

AN ORDINANCE 2008-04-03-0248

AUTHORIZING THE EXECUTION OF A DEVELOPER PARTICIPATION CONTRACT IN AN AMOUNT NOT TO EXCEED \$83,516.00, WITH LACKLAND HILLS JOINT VENTURE TO OVERSIZE CONSTRUCTION OF A DRAINAGE FACILITY AND GRANTING A TEMPORARY CONSTRUCTION EASEMENT, IN CONNECTION WITH THE MEDINA BASE ROAD DEVELOPMENT PROJECT, LOCATED IN DISTRICT 4.

* * * * *

WHEREAS, the Medina Base Road Development Project is located adjacent to the northern boundary of the Lackland Heights Subdivision and south of Lackland Air Force Base with public right of ways crossing Medina Base Road to the East; and

WHEREAS, the current storm water drainage improvements run under Medina Base Road within the public right of way and is in need of an improved drainage system due to severe flooding in this area; and

WHEREAS, this Ordinance authorizes the execution of a Developer Participation Contract with Lackland Hills Joint Venture to replace the existing improvements with a proposed culvert system which will channel storm water runoff into an existing natural drainage system and away from the Lackland Heights Subdivision in connection with the Medina Base Road Development Project; and

WHEREAS, Lackland Hills Joint Venture plans to oversize the design, reconstruction and expansion of the Medina Base Road culvert drain to accommodate the expansion of Medina Base Road as a paved and curbed five-lane secondary arterial type A roadway; and

WHEREAS, this Ordinance also authorizes the City of San Antonio to pay for the cost of oversizing a drainage facility on Medina Base Road in the total amount of \$83,516.00 and also authorize the conveyance of a temporary construction easement to Lackland Hills Joint Venture; and

WHEREAS, this is a one-time capital expenditure in the amount of \$83,516.00 which are available from the 2007 General Obligation Bond Program Fund; **NOW THEREFORE**,

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

SECTION 1. The City Manager or her designee is hereby authorized to execute a Developer Participation Contract between the City of San Antonio and Lackland Hills Joint Venture to replace the existing drainage improvements with a culvert system which will alleviate storm water runoff into an existing natural drainage system. A copy of said Contract in the form substantially affixed hereto as **Attachment I**. This Contract qualifies as a Developer Participation Contract pursuant to Section 212.071 et. seq. of the Texas Local Government Code.

SECTION 2. The following financial adjustments are hereby approved:

- a) A Developer Participation Contract with Lackland Hills Joint Venture in the amount of \$83,516.00 has been authorized for project 40-00023, Medina Base Rd, Phase 1 from previously appropriated funding on ordinance Ord. No. 2008-01-31-0066, dated January 31, 2008.
- b) Payment in the amount of \$83,516.00 is authorized and should be encumbered with a purchase order and made payable to **Lackland Hills Joint Venture**, for Medina Base Rd, Phase 1 development project.

SECTION 3. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager, or the City Manager's designee, correct allocation to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 4. This Ordinance shall take effect on the tenth day after passage.

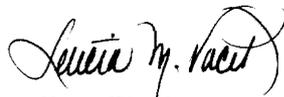
PASSED AND APPROVED this 3rd day of April, 2008.



M A Y O R

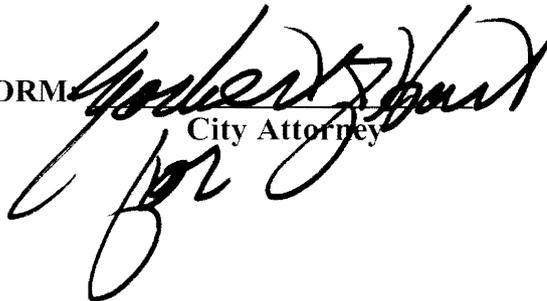
PHIL HARDBERGER

ATTEST:



City Clerk

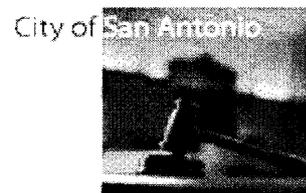
APPROVED AS TO FORM:



City Attorney



Request for
COUNCIL
ACTION



Agenda Voting Results - 12

Name:	12						
Date:	04/03/2008						
Time:	10:23:51 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing the execution of a Developer Participation Contract in an amount not to exceed \$83,516.00, with Lackland Heights Joint Venture to oversize construction of a drainage facility and granting a temporary construction easement, in connection with the Medina Base Road Development Project, located in District 6. [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				
Philip A. Cortez	District 4		x			x	
Lourdes Galvan	District 5	x					
Delicia Herrera	District 6		x				
Justin Rodriguez	District 7		x				
Diane G. Cibrian	District 8		x				x
Louis E. Rowe	District 9		x				
John G. Clamp	District 10	x					

