2009.

4.1.4 CITY shall pay CONSULTANT the remaining amount due under this Agreement within thirty (30) days of the receipt of an invoice following completion of all services to be provided by CONSULTANT under this Agreement, subject to Sections 3.2, 4.1 and 4.3. Pricing shall be based on the rates set forth in Exhibit B. Any additional work not set forth in Exhibit B shall be at a rate agreed to by the Parties.

4.2 No additional fees or expenses of CONSULTANT shall be charged by CONSULTANT nor be payable by CITY. The Parties hereby agree that all compensable expenses of CONSULTANT have been provided for in the total payment to CONSULTANT as specified in section 4.1 above. Total payments to CONSULTANT cannot exceed that amount set forth in section 4.1 without prior approval and agreement of all Parties, evidenced in writing and approved by Director.

4.3 Final acceptance of work products and services require written approval by CITY. The approval official shall be Director. Payment will be made to CONSULTANT following written approval of the final work products and services by Director. CITY shall not be obligated or liable under this Agreement to any party, other than CONSULTANT, for the payment of any monies or the provision of any goods or services.

V. OWNERSHIP OF DOCUMENTS

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

5.2 CONSULTANT understands and acknowledges that as the exclusive owner of any and all such writings, documents and information, CITY has the right to reasonably use all such writings, documents and information as CITY desires.

5.3 CITY agrees to reference the date of the Report in any uses permitted under Section 5.2.

VI. RECORDS RETENTION

6.1 CONSULTANT and its subcontractors, if any, shall properly, accurately and completely maintain all documents, papers, and records, and other evidence pertaining to the services rendered hereunder (hereafter referred to as "documents"), and shall make such materials available to the CITY at their respective offices, at all reasonable times and as often as CITY may deem necessary during the Agreement period, including any extension or renewal hereof, and the record retention period established herein, for purposes of audit, inspection, examination, and making excerpts or copies of same by CITY and any of its authorized representatives.

6.2 CONSULTANT shall retain any and all documents produced as a result of services provided hereunder for a period of four (4) years (hereafter referred to as "retention period") from the date of termination of the Agreement. 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, CONSULTANT shall retain the records until the resolution of such litigation or other such questions. CONSULTANT acknowledges and agrees that CITY shall have access to any and all such documents at any and all times, as deemed necessary by CITY, during said retention period. CITY may, at its election, require CONSULTANT to return said documents to CITY prior to or at the conclusion of said retention.

6.3 CONSULTANT shall notify CITY, immediately, in the event CONSULTANT receives any requests for information from a third party, which pertain to the documentation and records referenced herein. CONSULTANT understands and agrees that CITY will process and handle all such requests.

VII. TERMINATION

7.1 For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term as stated in Article II of this Agreement or earlier termination pursuant to any of the provisions hereof.

7.2 Termination Without Cause. This Agreement may be terminated by CITY upon no less than 30 calendar days' written notice, which notice shall be provided in accordance with Article VIII.

7.3 Termination For Cause. Upon written notice, which notice shall be provided in accordance with Article VIII, CITY may terminate this Agreement as of the date provided in the

notice, in whole or in part, upon the occurrence of one (1) or more of the following events, each of which shall constitute an Event for Cause under this Agreement:

7.3.1 The sale, transfer, pledge, conveyance or assignment of this Agreement without prior approval, as provided in Article XII.

7.4 Defaults With Opportunity for Cure. Should CONSULTANT default in the performance of this Agreement in a manner stated in this section 7.4 below, same shall be considered an event of default. CITY shall deliver written notice of said default specifying such matter(s) in default. CONSULTANT shall have fifteen (15) calendar days after receipt of the written notice, in accordance with Article VIII, to cure such default. If CONSULTANT fails to cure the default within such fifteen-day cure period, CITY shall have the right, without further notice, to terminate this Agreement in whole or in part as CITY deems appropriate, and to contract with another consultant to complete the work required in this Agreement. CITY shall also have the right to offset the cost of said new agreement with a new consultant against CONSULTANT's future or unpaid invoice(s), subject to the duty on the part of CITY to mitigate its losses to the extent required by law.

