

AN ORDINANCE

2009-10-29-0868

**AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT
WITH CAROLYN ARNOLD COMMUNICATIONS
CONSULTANT, INC. TO PROVIDE CONSULTING SERVICES
FOR AUDITING TELECOMMUNICATIONS BILLINGS TO FIND
INSTANCES OF OVERPAYMENT AND ERRONEOUS BILLING
AND RECOVERING THOSE AMOUNTS FOR THE CITY.**

* * * * *

WHEREAS, currently the City spends in excess of \$6 million annually with multiple telecommunications providers for delivery of the following categories of services: (1) Wired Services; (2) Metro-Ethernet Service; (3) Broadband Service; (4) Internet Connection Service; (5) Long Distance, Group Conferencing, Directory Assistance and 3-1-1 Non-emergency Reporting Services; (6) Wireless Voice Services; (7) Mobile Wireless Voice Service with Push-to-Talk Feature; (8) Mobile Wireless Data Services; (9) Paging Service; and (10) PBX and Key System Equipment and Maintenance Services; and

WHEREAS, monthly invoices for these telecommunications services are voluminous documents detailing the usage of service during the billing period and the applicable rates for those services based on a variety of criteria, including: contractual provisions, state and federal tariffs and regulations, company specific terms and conditions of service, regulatory fees, and other considerations; and

WHEREAS, a proper review and verification of the accuracy of telecommunications billing records requires a mastery of several interrelated disciplines including, but not limited to, an intimate understanding and knowledge of: telecommunications networks; the scope and availability of communications services and equipment offered by service providers; carrier billing system operations and internal service code designations; telecommunications service marketing practices; service installation, change and termination procedures; industry terminology; and federal and state telecommunications tariffs and regulations; and

WHEREAS, on July 24, 2009, the City issued a Request for Proposal for Telecommunications Billing Audit and Correction Services ("RFP") and received four (4) qualified responses; and

WHEREAS, following a rigorous evaluation of the qualified proposals conducted by the City's Purchasing and General Services Department, Carolyn Arnold Communications Consultant, Inc. ("CACC") received the highest combined score by the evaluation team; and

WHEREAS, the City and CACC engaged in negotiations following the evaluation process resulting in a best and final offer by CACC on September 2, 2009; and

WHEREAS, it is standard practice in the industry for telecommunications auditing consultants to receive compensation for their services based on the recovery of overpayments, typically at 50% level; however, under the best and final offer negotiations with CACC, the City will receive 60% of recoveries and CACC will keep 40% as compensation for services rendered: **NOW THEREFORE:**

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

SECTION 1. The Professional Services Agreement for Telecommunications Billing Audit and Correction Services between the City of San Antonio and Carolyn Arnold Communications Consultant, Inc. ("Agreement") is hereby approved. A copy of the Agreement in substantially its final form is attached hereto and made a part of this Ordinance as Exhibit "A." A copy of the fully executed Agreement will be attached to this Ordinance and will replace Exhibit "A."

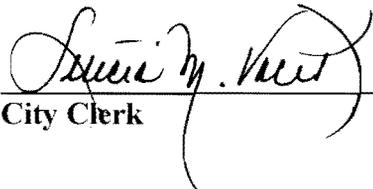
SECTION 2. The City Manager or her designee is hereby authorized for a period of ninety (90) days to execute any and all documents necessary to fulfill the purpose and intent of this Ordinance.

SECTION 3. This Ordinance shall become effective immediately upon the passage by eight (8) votes of the City Council and if passed upon fewer than eight (8) votes after the tenth (10th) day after passage thereof.

PASSED AND APPROVED this 29TH day of OCTOBER 2009.

