SW/mgc
03/13/08
Item # 22

AN ORDINANCE 2008-03-13-0208

APPROVING A FUNDING AGREEMENT WITH THE SAN ANTONIO MUSEUM ASSOCIATION, D/B/A THE WITTE MUSEUM FOR THE EXPENDITURE OF UP TO $3,750,000.00 FOR CONSTRUCTION OF THE BRACKENRIDGE PARK PARKING FACILITY, LOCATED IN DISTRICT 9.

* * * * *

WHEREAS, on June 28, 2007, City Council approved a $400,000.00 Funding Agreement with the Witte Museum to complete appropriate studies, surveys, and design of a Brackenridge Park Parking Facility; and

WHEREAS, this project is associated with the relocation of the 4 acre City Nursery from Brackenridge Park on Avenue B to facilitate the development of a parking facility in that area of the park; and

WHEREAS, the Witte Museum, in conjunction with Lake/Flato Architects, completed the required tree survey, archeological, environmental, and geotechnical studies, engineering, conceptual and final design, and construction cost estimates for the parking facility; and

WHEREAS, construction of the parking facility maximizes available parking for visitors to Brackenridge Park, minimizes impervious cover, and takes into consideration the parking needs of the Witte Museum for their planned expansion; and

WHEREAS, the current design is for a three level parking structure consisting of approximately 325 parking spaces, with an approximate footprint of 39,000 square feet; and

WHEREAS, public meetings regarding the parking facility were held with the Parks and Recreation Board and the Historic and Design Review Commission which provided opportunities for input from stakeholders, including neighborhood organizations; and

WHEREAS, on December 19, 2007, the Historic and Design Review Commission approved the parking garage design; and

WHEREAS, public input has generally been in support of the parking facility; however, concern has been expressed about the potential loss of existing trees to construct the structure; and

WHEREAS, a tree preservation and relocation plan for the site has been developed to protect 70% of the diameter inches of protected trees; and

WHEREAS, the City Nursery, to be relocated to the new Parks and Recreation Operations Headquarters in District 6, will be returned to vegetated park land; **NOW THEREFORE:**

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

SECTION 1. The City Manager or her designee, or the Director of Parks and Recreation or his designee is authorized to execute a Funding Agreement with the San Antonio Museum Association, d/b/a The Witte Museum for the expenditure of up to $3,750,000.00 for construction of the Brackenridge Park parking facility, located in District 9. A copy of the agreement is attached hereto and incorporated herein for all purposes as Attachment I.

SECTION 2. The amount of $2,500,000.00 is appropriated in SAP Fund 43902025, 2007 CO Parks and Recreation Improvements, SAP WBS CO-20750-01-01-13, SAP GL account 6102100 Interfund Transfer out entitled Transfer to 40-00180-90-01. The amount of $2,500,000.00 is authorized to be transferred to SAP Fund 43099000.

SECTION 3. The budget in SAP Fund 43099000, SAP Project Definition 40-00180, Witte Museum/Brackenridge Parking, shall be revised by increasing SAP WBS element 40-00180-90-01 entitled Trf Fr CO-20750-01-01-13, SAP GL account 6101100 Interfund Transfer In, by the amount of $2,500,000.00.

SECTION 4. The amount of $2,500,000.00 is appropriated in SAP Fund 43099000, SAP Project Definition 40-00180, Witte Museum/Brackenridge Parking, SAP WBS Element 40-00180-05-02-01, entitled City Construction, SAP GL Account 5201140, and is authorized to be encumbered and made payable, for construction services.

SECTION 5. The budget in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 20-00136, Witte Museum, shall be revised by decreasing SAP WBS Element 40-00136-01-03 entitled Consultant Contract Fees, SAP GL account 5201170, by the amount of $138,318.75.

SECTION 6. The budget in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 20-00136, Witte Museum, shall be revised by decreasing SAP WBS Element 40-00136-01-07 entitled Project Capital Administrative Costs, SAP GL account 5402010, by the amount of $74,231.06.

SECTION 7. The budget in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 20-00136, Witte Museum, shall be revised by decreasing SAP WBS Element 40-00136-01-08 entitled Design Enhancement, SAP GL account 5201040, by the amount of $9,221.25.

SECTION 8. The budget in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 20-00136, Witte Museum, shall be revised by decreasing SAP WBS Element 40-00136-04-01 entitled, SAP GL account 5402010 by the amount of $2,922.00.

SECTION 9. The budget in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 20-00136, Witte Museum, shall be revised by decreasing SAP WBS Element

40-00136-04-02 entitled Environmental Cost, SAP GL account 5201040 by the amount of $9,221.25.

SECTION 10. The budget in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 20-00136, Witte Museum, shall be revised by decreasing SAP WBS Element 40-00136-05-07 entitled Project Contingency, SAP GL account 5201040 by the amount of $93,960.69.

SECTION 11. The budget in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 20-00136, Witte Museum, shall be revised by increasing SAP WBS Element 40-00136-05-02-01 entitled City Construction, SAP GL Account 5201140, by the amount of $327,875.00.