7.4.1 Bankruptcy or selling substantially all of company's assets

7.4.2 Failing to perform or failing to comply with any covenant herein required

7.4.3 Performing unsatisfactorily

7.5 Termination By Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.

7.6 Regardless of how this Agreement is terminated, CONSULTANT shall affect an orderly transfer to CITY or to such person(s) or firm(s) as the CITY may designate, at no additional cost to CITY, all completed or partially completed documents, papers, records, charts, reports, and any other materials or information produced as a result of or pertaining to the services rendered by CONSULTANT, or provided to CONSULTANT, hereunder, regardless of storage medium, if so requested by CITY, or shall otherwise be retained by CONSULTANT in accordance with Article VI of this Agreement. Any record transfer shall be completed within thirty (30) calendar days of a written request by CITY and shall be completed at CONSULTANT's sole cost and expense. Payment of compensation due or to become due to CONSULTANT is conditioned upon delivery of all such documents, if requested.

7.7 Within forty-five (45) calendar days of the effective date of completion, or termination or expiration of this Agreement, CONSULTANT shall submit to CITY its claims, in detail, for the monies owed by CITY for services performed under this Agreement through the effective date of termination. Failure by CONSULTANT to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of CITY and constitute a **Waiver** by

CONSULTANT of any and all right or claims to collect moneys that CONSULTANT may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

7.8 Upon the effective date of expiration or termination of this Agreement, CONSULTANT shall cease all operations of work being performed by CONSULTANT or any of its subcontractors, if any, pursuant to this Agreement.

7.9 Termination not sole remedy. In no event shall CITY's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of CITY's remedies, nor shall such termination limit, in any way, at law or at equity, CITY's right to seek damages from or otherwise pursue CONSULTANT for any default hereunder or other action.

VIII. NOTICE

Except where the terms of this Agreement expressly provide otherwise, any election, notice or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or three (3) days after depositing same in the U.S. mail, first class, with proper postage prepaid, or upon receipt if sending the same by certified mail, return receipt requested, or upon receipt when sent by a commercial courier service (such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier, at the addresses set forth below or to such other address as either party may from time to time designate in writing.

If intended for CITY, to:

CITY of San Antonio
Attn: Director
Convention and Visitors Bureau
203 S. St. Mary's
San Antonio, TX 78205

If intended for CONSULTANT, to:

ConsultEcon, Inc.
Attn: Robert Brais, Vice President
545 Concord Avenue, Suite 210
Cambridge, Massachusetts 02138

IX. [Reserved]

X. INSURANCE

10.1 Prior to the commencement of any work under this Agreement, CONSULTANT shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the CITY's Convention and Visitors Bureau Department, which shall be clearly labeled "Visitor Information Center Feasibility Study" 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 Agreement until such certificate and endorsements have been received and approved by the CITY's Convention and Visitors Bureau Department. No officer or employee, other than the CITY's Risk Manager, shall have authority to waive this requirement.

10.2 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 contract. In no instance will CITY allow modification whereupon CITY may incur increased risk.

10.3 A consultant's financial integrity is of interest to the CITY; therefore, subject to CONSULTANT's right to maintain reasonable deductibles in such amounts as are approved by the CITY, CONSULTANT shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at CONSULTANT's sole expense, insurance coverage written on an occurrence basis, 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 below:

TYPE	AMOUNTS
1. Broad Form Commercial General Liability Insurance to include coverage for the following: <ul style="list-style-type: none"> a. Premises operations *b. Independent Contractors c. Products/completed operations d. Personal Injury e. Contractual 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
2. Professional Services Liability	\$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.

10.4 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). CONSULTANT shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to CITY at the address provided below within 10 days of the requested change. CONSULTANT shall pay any costs incurred resulting from said changes.

CITY of San Antonio
Convention and Visitors Bureau Department
Visitor Information Center Feasibility Study
203 S. St. Mary's Street
San Antonio, Texas 78205

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

- Name the CITY and its officers, officials, employees, volunteers, and elected representatives as additional insured 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.

10.6 Within five (5) calendar days of a suspension, cancellation, or non-renewal of coverage, CONSULTANT shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend CONSULTANT's performance should there be a lapse in coverage at any time during this Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

10.7 In addition to any other remedies the CITY may have upon CONSULTANT's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order CONSULTANT to stop work hereunder, and/or withhold any payment(s) which become due to CONSULTANT hereunder until CONSULTANT demonstrates compliance with the requirements hereof.

10.8 Nothing herein contained shall be construed as limiting in any way the extent to which CONSULTANT may be held responsible for payments of damages to persons or property

resulting from CONSULTANT's or its subcontractors' performance of the work covered under this Agreement.

10.9 It is agreed that CONSULTANT's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the CITY of San Antonio for liability arising out of operations under this Agreement.