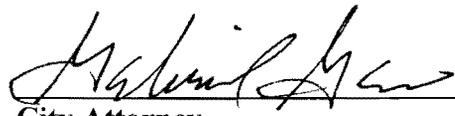

M A Y O R

ATTEST:



City Clerk

APPROVED AS TO FORM:


for _____
City Attorney

Agenda Item:	26						
Date:	10/29/2009						
Time:	11:00:35 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing a professional services agreement with Carolyn Arnold Communications Consultant, Inc. to provide consulting services for auditing telecommunications billings to find instances of overpayment and erroneous billing and recovering those amounts for the City. [Richard Varn, Chief Information Officer; Hugh Miller, Director, Information Technology Services Department]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Mary Alice P. Cisneros	District 1		x				
Ivy R. Taylor	District 2		x				
Jennifer V. Ramos	District 3		x				
Philip A. Cortez	District 4		x				
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Justin Rodriguez	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x				x
John G. Clamp	District 10		x			x	

EXHIBIT A

STATE OF TEXAS

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§
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COUNTY OF BEXAR

**PROFESSIONAL SERVICES AGREEMENT FOR TELECOMMUNICATIONS
BILLING AUDIT AND CORRECTION SERVICES BETWEEN
THE CITY OF SAN ANTONIO AND CAROLYN ARNOLD
COMMUNICATIONS CONSULTANT, INC.**

This Agreement is entered into by and between the City of San Antonio, a home-rule municipal corporation situated in Bexar County, Texas (“City”) acting by and through its City Manager, pursuant to Ordinance No. _____ passed and approved on the _____ day of _____, 2009 and Carolyn Arnold Communications Consultant, Inc. (“CACC” or “Consultant”), both of which may be referred to herein collectively as the “Parties”.

WITNESSETH

WHEREAS, on July 24, 2009, the City issued a Request for Proposal for Telecommunications Billing Audit and Correction Services in response to which the City received four eligible proposals from qualified telecommunications consultants;

WHEREAS, following a rigorous evaluation of the eligible proposals conducted by the City’s Purchasing and General Services Department, CACC received the highest combined score by the evaluation team;

WHEREAS, the City and CACC engaged in negotiations following the evaluation process resulting in a Best and Final Offer (“BAFO”) by CACC on September 2, 2009;

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged and confessed, and intending to be legally bound hereby, the City and CACC agree as follows:

I. DEFINITIONS

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

1.1 “Agreement” shall mean this Professional Services Agreement for Telecommunications Billing Audit and Correction Services between the City of San Antonio and Carolyn Arnold Communications Consultants, Inc., including the City’s Request for Proposal and Consultant’s Proposal.

1.2 “City” shall mean the City of San Antonio represented by the Chief Technology Officer and Director of the Information Technology Services Department as designee for the City Manager.

1.3 "Commencement Date" shall mean October ____, 2009.

1.4 "Consultant" shall mean Carolyn Arnold Communications Consultants, Inc.

1.5 "Director" shall mean the acting director of City's Information Technology Services Department.

1.6 "Request for Proposal" shall mean the City's Request for Proposal for Telecommunications Billing Audit and Correction Services issued on July 24, 2009 attached as Exhibit A.

II. TERM

2.1 Unless sooner terminated in accordance with the provisions of this Agreement, the term of this Agreement shall be for one year with two additional one year periods at the option of the City.

III. SCOPE OF SERVICES

3.1 Provision of Services. The Consultant agrees to provide the services described in this Article III entitled Scope of Services in exchange for the compensation described in Article IV, Compensation to Consultant.

3.2 Statement of Work. The Consultant will perform the following services for the City:

- 3.2.1 Perform a physical inventory of all carrier-provided telecommunications circuits and equipment.
- 3.2.2 Perform an audit of all telecommunications contracts and billings.
- 3.2.3 Recover any overpayments for communications services, surcharges, taxes or other service components or billing elements.
- 3.2.4 Provide recommendations for future savings based on the reconfiguration of carrier-provided telecommunications services, service components, circuits, equipment, and/or customer premise equipment.
- 3.2.5 Present the City with an audit plan outlining the scope, process and time frame for conducting the proposed audit.
- 3.2.6 Provide monthly reports of auditing activities, complete a final audit report at the completion of the assignment, and communicate with City personnel throughout the auditing process.