Medina Base Road - Phase I



4

**DEVELOPER PARTICIPATION CONTRACT
MEDINA BASE ROAD, SAN ANTONIO, TEXAS
CULVERT IMPROVEMENT PROJECT**

THIS DEVELOPER PARTICIPATION CONTRACT ("Contract") entered into as of March __, 2008, (hereinafter the "Effective Date") by and between **THE CITY OF SAN ANTONIO, TEXAS**, a Texas municipal corporation ("City"), and **LACKLAND HILLS JOINT VENTURE**, a Texas joint venture ("Developer"), pursuant to Ordinance No. _____ passed by the City of San Antonio City Council on _____, 2008.

RECITALS

Whereas, (i) Medina Base Road is an existing street which runs adjacent to the northern boundary of the Lackland Heights subdivision and south of the southern boundary of Lackland Airforce Base, (ii) a public right of way crosses Medina Base Road just to the east of the Lackland Heights subdivision, (iii) certain existing storm water drainage improvements (the "Existing Improvements") run under Medina Base Road within the public right of way, (iv) the City and the Developer desire to replace the Existing Improvements with the Medina Base Road Drainage Improvements (hereinafter defined) to add additional storm water drainage capacity, and the City, the Developer and the Project Engineer have determined that the most efficient method to add such additional storm water drainage capacity would be to replace the Existing Improvements so as to enable additional stormwater run-off to be channeled into an existing natural drainage way and away from the Lackland Heights subdivision; and

Whereas, in order to accommodate the future expansion of Medina Base Road, City desires Developer to oversize the design, reconstruction, and expansion of the Medinal Base Road Drainage Improvements to accomodate the expansion of Medina Base Road as a paved and curbed five-lane secondary arterial type-A roadway, to the extent that participation by the Developer is roughly proportionate to the cost of the drainage improvements if Medina Base Road were not be expanded, and the participation of the City to be based on the cost of the Drainage Improvements to accomodate the expansion of Medina Base Road; and

Whereas Developer agrees that its proportionate share of the costs as set forth in this Contract is roughly proportionate to Developer's impact to the public infrastructure; and

Whereas, Developer's Share of the costs of this Contract will equal or exceed the Developer's roughly proportionate impact to the public infrastructure; and

Whereas, the City's participation is in contemplation of future widening and straighting of Medina Base Road and future storm water drainage improvements; and

Whereas, Section 212.071 of the TEXAS LOCAL GOVERNMENT CODE authorizes the City to make a contract with a developer of a subdivision or land to construct public improvements related to the development; and

Whereas, Developer is willing to perform the reconstruction and expansion of the aforesaid Medina Base Road Drainage Improvements as specified in this Contract;

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 hereto, intending to be legally bound, do hereby covenant and agree as follows:

A. DEFINITIONS:

Certain terms used in this Contract (defined below) shall have the meanings set forth as follows:

1. “City” means the City of San Antonio, Texas, a Texas municipal corporation.
2. “City Property” means (i) the existing Medina Base Road right-of-way, along with the drainage easements and other rights in favor of the City related thereto.
3. “City’s Representative” means the Director of Capital Management Improvement Services Department or such other person as the City Manager may designate.
4. “City Share” means (A) the lesser of (i) One Hundred Percent (100%) of total Project Costs pertaining to oversizing of the Medina Base Road Drainage Improvements desired by the City (including, without limitation, culvert installation, paving, curbing , any necessary relocation of utilities), all as authorized by Section 212.072(c) of the TEXAS LOCAL GOVERNMENT CODE, or (ii) \$83,516.00, plus (B) One Hundred Percent (100%) of Utility Relocation Costs.
5. “Contract” means this Developer Participation Contract between the City and Developer.
6. “Contract Documents” means this Contract and **Exhibit A** through **Exhibit F** attached hereto and made a part hereof for all purposes.
7. “Construction Documents” means the plans, specifications and estimates for the Project which shall be provided by Developer pursuant to the terms of this Contract. The Construction Documents shall illustrate the dimensions, materials, methods of construction, and other details of the Project. A description of the Construction Documents is provided in **Exhibit C**.
8. “Developer’s Representative” means Gordon A. Woods, or such other person or entity as Developer may designate.
10. “Developer’s Share” means One Hundred Percent (100%) of the total Project Costs, less the City Share. The parties acknowledge that it has been determined in accordance with the requirements of Section 212.904 of the TEXAS LOCAL GOVERNMENT CODE that Developer’s Share does not exceed the amount of the Project Costs that is roughly proportionate to the impact of the Development to the Medina Base Road Drainage Improvements public infrastructure.
12. “Development” means the Lackland Heights subdivision.
13. “Director” means the Director of the Capital Improvements Management Services Department, City of San Antonio.
14. “Medina Base Road Drainage Improvements” means the replacement of the Existing Improvements under and across Medina Base Road as specified in this Contract.