10.10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement.

XI. INDEMNIFICATION

11.1 CONSULTANT covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, CITY and the elected officials, employees, officers, directors, volunteers and representatives of 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 CITY directly or indirectly arising out of, resulting from or related to CONSULTANT's activities under this Agreement, including any acts or omissions of CONSULTANT, any agent, officer, director, representative, employee, consultant or subcontractor of CONSULTANT, and their respective officers, agents employees, directors and representatives while in the exercise of performance of the rights or duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

11.2 The provisions of this INDEMNIFICATION are solely for the benefit of the Parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

11.3 CONSULTANT shall advise CITY in writing within 24 hours of any claim or demand against CITY or CONSULTANT known to CONSULTANT related to or arising out of CONSULTANT's activities under this Agreement.

11.4 Defense Counsel - CITY shall have the right to select or to approve defense counsel to be retained by CONSULTANT in fulfilling its obligation hereunder to defend and indemnify CITY, unless such right is expressly waived by CITY in writing. CONSULTANT shall retain CITY approved defense counsel within seven (7) business days of CITY's written notice that CITY is invoking its right to indemnification under this Agreement. If CONSULTANT fails to

retain Counsel within such time period, CITY shall have the right to retain defense counsel on its own behalf, and CONSULTANT shall be liable for all costs incurred by CITY. CITY shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

11.5 Employee Litigation – In any and all claims against any party indemnified hereunder by any employee of CONSULTANT, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for CONSULTANT or any subcontractor under worker's compensation or other employee benefit acts.

XII. ASSIGNMENT AND SUBCONTRACTING

12.1 CONSULTANT shall supply qualified personnel as may be necessary to complete the work to be performed under this Agreement. Persons retained to perform work pursuant to this Agreement shall be the employees of CONSULTANT. CONSULTANT shall perform all necessary work.

12.2 It is CITY's understanding and this Agreement is made in reliance thereon that CONSULTANT intends to use the following subcontractor in the performance of this Agreement: Sherry Wagner. City approves of the use of said subcontractor for the provision of services set forth in Exhibit B.

12.3 The subcontracting permitted under Section 12.2 and any additional subcontracting that is deemed necessary, in Director's sole discretion, shall be subcontracted only by written agreement and, unless specific waiver is granted in writing by the CITY, shall be subject by its terms to each and every provision of this Agreement. Compliance by subcontractors with this Agreement shall be the responsibility of CONSULTANT. CITY shall in no event be obligated to any third party, including any subcontractor of CONSULTANT, for performance of services or payment of fees. Any references in this Agreement to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by the Director.

12.4 Except as otherwise stated herein, CONSULTANT may not sell, assign, pledge, transfer or convey any interest in this Agreement, nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the written consent of Director. As a condition of such consent, if such consent is granted, CONSULTANT shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor CONSULTANT, assignee, transferee or subcontractor.

12.5 Any attempt to transfer, pledge or otherwise assign this Agreement without said written approval, shall be void and shall confer no rights upon any third party. Should CONSULTANT assign, transfer, convey, delegate, or otherwise dispose of any part of all or any part of its right, title or interest in this Agreement, CITY may, at its option, cancel this Agreement and all rights, titles and interest of CONSULTANT shall thereupon cease and terminate, in accordance with Article VII, notwithstanding any other remedy available to CITY

under this Agreement. The violation of this provision by CONSULTANT shall in no event release CONSULTANT from any obligation under the terms of this Agreement, nor shall it relieve or release CONSULTANT from the payment of any damages to CITY, which CITY sustains as a result of such violation.

XIII. SBEDA

13.1 **SBEDA Program**. The CITY has adopted a Small Business Economic Development Advocacy Ordinance (the "SBEDA Program"), which is posted on the CITY's Economic Development Department website and is also available in hard copy form upon request to the CITY. In addition to the definitions provided in the SBEDA Program, the following definitions will apply pursuant to SBEDA Program requirements and this Agreement:

13.2 **SBEDA Enterprise ("SE")** – A corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed, as applicable, and otherwise authorized to do business in the state of Texas and certified pursuant to SBEDA Program requirements.

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

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

13.5 **SBEDA Plan** – The Good Faith Effort Plan ("GFEP"), SBEDA Narrative, List of Subcontractors/Suppliers and executed Letters of Intent (all as applicable) that are submitted with CONSULTANT's bid for this project Agreement, attached hereto and incorporated herein as Exhibit B.