3.3 Physical Inventory. The Consultant shall conduct a physical inventory of telecommunications services, circuits, and equipment of all City facilities. In conducting the physical inventory the Consultant will make use of dial testing for inventory assessment and site validations as necessary and appropriate for completion and completeness of this task. The Consultant will provide to the City the findings of the physical inventory.

3.4 Historical Telecom Billing Audit Review. In conducting its audit, the Consultant will review historical billing information as far back as is available from the City and the City's telecommunications providers. The Consultant will request, from the appropriate providers, telecommunications invoices (paper, CD, and/or electronic interchange records) and customer service records ("CSRs") for voice, data, long-distance and wireless services. The purpose of the audit is to review all available records to the Universal Service Order Code ("USOC") level. Once information has been gathered from the physical inventory and telecommunications invoices, the Consultant will determine whether billing errors or discrepancies exist, which may include the following: (1) continued charges for discontinued services; (2) contracted or tariff rates applied incorrectly; (3) erroneous or inapplicable fees and surcharges; (4) inapplicable taxes; (5) service installations or disconnections not performed; (6) instances of slamming or cramming of services that were not authorized by the City; and (7) other instances of erroneous billings.

3.5 Recovery of Overpayments. The Consultant shall act as an advocate for the City in pursuing the recovery of overpayments identified through the auditing process. Following negotiations with the telecommunications providers for recovery of overpayments or other billing discrepancy, the Consultant will notify the City of the results of the negotiations. Where the Consultant is successful in its negotiations, the Consultant will instruct the provider to send a check to the City reimbursing the overpayments with interest, and/or fix the discrepancy in the provider's billing system and network (where appropriate to deliver the correct level of service). This practice will only apply to reimbursements in excess of \$300.00. For reimbursement of \$300.00 or less, the City will accept a credit from the relevant provider in the following month's invoice.

3.5.1 Letter of Agency. In order for the Consultant to commence representation of the City in seeking reimbursement of over payments made by the City to telecommunications providers, the City will execute a Letter of Agency in substantially similar form as set out in Exhibit D.

3.6 Future Savings. Prior to pursuing future savings opportunities, the Consultant shall request authority from the City. Future savings opportunities may result from identifying telecommunications services or components of services that the City is being billed for or has been billed for, but which services the City did not receive, does not receive, or no longer needs (as determined by the City). In addition, future savings opportunities may also result from making recommendations for ways to reconfigure

services, service components, and/or equipment in order to receive the same or similar level of service, but at a reduced cost (as accepted by the City).

3.7 Audit Plan. The Consultant shall present an audit plan to the Director within 30 days following approval of this Agreement and based on the Consultant's Proposal which is attached as Exhibit B. The Director or his designee will have the right to review the audit plan and recommend adjustments to its scope, process, and time frame. The Consultant shall adjust the audit plan based on the Director's recommendations and present a revised plan for execution.

3.8 Communications with City. Throughout the auditing process, the Consultant shall communicate with City personnel. Communications may include, but will not be limited to the following reasons: (1) providing monthly activity reports; (2) gathering network and billing information; (3) gaining entry to City facilities; (4) pursuing opportunities for future savings; (5) reporting on status of negotiations with providers; (6) making recommendations to the City; (7) responding to City requests for information; (8) drafting a Final Audit Report; and (9) any other activities as necessary to fulfill the purpose of this Agreement.

3.9 Final Audit Report. At the end of the audit process, the Consultant will provide the City with a written Final Audit Report outlining the results of the audit. Acceptance of the Final Audit Report will require written approval by the Director. The Consultant shall provide the Director a draft of the Final Audit Report 60 days prior to the anticipated end of the audit.

3.10 Satisfaction with Audit. All work performed by the Consultant hereunder shall be performed to the satisfaction of the Director. The determination made by the Director shall be final, binding and conclusive on all Parties hereto. The City shall have the right to terminate this Agreement, in accordance with Article VII, Termination, in whole or in part, should the Consultant's work not be satisfactory to the Director.