15. “Project” means the public works infrastructure improvements consisting of the Medina Base Road Drainage Improvements under and across Medina Base Road, and associated improvements to be constructed on the City Property by Developer pursuant to the Construction Documents, as more fully described in **Exhibit C** attached hereto and made a part hereof for all purposes, and including associated utility relocations (or coordination with the utility provider in cases where the utility provider itself performs the relocation work).

16. “Project Costs” means all costs and expenses incurred by Developer with respect to the Project in accordance with this Contract, 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 Project Engineer; (b) all costs of preparing any necessary environmental reports; (c) all legal fees; (d) all costs and expenses to construct the Project, including, without limitation, any Utility Relocation Costs and new storm drains; and (e) all other reasonable and necessary fees and expenses relating to the Project.

17. “Project Engineer” means Pape-Dawson Consulting Engineers, Inc.

18. “UDC” means Chapter 35 of the City Code of the City of San Antonio entitled Unified Development Code.

19. “Utility Relocation Costs” means all costs of utility relocations, which will be joint bid (as separate distinct line items) as part of the overall Project.

20. “Work” means the installation and construction of the Project by Developer on the City Property in accordance with the Construction Documents and as provided herein.

B. CONTRACT PROVISIONS

1. Background. This Contract qualifies as a “Developer Participation Contract” pursuant to Sections 212.071-212.072 et. seq. of the TEXAS LOCAL GOVERNMENT CODE. In this regard, Developer shall construct the Project on the City Property. To accommodate City needs, Developer agrees to construct the Medina Base Road Drainage Improvements and to oversize this facility to accommodate a five-lane secondary arterial type-A roadway, as shown on **Exhibit E**. City shall pay the cost for oversizing the Developer’s roughly proportionate share of the facility to be constructed by Developer by paying the City Share. The total Project Costs are estimated to be \$298,272.00, exclusive of Utility Relocation Costs which shall be borne by the City or the utility providers, it being understood that the Project is classified as a “city project” for utility relocation purposes and that in such type of project the affected utility providers are responsible for the relocation costs Accordingly, the City will be seeking reimbursement for its own account, outside of this contract, from the applicable utility providers, and Developer will therefore keep separate records of the Utility Relocation Costs to facilitate the City’s reimbursement claims resulting from the widening and straightening of Medina Base Road, as more particularly set forth in paragraph 3 of Article B. A detailed preliminary estimate of the Project Costs , including Utility Relocation Costs is attached hereto as Exhibit D. A calculation of the City Share is also illustrated in **Exhibit D**. City will have the right to review and approve the final Project plans and budget prior to commencement of construction. Notwithstanding anything in this Contract to the contrary, either party shall have the right to terminate this Contract if any situation is discovered during the engineering and design phase of the Project or at any time prior to commencement of construction that materially increases the Project Costs over the cost estimates as set forth on **Exhibit D** hereto. For purposes hereof, an increase of

more than ten (10%) in the Project Costs shall be deemed to be material. Notice of any such termination must be given prior to commencement of construction of the Project.

2. Temporary Construction Easement and Other Easements.

(a) City shall grant the Temporary Construction Easement to Developer pursuant to and in the form of **Exhibit F**. The Temporary Construction Easement Document shall be executed by City, as Grantor, and delivered to Developer simultaneously with execution of this Contract by City.

(b) City shall provide or be responsible for obtaining any easements or the necessary permission required to construct the Project, including third-party consents and approvals, subject to any other governmental requirements or controls. In addition, City shall be responsible for obtaining any permission required to relocate any utilities and/or adjacent driveways in connection with the construction of the Project. City will use its best efforts (without cost or expense to City, except as otherwise provided herein) to obtain any third-party consents and approvals in a timely manner so as not to cause Project construction delays. City shall be responsible for all costs and expenses associated with obtaining any easements necessary for the construction of the Project under Medina Base Road. Developer agrees to assist the City in all reasonable respects in this regard (provided that such assistance shall not require that Developer incur any expense to third parties).