13.6 **For this Agreement, the Parties agree that:**

- (a) The terms of the CITY's SBEDA Ordinance, as amended, together with all requirements and guidelines established under or pursuant to the Ordinance (collectively, the "SBEDA Program") are incorporated into this Agreement by reference; and

- (b) The failure of CONSULTANT or any applicable SE to comply with any provision of the SBEDA Program shall constitute a material breach of the SBEDA Program and this Agreement.
- (c) Failure of CONSULTANT or any applicable SE to provide any documentation or written submissions required by the CITY Managing Department or SBEDA Program Office pursuant to the SBEDA Program, within the time period set forth by the SBEDA Program Office, shall constitute a material breach of the SBEDA Program and this Agreement.
- (d) During the Term of this Agreement, and any renewals thereof, any unjustified failure to utilize good faith efforts to meet, and maintain, the levels of SE participation identified in CONSULTANT's SBEDA Plan shall constitute a material breach of the SBEDA Program and this Agreement.
- (e) CONSULTANT shall pay all suppliers and subcontractors identified in its SBEDA Plan in a timely manner for satisfactory work, pursuant to and as outlined in Section VII, Paragraph F(2)(e) of the SBEDA Ordinance, as amended. Documentation of all billing and payment information applicable to SBEDA Plan suppliers and subcontractors shall be submitted by CONSULTANT to the CITY Managing Department. Failure to pay SEs in a timely manner or submit the required billing and payment documentation shall constitute a material breach of this Agreement.

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

- (a) Failure of CONSULTANT to utilize an SE that was originally listed at bid opening or proposal submission to satisfy SBEDA Program goals in order to be awarded this Agreement, or failing to allow such SE to perform a Commercially Useful Function; or
- (b) Modification or elimination by CONSULTANT of all or a portion of the scope of work attributable to an SE upon which the Agreement was awarded; or
- (c) Termination by CONSULTANT of an SE originally utilized as a Subcontractor, Joint Venturer, Supplier, Manufacturer or Broker in order to be awarded the Agreement without replacing such SE with another SE performing the same Commercially Useful Function and dollar amount, or without demonstrating each element of Modified Good Faith Efforts to do so; or
- (d) Participation by CONSULTANT in a Conduit relationship with an SE scheduled to perform work that is the subject of this Agreement.

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

any one or more of the following remedies if the CONSULTANT materially breaches the requirements of the SBEDA Program:

- (a) Terminate this Agreement for default;
- (b) Suspend this Agreement for default;
- (c) Withhold all payments due to the CONSULTANT under this Agreement until such violation has been fully cured or the Parties have reached a mutually agreeable resolution; and/or
- (d) Offset any amounts necessary to cure any material breach of the requirements of the SBEDA Program from any retainage being held by the CITY pursuant to the Agreement, or from any other amounts due to the CONSULTANT under the Agreement.
- (e) Suspension, Revocation or Modification of SE Certification: The SBEDA Program Office may suspend or revoke an offending SE's eligibility for Certification, and may suspend its participation from counting toward a project goal, based upon such SE's acting as a Conduit, failing to comply with the provisions of the SBEDA Program, failing to perform a Commercially Useful Function on a project, failing to submit information as required by the SBEDA Program Office, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations. The SBEDA Program Office may further modify the list of areas for which an SE is certified, if the SE is routinely failing to submit bids or proposals for work in a particular area, or if it becomes apparent that the SE is not qualified to perform work in a particular area.

13.9 The Parties agree that nothing in the SBEDA Program or that any action or inaction by the SBEDA Program Office or the SBEDA Program Manager shall be deemed a representation or certification that an SE is qualified to perform work in a particular area for the purposes of this Agreement.

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

13.11 CITY Process For Exercising SBEDA Program Remedies. The SBEDA Program Manager shall make all decisions regarding the suspension or revocation of an SE's certification as well as the duration of such suspension or revocation. The SBEDA Program Manager shall make a recommendation to the Managing Department Director regarding appropriate remedies for the CITY to exercise in the event a Contractor violates the SBEDA Program. The Managing Department Director shall make a recommendation regarding appropriate remedies to the CITY Manager or designee, who shall have final approval regarding the remedy to be exercised except for termination of the Agreement. If the recommended remedy is to terminate the Agreement, then the Managing Department Director or CITY Manager, or her designee, shall bring forward the recommendation to CITY Council for final determination.