IV. COMPENSATION TO CONSULTANT

4.1 Contingency Fee. In consideration of the Consultant's performance in a satisfactory and efficient manner of all services and activities set forth in this Agreement, the City agrees to pay the Consultant as follows:

4.1.1 A contingency fee of forty percent (40%) of all recoveries of overpayments made on behalf of the City.

4.1.2 A contingency fee of forty percent (40%) of future savings over a nine (9) month period.

4.1.3 The Consultant will be paid out of the proceeds recovered as a result of the audit and only after the City has received reimbursement for overpayments, or the benefit of future savings.

The Consultant will be eligible to receive the appropriate contingency fee on an on-going basis following each event of reimbursement and each implementation or reconfiguration of services that results in future savings to the City.

4.2 No Other Compensation. 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 the Consultant have been provided for in the total payment to the Consultant as specified in section 4.1 above. Total payments to the Consultant cannot exceed that amount set forth in section 4.1 above, without prior approval and agreement of all parties, evidenced in writing and approved by the San Antonio City Council by passage of an ordinance therefore.

4.3 Final Compensation. The City will be entitled to withhold compensation based on the last event of reimbursement at the end of the audit process pending completion of the Final Audit Report. The Director will have the discretion to waive this requirement if he is satisfied that there will be no delay in the completion of the Final Audit Report. The City shall not be obligated or liable under this Agreement to any party, other than the Consultant, for the payment of any monies or the provision of any services.

V. OWNERSHIP OF DOCUMENTS

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

5.2 The Consultant understands and acknowledges that as the exclusive owner of any and all such writings, documents and information, City has the right to use all such writings, documents and information as City desires, without restriction.

VI. RECORDS RETENTION

6.1 The 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 The 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, the Consultant shall retain the records until the resolution of such litigation or other such questions. The Consultant acknowledges and agrees that the City shall have access to any and all such documents at any and all times, as deemed necessary by the City, during said retention period. The City may, at its election, require the Consultant to return said documents to the City prior to or at the conclusion of said retention.

6.3 The Consultant shall notify City, immediately, in the event the Consultant receives any requests for information from a third party, which pertain to the documentation and records referenced herein. The Consultant understands and agrees that the 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. Term, or earlier termination pursuant to any of the provisions hereof.

7.2 Termination Without Cause. This Agreement may be terminated by either party upon 60 days written notice, which notice shall be provided in accordance with Article VIII. Notice.

7.3 Termination For Cause. Upon written notice, which notice shall be provided in accordance with Article VIII. Notice, 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. Assignment and Subcontracting.

7.4 Defaults With Opportunity for Cure. Should the Consultant default in the performance of this Agreement in a manner stated in this section 7.4 below, and the Consultant fails to cure following notice and the opportunity to cure, the Consultant's failure to cure shall be considered an event of default. The City shall deliver written notice of said default specifying such matter(s) in default. The Consultant shall have fifteen (15) calendar days after receipt of the written notice to cure SBEDA related activities, and thirty (30) days for other events of default, in accordance with Article VIII. Notice. If the Consultant fails to cure the default within the corresponding period, the City shall have the right, without further notice, to terminate this Agreement in whole or in part as the City deems appropriate, and to contract with another consultant to complete the work required in this Agreement. The City shall also have the right to offset the cost of said new Agreement with a new consultant against the Consultant's future or unpaid

compensation, subject to the duty on the part of the City to mitigate its losses to the extent required by law.

- 7.4.1 Failure to comply with the terms and conditions stated in Article XIV. SBEDA.
- 7.4.2 Bankruptcy or selling substantially all of company's assets
- 7.4.3 Failing to perform or failing to comply with any covenant herein required
- 7.4.4 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, the 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 the 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 the Consultant, or provided to the Consultant, hereunder, regardless of storage medium, if so requested by the City, or shall otherwise be retained by the Consultant in accordance with Article VI. Records Retention. Any record transfer shall be completed within thirty (30) calendar days of a written request by the City and shall be completed at the Consultant's sole cost and expense. Payment of compensation due or to become due to the Consultant is conditioned upon delivery of all such documents, if requested.