3. Construction. Developer shall commence construction of the Project within _____ days after the later of (i) approval of the Construction Documents by the Director, and (ii) receipt by Developer of all governmental and regulatory permits and approvals required in connection with the construction of the Project (the "Permits"). Developer's obligation to commence construction of the Project is conditioned upon the receipt by Developer of the Permits on such terms and conditions as Developer may deem to be acceptable in Developer's reasonable discretion. City agrees to use its best efforts (without cost or expense to City) to assist Developer in obtaining the Permits. Without limiting the foregoing, City agrees to use its best efforts (without cost or expense to City) to assist Developer with all requisite approvals from any regulatory authority in connection with the construction of the Project. Construction of the Project shall at all times be performed in a good and workmanlike manner in accordance with the Construction Documents using only new, high-quality materials as specified in the Construction Documents. Any variations from the Construction Documents shall require approval by City's Representative, 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 City's Representative for its review and approval, which approval shall not be unreasonably withheld, conditioned or delayed. Upon written approval of any change order by both Developer and City's Representative, the Project Costs and City Share shall be adjusted accordingly.

With respect to Project Costs other than Utility Relocation Costs, Developer may, at its option, submit periodic draw requests to City no more often than once per month during the engineering or construction of the Project, for payment of that portion of City Share as may be attributable to the completed engineering or construction of the Project since the last periodic draw request. All draws shall be submitted through the City's Program Management Portal. Prior to submittal of the first draw, Developer 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. City shall pay the City Share within thirty (30) days following

City's receipt and acceptance/approval of each such periodic draw request, such acceptance/approval not to be unreasonably withheld, conditioned or delayed. In no event shall City be required to pay more than the City Share with respect to Project Costs, and Developer shall be required to complete the Project and to pay all Project Costs in excess of the City Share, except that City shall be responsible for all Utility Relocation Costs .

With respect to Utility Relocation Costs, Developer may, at its option, submit periodic draw requests to the City no more often than once per month during the engineering or performance of the utility relocation portion of the Work, for payment by City of the completed engineering or performance of the utility relocation work since the last periodic draw request. All draws shall be submitted through the City's Program Management Portal. Prior to submittal of the first draw, Developer will submit a schedule of values for payment to be approved by the City, which approval shall not be unreasonably withheld, conditioned or delayed. Schedule of values will identify costs attributable separately to each of the several types of utilities involved, independently from the others, so that City can properly substantiate its reimbursement claims against each separate utility provider. Any changes to the schedule of values once approved will be processed and approved as task orders through the portal. City shall pay the amount of such draw request within thirty (30) days following City's receipt and acceptance/approval of each such periodic draw request, such acceptance/approval not to be unreasonably withheld, conditioned or delayed.

Notwithstanding anything in this Agreement to the contrary, the Project does not include, and Developer shall have no responsibility for, the remediation of (or the cost of the remediation of) archaeological materials or any hazardous materials or substances (as defined in applicable environmental laws or regulations) which are discovered on City Property within the existing or proposed Medina Base Road rights-of-way (excluding hazardous materials or substances released by Developer, Owners, or their respective agents, employees or contractors).

Developer shall enter into a contract (the "Construction Contract") for construction of the Project with a licensed contractor selected by Developer (the "Contractor") subject to City's approval, which approval shall not be unreasonably withheld, conditioned or delayed, provided such contractor has the proven capacity, solvency and expertise to construct the Project. Once commenced, Developer shall use commercially reasonable efforts to cause construction of the Project to be prosecuted diligently and continuously by the Contractor in accordance with the Construction Contract until completion in accordance with the Construction Documents, as certified jointly by the Project Engineer and the Director. The Director shall have the authority to accept the Project on behalf of City, and 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 Developer may determine, subject to City's reasonable approval. Developer'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 described in paragraph 2(b) of this Article B.

Developer will provide construction schedules in accordance with the City's Specification Item 700, Cost Loaded Project Schedules.

PREVAILING WAGE RATE. The Provisions of Chapter 2258 and 5159a, Texas Government Code, shall expressly be made a part of the Construction Contract. In accordance therewith, the City will provide Developer / 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 this schedule will become a part of the Construction Contract. The

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 said contract, by the Contractor or any sub-contractor under it. The establishment of prevailing wage rates pursuant to Chapter 2258, Texas Government Code shall not be construed to relieve the 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.

Prior to the commencement of construction, Developer shall cause the Contractor to provide City with (i) a performance bond in the amount of \$298,272.00 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 Developer itself shall have no obligation to provide a bond other than the bond to be provided by Contractor), and (ii) insurance certificates showing the City as a named insured in types and amounts reasonably required by the City's Risk Management Department. The foregoing shall remain in force and effect throughout the course of construction of the Project.