13.12 Special Provisions for Extension of Agreements. In the event the CITY extends this Agreement without a competitive Bid or Proposal process, the CITY Managing Department responsible for monitoring the Agreement shall establish the following, subject to review and approval by the SBEDA Program Manager:

- (a) a SBEDA Utilization Goal for the extended period; and
- (b) a modified version of the Good Faith Efforts ("Modified Good Faith Efforts Plan") set forth in the SBEDA Program Ordinance, as amended, if CONSULTANT does not meet the SBEDA Utilization Goal; and
- (c) the required minimum Good Faith Efforts outreach attempts that CONSULTANT shall be required to document in attempting to meet the SBEDA Utilization Goal. The SBEDA Utilization Goal, Modified Good Faith Efforts Plan and the required number of minimum Good Faith Efforts outreach attempts shall be added into the Agreement extension document. The CONSULTANT entering into the extension shall either meet the SBEDA Utilization Goal or document that it has made the Good Faith Efforts to meet the SBEDA Utilization Goal. Failure to do so shall:
 - (i) subject CONSULTANT to any of the remedies listed above; and/or
 - (ii) result in a new bid or proposal request for the Agreement that was considered for extension.

XIV. INDEPENDENT CONTRACTOR

14.1 CONSULTANT covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of CITY; that CONSULTANT shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between CITY and CONSULTANT, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint venturers between CITY and CONSULTANT. The Parties hereto understand and agree that the CITY shall not be liable for any claims which may be asserted by any third party occurring in connection with the services to be performed by the CONSULTANT under this Agreement and that the CONSULTANT has no authority to bind the CITY.

XV. CONFLICT OF INTEREST

15.1 CONSULTANT 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 agreement 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 (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent 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.

15.2 Pursuant to the subsection above, CONSULTANT 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. CONSULTANT further warrants and certifies that it has tendered to the CITY a Discretionary Contracts Disclosure Statement in compliance with the CITY's Ethics Code.

XVI. AMENDMENTS

16.1 Except where the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both CITY and CONSULTANT, and subject to approval by the Director, as evidenced in writing. No amendment shall be made to increase the amount of consideration CONSULTANT is to receive under this Agreement unless such amendment is authorized and approved by City Council.

XVII. SEVERABILITY

17.1 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.

XVIII. LICENSES/CERTIFICATIONS

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

XIX. COMPLIANCE

19.1 CONSULTANT shall provide and perform all services required under this Agreement in compliance with all applicable federal, state and local laws, rules and regulations.

XX. NONWAIVER OF PERFORMANCE

20.1 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 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. In case of City, such changes must be approved by the Director, as described in Article XVI of this Agreement. 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.

XXI. LAW APPLICABLE

21.1 **THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.**

21.2 Any legal action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the CITY of San Antonio, Bexar County, Texas.

XXII. LEGAL AUTHORITY

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

XXIII. PARTIES BOUND

23.1 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, except as otherwise expressly provided for herein.

XXIV. CAPTIONS

24.1 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.

XXV. INCORPORATION OF EXHIBITS

25.1 Each of the Exhibits listed below is an essential part of the Agreement, which governs the rights and duties of the Parties, and shall be interpreted in the order of priority as appears below:

- A) CITY's Request for Proposals for Visitor Information Center Feasibility Study
- B) CONSULTANT's Response to CITY's Request for Proposals for Visitor Information Center Feasibility Study

25.2 In the event of a conflict between this Agreement and any of the Exhibits listed above, this Agreement shall control.

XXVI. ENTIRE AGREEMENT

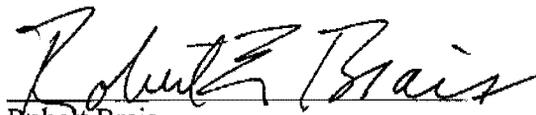
26.1 This Agreement, together with its authorizing ordinance and its exhibits, if any, constitute the final and entire agreement between the Parties hereto and contain all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the Parties hereto, unless same be in writing, dated subsequent to the date hereto, and duly executed by the Parties, in accordance with Article XVI.

EXECUTED and **AGREED** to this the _____ day of _____, 2008.

CITY:
CITY OF SAN ANTONIO

CONSULTANT:
ConsultEcon, Inc.

Sheryl Sculley
City Manager



Robert Brais
Vice President

Approved as to Form:

City Attorney

- Exhibit A: CITY's Request for Proposals for Visitor Information Center Feasibility Study
- Exhibit B: CONSULTANT's Response to CITY's Request for Proposals for Visitor Information Center Feasibility Study