7.7 In the event of early termination of this Agreement, the Consultant shall submit to the City its claims, in detail, for the monies owed by the City for services performed under this Agreement through the effective date of termination.

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

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

VIII. NOTICE

8.1 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: Kevin Goodwin
Information Technology Services
Department
515 Frio
San Antonio, Texas _____

If intended for Consultant, to: Carolyn Arnold Communications
Consultants, Inc.
Attn: Carolyn Arnold
32884 IH-10 West
Boerne, Texas 78006

IX. INTELLECTUAL PROPERTY

9.1 The Consultant will be responsible for complying with all intellectual property and copyright state and federal laws, including the purchase of appropriate software licenses, necessary to utilize the analytical tools required to conduct the telecommunications billings audit and provide the service outlined in this Agreement.

X. INSURANCE

10.1 Prior to the commencement of any work under this Agreement, the Consultant shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the City's Information Technology Services Department, which shall be clearly labeled "*Telecommunications Consulting Services*" 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 Information Technology Services 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 the City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will the City allow modification whereupon the City may incur increased risk.

10.3 The Consultant's financial integrity is of interest to the City; therefore, subject to the Consultant's right to maintain reasonable deductibles in such amounts as are approved by the City, the Consultant shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at the 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 of Coverage	Amounts
1. Professional Liability (Claims Made Form)	\$1,000,000 per claim to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error, or omission in professional services.
2. Workers' Compensation	Statutory
3. Employers' Liability	\$1,000,000/\$1,000,000/\$1,000,000
4. Commercial General (public) Liability Insurance to include coverage for the following: a. Premises/Operations b. Independent Contractors c. Products/complete operations d. Personal Injury e. Contractual liability f. Property damage, to include Fire Legal Liability	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence; General Aggregate limit of \$2,000,000 per occurrence or its equivalent in umbrella or excess liability coverage (f) Property damage, minimum of \$50,000
5. Business Automobile Liability a. Owned/Leased Vehicles b. Non-Owned Vehicles c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence

10.4 The City shall be entitled, upon request and without expense, to receive copies of the policies, declaration 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 the City at the address provided below within 10 days of the requested change. The Consultant shall pay any costs incurred resulting from said changes.

City of San Antonio
Attn: Information Technology Services Department
P.O. Box 839966
San Antonio, Texas 78283-3966

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

- Name the City, 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.
- 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 notice for nonpayment of premium.

10.6 Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, the Consultant shall provide a replacement Certificate of Insurance and applicable endorsements to the City. The City shall have the option to suspend the 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 the 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 the Consultant to stop work hereunder, and/or withhold any payment(s) which become due to the Consultant hereunder until the Consultant demonstrates compliance with the requirements hereof.

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

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

10.9 It is agreed that the 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.

10.11 The Consultant and any subcontractors are responsible for all damage to their own equipment and/or property.

XI. INDEMNIFICATION

11.1 CONSULTANT covenants and agrees to FULLY INDEMNIFY, DEFEND and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY directly or indirectly arising out of, resulting from or related to 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 the rights or performance of the 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 THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

11.2 The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. The CONSULTANT shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or CONSULTANT known to the CONSULTANT related to or arising out of the CONSULTANT'S activities under this AGREEMENT and shall see to the investigation and defense of such claim or demand at the CONSULTANT'S cost. The CITY shall have the right, at its option and at its own

expense, to participate in such defense without relieving the CONSULTANT of any of its obligations under this paragraph.

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

11.4 Employee Litigation. In any and all claims against any party indemnified hereunder by any employee of the 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 the CONSULTANT or any subcontractor under worker's compensation or other employee benefit acts.