The Construction Contract shall prohibit third-party beneficiaries other than City which shall be specifically designated as a third-party beneficiary, shall not be assignable by the Contractor and shall provide 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 City has certain rights hereunder and pursuant to the Construction Contract. "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 Project Engineer and the Director.

During construction of the Project, Developer shall provide the Director with 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 City's web portal. In all cases it is Developer's sole responsibility to connect to the City's web portal (system) at no cost to the City.

4. Inspections. The Project shall be accessible at all reasonable times to the Director or his/her designee for inspection. The Developer acknowledges that any inspections performed by City during the course of construction for purposes of this Contract (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 City only and may not be relied upon by others, be claimed by Developer as an approval by City, a permit granted by City, a waiver by City, or used for any purpose by Developer, the Contractor or any third party. Developer further acknowledges that Developer and Contractor are required to perform their own inspections, and inspections by City do not address any obligations of Developer or others. Subject to the foregoing, City shall promptly notify Developer of any defects or non-conformances discovered during any City inspection.

5. Construction Documents. Developer shall provide City with a complete set of Construction Documents meeting the requirements of this Contract 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 individual engineer working on behalf of the Project Engineer. Construction of any part of the Project shall in no event commence prior to City approval of the Construction Documents for that part of the Project. Developer shall cause the Project Engineer to commence preparation of the

Construction Documents promptly upon completion of engineering and design, and to diligently continue same to completion.

6. 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, City shall immediately give Developer written notice thereof specifying the defect and/or non-conforming Work with particularity. Developer shall correct such defective or non-conforming Work within thirty (30) days of notice thereof given by City, or within such longer time as may be reasonably necessary, provided Developer is working diligently and continuously towards a cure. If Developer fails to so cure such defective or non-conforming Work, then City may, at its own expense, correct such defective or non-conforming Work by City's own crews or by outside contractors, at City's option, and the reasonable cost of such correction shall be deemed to be sums due City by Developer, and may be offset against any outstanding sums due by City to Developer under this Contract. The cost of 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 product and workmanship material warranties, including all warranties given by Contractor, shall be assigned to City, to the extent assignable. This provision shall survive termination of this Contract.

7. Default. Upon the occurrence of a default by Developer in the performance of its obligations hereunder and the failure of Developer to cure such default within thirty (30) days following receipt of written notice of default from City (or such reasonably longer time as may be necessary provided the Developer commences the cure within thirty (30) days and continuously and diligently pursues the cure to completion) (a "Default"), City shall have the right to terminate this Contract.

In the event of Default by Developer, City may require Developer to cease construction and City may, at its option, take over construction of the Project with its own contractor. This Contract shall operate as an agreement by Developer to allow City access to the Developer Property as necessary to complete the Project in accordance with the Contract Documents. These remedies are in addition to any money damages and/or legal, equitable and/or other contract rights City may have in the event of a Default; 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 Contract.

8. Record. This Contract may not be filed and recorded in the real property records of Bexar County, Texas, without the prior written approval of both parties.

9. Representations and Warranties. Developer and City represent, warrant, certify and agree that neither this Contract, nor the Contract Documents, nor any part of the relationship between the parties hereto shall be construed in any way or operate as creating a joint venture, partnership or other business entity between Developer and City.

10. Assignment. Except as hereinafter provided, Developer may not assign its rights or obligations under this Contract without the prior written consent of 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 City shall, at 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. Developer may assign this Contract without obtaining the City's consent to (i) one or more of the Owners, or (ii) an entity which acquires fee title to a portion of the Developer Property from one of the Owners.

11. **Indemnity.** Developer covenants and agrees to FULLY REIMBURSE, INDEMNIFY, and HOLD HARMLESS, City and the elected officials, agents, employees, officers, directors, volunteers, contractors, subcontractors, consultants, subconsultants and representatives of City individually or collectively, (collectively, the "City Parties") from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including, but not limited to, personal injury, death and property damage, (the "Damages") made upon City, arising out of or resulting from Developer's negligent activities or omissions under this Contract, including any negligent acts or omissions of any agent, officer, director, representative, employee, consultant, subconsultant, licensee, sublicensee, contractor or subcontractor of Developer, and their respective officers, agents, employees, directors and representatives (collectively, "Developer Parties") while in the exercise of the performance of the rights or duties under this Contract, all without, however, waiving any governmental immunity available to City under Texas law and without waiving any defenses of the parties under Texas law. THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF CITY, OR THE CITY PARTIES IN SUCH INSTANCE WHERE SUCH NEGLIGENCE CAUSES PERSONAL INJURY, DEATH OR PROPERTY DAMAGE. IN THE EVENT DEVELOPER AND 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 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 hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Developer shall promptly advise City in writing of any claim or demand against City or Developer known to Developer and related to or arising out of Developer's negligent activities or omissions under this Contract, and shall see to the investigation and defense of such claim or demand at Developer's cost. Notwithstanding any condition imposed by a policy of insurance to which Developer and City are named, City shall retain the right, at its option and at its own expense, to participate in such defense provided by any insurance or self-insurance of Developer under this paragraph without relieving Developer of any of its obligations under this paragraph.

To the extent provided by law, City shall be responsible for all claims, demands, and causes of action against City arising in favor of any person, because of personal injuries or death or damage to property, occurring, growing out of, or incident to, related to or resulting directly or indirectly from, the occurrence of activities or omission of activities contemplated by this Contract, caused by the negligence of City and/or any of the City Parties.

12. **Entire Agreement.** The terms of this Contract are intended to be a final expression of the parties' agreement and may not be contradicted by evidence of any prior or contemporaneous statements, representations, agreements or understandings, whether written or oral. The parties expressly agree that no such statements, representations, agreements or

understandings exist. The parties further intend that this Contract constitutes the complete and exclusive statement of the parties' intent and that no extrinsic evidence may be introduced in any proceeding involving the Contract Documents. No addition to, deletion from, or modification of any term or provision of this Contract shall be effective unless it is made in a writing signed by the parties hereto.

13. Conflicts Between Documents. In the event of any conflict between the Exhibits hereto and the terms and provisions of this Contract, the terms and provisions of this Contract shall control.

14. Waiver. It is understood and acknowledged that City exercises no control over the means of accomplishing the Work. No approval by City shall impose any liability on City for any risk or damage to persons or property or the City Property or shall imply or guarantee any drainage implications or the operation of the drainage facilities to the parties, any other party or otherwise.

15. Attorneys' Fees. If either party commences an action against the other to enforce any of the terms of this Contract or for damage relative to this Contract, the losing party shall pay to the prevailing party the court ordered costs and expenses incurred in connection with the prosecution or defense of such action, including reasonable attorneys' fees and all other costs of suit.

16. Notices. Any notice required or permitted to be given under this Contract shall be in writing and shall be (1) mailed by certified mail, postage prepaid, return receipt requested, or (2) delivered by a nationally recognized overnight air or ground courier service, at its address set forth as follows:

If to Developer: Lackland Heights Joint venture
 Attn: Mr. Gordon Woods
 8227 Elm Glade
 San Antonio, Texas 78251
 Telephone No.: (210) 725-7840

If to City: City of San Antonio
 Attn: Director of Capital Management Improvement
 Serveces Department
 P.O. Box 839966
 San Antonio, Texas 78283-3966
 Telephone No.: (210) 207-8024

 City of San Antonio
 Attn: City Clerk
 P.O. Box 839966
 San Antonio, Texas 78283-3966
 Telephone No.: (210) 207-8940

Any communication so addressed and mailed shall be deemed to be given on the earliest of: (a) when actually received or delivered; (b) when proof of return of certified mail is received; or (c) on the first business day after deposit with an overnight air courier service, if proof to the address of the intended addressee is provided. A change of address may be given by written notice as provided herein.

17. Third Party Beneficiaries. There shall be no third-party beneficiaries to this Contract.

18. Partial Invalidity. Any provisions or part of this Contract held to be void or unenforceable under any law or regulation shall be deemed stricken and all remaining provisions shall continue to be valid and binding upon the parties and construed as close as reasonably possible to their original intent.

19. Authority of Signatory. The persons signing on behalf of each of the parties to this Contract represent that they each have the authority to bind their respective party to this Contract. The signature on this Contract or any document on behalf of City is subject to passage of an ordinance approving the authority of such signatory.

20. Gender and Number, Other Terms. Where the context of this Contract permits, the singular shall include the plural, the plural the singular, and the masculine shall include the neuter and feminine.

21. Governing Law and Venue. This Contract shall be construed and interpreted under and shall be governed and enforced according to the laws of the State of Texas. Venue for any legal proceeding arising out of or in connection with this Contract shall be in Bexar County, Texas.

22. No Oral Modification. This Contract shall not be modified orally or by course of conduct or dealing. Any modification of this Contract shall be in writing and signed by the authorized party.

23. Counterparts. The Contract Documents may be executed in counterparts, each of which shall be deemed an original and together shall constitute a single instrument.