XII. ASSIGNMENT AND SUBCONTRACTING

12.1 The 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 or subcontractors of the Consultant. The Consultant, its employees or its subcontractors shall perform all necessary work.

12.2 It is the City's understanding based on the Consultant's Proposal that the Consultant does not intend to use the any subcontractors in the performance of this Agreement.

12.3 Except as otherwise stated herein, the 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 consent of the City Council, as evidenced by passage of an ordinance.

12.4 Any attempt to transfer, pledge or otherwise assign this Agreement without said written approval, shall be void *ab initio* and shall confer no rights upon any third person. Should the 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, the City may, at its option, cancel this Agreement and all rights, titles and interest of the Consultant shall thereupon cease and terminate, in accordance with Article VII. Termination, notwithstanding any other remedy available to the City under this

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

XIII. INDEPENDENT CONTRACTOR

13.1 The Consultant covenants and agrees that it is an independent contractor and not an officer, agent, servant or employee of the City; that the 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 the City and the 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 the City and the 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.

XIV. SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY (SBEDA)

14.1 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:

14.2 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.

14.3 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.

14.4 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.

14.5 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 the Consultant’s proposal for this project Agreement, attached hereto and incorporated herein as “Exhibit C”.

14.6 For this Agreement, the Parties agree that:

14.6.1 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

14.6.2 The failure of the 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.

14.6.3 Failure of the 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.

14.6.4 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 the Consultant’s SBEDA Plan (“Exhibit C”) shall constitute a material breach of the SBEDA Program and this Agreement.

14.6.5 The Consultant shall pay all suppliers and subcontractors identified in its SBEDA Plan (“Exhibit C”) 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.

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

14.7.1 Failure of the 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

14.7.2 Modification or elimination by the Consultant of all or a portion of the scope of work attributable to an SE upon which the Agreement was awarded; or

14.7.3 Termination by the 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

14.7.4 Participation by the Consultant in a Conduit relationship with an SE scheduled to perform work that is the subject of this Agreement.

14.8 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:

14.8.1 Terminate this Agreement for default;

14.8.2 Suspend this Agreement for default;

14.8.3 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

14.8.4 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.

14.8.5 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.

14.9 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.

14.10 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.

14.11 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 consultant 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.

14.12 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:

14.12.1 a SBEDA Utilization Goal for the extended period; and

14.12.2 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

14.12.3 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 of the Agreement that was considered for extension.

XV. CONFLICT OF INTEREST

15.1 The 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 contract or sale: a City officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (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, the 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. The 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 the City and the Consultant, and subject to approval by the City Council, as evidenced by passage of an ordinance.

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 the 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 The Consultant warrants and certifies that the 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 The 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 the City, such changes must be approved by the City Council, as described in Article XVI, Amendments. 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 the Consultant represents, warrants, assures and guarantees that he has full legal authority to execute this Agreement on

behalf of the Consultant and to bind the 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:

- 25.1.1 Exhibit A: The City's Request for Proposal for Telecommunications Audit and Correction Services
- 25.1.2 Exhibit B: CACC's Proposal
- 25.1.3 Exhibit C: CACC's Good Faith Effort Plan
- 25.1.4 Exhibit D: Letter of Agency

25.2 In the event of a conflict between this Agreement and any Exhibit, this Agreement will prevail followed by the Request for Proposal, followed by CACC's Proposal.

XXVI. ENTIRE AGREEMENT

26.1 This Agreement, together with its authorizing ordinance and its exhibits 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. Amendments.

EXECUTED and **AGREED** to as of the dates indicated below.

CITY OF SAN ANTONIO

**CAROLYN ARNOLD
COMMUNICATIONS
CONSULTANTS, INC.**

(Signature)

Printed Name: Sheryl L. Sculley
Title: City Manager
Date: _____

(Signature)

Printed Name: Carolyn Arnold
Title: President
Date: _____

APPROVED AS TO FORM:

City Attorney