24. Force Majeure. In the event Developer or 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 Contract, 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 Contract 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 the Developer's contractor suffers any event of "force majeure", such event shall likewise constitute force majeure with respect to Developer.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, this Contract is entered into as of the day and year set forth above.

CITY:

CITY OF SAN ANTONIO,
a Texas Municipal Corporation

By: _____

Name: _____

Title: _____

DEVELOPER:

**LACKLAND HEIGHTS JOINT
VENTURE,**
a Texas joint ventue

By: _____

By: _____

Name: _____

Title: _____

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on _____, 2008, by _____, _____ of the **CITY OF SAN ANTONIO**, a Texas municipal corporation, on behalf of said corporation.

Notary Public, State of Texas

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on this _____ day of _____, 2008, by _____, _____ of **LACKLAND HEIGHTS JOINT VENTURE**, a Texas joint venture, on behalf of said joint venture.

Notary Public, State of Texas

Schedule of Exhibits:

- Exhibit A – City Property Description
- Exhibit B – Developer Property
- Exhibit C – Construction Documents
- Exhibit D – Cost Estimates
- Exhibit E – Depiction of Project
- Exhibit F – Temporary Easement

EXHIBIT A
TO
DEVELOPER PARTICIPATION CONTRACT
CITY PROPERTY DESCRIPTION

**EXHIBIT B
TO
DEVELOPER PARTICIPATION CONTRACT**

DEVELOPER PROPERTY DESCRIPTION

TBA

**EXHIBIT C
TO
DEVELOPER PARTICIPATION CONTRACT
DESCRIPTION OF CONSTRUCTION DOCUMENTS
TBA**

**EXHIBIT D
TO
DEVELOPER PARTICIPATION CONTRACT**

**MEDINA BASE ROAD
CULVERT IMPROVEMENT PROJECT
ENGINEER'S OPINION OF PROBABLE COST
1/30/08**

ITEM NO.	DESCRIPTION	UNIT	QTY	UNIT PRICE	TOTAL AMOUNT
<u>CHANNEL CONSTRUCTION</u>					
1.	Street Excavation	CY	255.0	\$5.85	\$1,491.75
2.	Channel Excavation	CY	1,328.0	\$7.60	\$10,092.80
3.	Channel Embankment	CY	75.0	\$4.20	\$ 315.00
4.	Removal of Excess Material	CY	1,508.0	\$3.90	\$5,881.20
5.	Hot Mix Asphaltic Pavement	SY	69.4	\$29.35	\$2,036.89
6.	Asphalt Treated Base (10" Thick)	SY	69.4	\$58.20	\$4,039.08
7.	Base Reinforcement	SY	69.4	\$3.90	\$ 270.66
8.	Concrete Approach Slab	CY	50.6	\$467	\$23,630.20
9.	CIP Concrete Culvert (8'x6')	CY	113.9	\$665.50	\$75,800.45
10.	Reinforcing Steel	LB	13,950.0	\$1	\$13,950.00
11.	Topsoil	CY	137.7	\$15.40	\$2,120.58
12.	Hydromulch	SY	1,239.3	\$4.50	\$5,576.85
13.	Metal Beam Guard Rail	LF	412.0	\$35.75	\$14,729.00
14.	Gaurdrail End Treatment	EA	4.0	\$3,144	\$12,576.00
15.	Asphalt Treated Base (6" Thick)	SY	866.3	\$29.90	\$25,902.37
Subtotal:					\$198,412.83
16.	Mobilization				\$500.00
17.	Insurance & Bond				\$4,000.00
18.	Baricades, Signs & Traffic Handling				\$5,500.00
19.	Materials Testing (2%)				\$3,968.26
20.	Construction Contingency (10%)				\$19,841.28
21.	Engineering Fees				\$37,500.00
22.	Engineering Contingency (10%)				\$3,750.00
23.	Construction Staging Area Lease				\$5,000.00
24.	Project Administration				\$19,800.00
Subtotal:					\$99,859.54

PROJECT TOTAL:**\$298,272.37**

ENGINEERING FEES

1.	Civil Construction Design Plan Preparation	\$30,000.00
2.	Construction Phase Services	\$2,500.00
3.	Plan of Record Drawings	\$5,000.00

Total Engineering Fees:**\$37,500**

COST SHARING

Developer Property (Current Culvert Length) 65 Ft

Total Length (future CIP Culvert Length) 90 Ft

Lackland Heights MB, L.L.C. Share (65/90) = 72%

City of San Antonio Share (25/90) = 28%

PROJECT OVERSIZING

	<i>Oversizing Project Cost</i>	<i>Non-Oversizing Project Cost</i>	<i>Project Total</i>
Lackland Heights MB, L.L.C.	\$0 (0%)	\$214,756(100%)	\$214,756
City of San Antonio	\$83,516 (100%)	\$ 0 (0%)	\$83,516
<i>Project Total</i>	<i>\$83,516</i>	<i>\$214,756</i>	<i>\$\$298,272</i>

PREPARED BY: Pape-Dawson Engineers, Inc.
DATE: January 30, 2008 – Updated February 26, 2008
JOB NO.: 6829-11
DOC. ID.: p:\68\29\11\word\cost estimates\080130a1.doc

EXHIBIT E

TO
DEVELOPER PARTICIPATION CONTRACT

DEPICTION OF PROJECT

TBA

EXHIBIT F
TO
DEVELOPER PARTICIPATION CONTRACT
TEMPORARY CONSTRUCTION EASEMENT

STATE OF TEXAS §
 § KNOW ALL PERSONS BY THESE PRESENTS:
COUNTY OF BEXAR §

That, the **CITY OF SAN ANTONIO**, a Texas municipal corporation (“Grantor”), acting by and through its duly authorized officer and/or employee, for and in consideration of One Dollar (\$1.00) and other good and valuable consideration in hand paid by **LACKLAND HEIGHTS JOINT VENTURE**, a Texas joint venture (“Grantee”), the receipt and sufficiency of which are hereby acknowledged and confessed, has granted, sold and conveyed and by these presents does hereby grant, sell and convey unto Grantee, whose mailing address is Attn: Mr. Gordon Woods, 8227 Elm Glade, San Antonio, Texas 78251, an easement (the “Easement”) for the specific purpose of permitting Grantee and Grantee's contractors, subcontractors, employees, consultants and labor and material suppliers to reconstruct and expand the Drainage Improvements to Medina Base Road (collectively, the “Project”) within that certain real property located in the City of San Antonio, Bexar County, Texas, as more particularly described on **Exhibit A** and a drawing marked **Exhibit B** attached hereto and made a part hereof (the “Easement Area”), all in accordance with that certain Developer Participation Contract dated _____, 2008 between Grantor and Grantee (the “Contract”).

Grantee shall have the right to remove from the Easement Area by standard industry practices employed in vegetation management, all trees, and parts thereof, any vegetation or obstructions which interfere with the installation, maintenance, and/or repair of the Project within the Easement Area.

The Easement does not constitute a conveyance of fee simple title to the Easement Area or of the minerals or mineral rights therein and thereunder, but rather a conveyance of the Easement only. This Easement is a grant that is subject to all matters of record in Bexar County, Texas validly subsisting against the Easement Area on this date, and all easements, rights-of-way and prescriptive rights, of record; all presently recorded restrictions, reservations, covenants, conditions, oil and gas leases, mineral severances and other instruments, other than liens and conveyances, that affect the Easement Area; rights of adjoining owners in any wells and fences situated on a common boundary; any discrepancies, conflicts or shortages in area or boundary lines; and any existing encroachments or overlapping of improvements (collectively, the “Permitted Exceptions”).

Grantee shall have access over the drives and access ways situated from time-to-time on any property of Grantor so as to access the Easement Area during construction. Grantee shall promptly restore the surface of any property damaged by Grantee’s use of the Easement, at Grantee’s sole cost and expense. Grantee shall remove any debris resulting from its use of the Easement Area pursuant to the Easement.

TO HAVE AND TO HOLD the Easement and rights unto Grantee, its successors and assigns, until completion of construction of the Project in accordance with the provisions of the Contract. Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the Easement and rights unto Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through or under Grantor, but not otherwise, subject to the terms, conditions and provisions set forth herein, including but not limited to the Permitted Exceptions.

EXECUTED this ____ day of _____, 2008.

CITY OF SAN ANTONIO, a
Texas municipal corporation

By: _____
Name: _____
Title: _____

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on this ____ day of _____, 2008, by _____, the _____ of the **CITY OF SAN ANTONIO**, a Texas municipal corporation, on behalf of said municipal corporation.

Notary Public, State of Texas

Schedule of Exhibits:

- Exhibit A – Easement Area -- Field Notes
- Exhibit B – Easement Area – Drawing

**EXHIBIT A
TO
TEMPORARY CONSTRUCTION EASEMENT**

PROPERTY DESCRIPTION

TO BE ATTACHED

**EXHIBIT B
TO
TEMPORARY CONSTRUCTION EASEMENT
DRAWING/PLAT OF EASEMENT AREA**