SECTION 12. 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 allocations 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 13. This ordinance shall be effective on and after March 23, 2008.

PASSED AND APPROVED this 13th day of March, 2008.

M A Y O R
PHIL HARDBERGER

ATTEST: _____
City Clerk

APPROVED AS TO FORM: _____
for City Attorney

Request to: COUNCIL ACTION

City of San Antonio

Agenda Voting Results - 22

Name:	6, 7, 9, 10, 11, 13, 19, 20, 21, 22, 23A, 23B
Date:	03/13/2008
Time:	12:10:54 PM
Vote Type:	Motion to Approve
Description:	An Ordinance approving a Funding Agreement with the San Antonio Museum Association, d/b/a The Witte Museum for the expenditure of up to $3,750,000.00 for construction of the Brackenridge Park parking facility, located in District 9. [Frances A. Gonzalez, Assistant City Manager; Malcolm Matthews, Director, Parks and Recreation]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Phil Hardberger	Mayor		x				
Mary Alice P. Cisneros	District 1		x				x
Sheila D. McNeil	District 2		x				
Jennifer V. Ramos	District 3		x				
Philip A. Cortez	District 4	x					
Lourdes Galvan	District 5		x				
Delicia Herrera	District 6		x			x	
Justin Rodriguez	District 7		x				
Diane G. Cibrian	District 8		x				
Louis E. Rowe	District 9		x				
John G. Clamp	District 10		x				

CMS or Ordinance Number: CN4600007032

TSLGRS File Code:1075-16

Document Title:
CONT - Approving a funding agreement with the San Antonio Museum Association, D/B/A The Witte Museum for the expenditure up to $3,750,000.00 for the

Commencement Date: 3/27/2008

Expiration Date: 12/31/2009

STATE OF TEXAS §
§
COUNTY OF BEXAR § **FUNDING AGREEMENT – WITTE MUSEUM**

This AGREEMENT (the "Agreement") is hereby made and entered into by and between the CITY OF SAN ANTONIO (hereinafter referred to as "CITY"), a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance No. 2008-03-13-0208 dated March 13, 2008, and SAN ANTONIO MUSEUM ASSOCIATION, D/B/A THE WITTE MUSEUM (hereinafter referred to as "GRANTEE"), a Texas non-profit corporation, acting by and through its President/CEO, hereto duly authorized.

WHEREAS, CITY and GRANTEE entered into a Funding Agreement approved by the CITY on June 28, 2007 for $400,000 in 1999 Bond funds for schematic design, design development, construction documents, surveys, site testing, site assessment, development and evaluation of location options on Avenue B, and cost estimation in connection with a future Brackenridge Park Parking Facility ("Parking Facility"); and

WHEREAS, GRANTEE has completed the work associated with the June 28, 2007 Funding Agreement; and

WHEREAS, $1,250,000 in 2007 Bond funds for general improvements benefiting the Witte Museum, including parking improvements, and $2,500,000 in General Fund Certificates of Obligation funds in the CITY's FY07/08 Budget, for a total of $3,750,000 are now available for the construction of the Parking Facility; and

WEREAS, CITY and GRANTEE desire for GRANTEE to facilitate the construction of this Parking Facility to be constructed on CITY-owned land,

NOW THEREFORE, the parties hereto (the "Parties") severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described.

I. TERM

1.01 This AGREEMENT shall continue in full force and effect until the earlier to occur of (i) the completion of the Parking Facility and final payments have been made therefore and (ii) two years from the date of its execution, except for those covenants contained herein which will expire of their own accord prior to that date.

II. GENERAL RESPONSIBILITIES

2.01 Provided GRANTEE receives the funding described in Section 6.01, GRANTEE

shall perform the services and activities described in this AGREEMENT to implement the construction of the Parking Facility. The funds provided for under this AGREEMENT shall only be used for work directly related to the Parking Facility to include construction costs, construction contingency, construction administration, all required permits and inspections, including state and local, building materials and components and other items set forth in the approved Budget (hereinafter defined).

2.02 If GRANTEE elects to utilize any selection process other than low bids to select the general contractor or general contractors for the Parking Facility (the "Contractor"), CITY shall have the right to participate in the selection process. CITY acknowledges that GRANTEE may enter into one or more construction contracts to construct the Parking Facilities, subject to the provisions hereof.

2.03 Within forty-five (45) days following the completion of the Parking Facility, GRANTEE shall provide to CITY the following items: a) as-built drawings, in both electronic and reproducible Mylar format, b) Certificate of Occupancy, c) copies of all permits, d) final release of lien from the Contractor, d) operation and maintenance specifications on all equipment and systems, e) information on all warranties, including the contact person , and f) any other documents or information in GRANTEE'S possession or control related to the operation and maintenance of the Parking Facility. For purposes of this Agreement "completion" of the Parking Facility shall be deemed to be on the date that all of the following have occurred: (i) final payment has been made to all Contractors, including any retainage payments, (ii) GRANTEE has obtained full and final releases of liens from Contractor and all subcontractors as may be required by GRANTEE, (iii) all punchlist items have been fully completed to GRANTEE'S and GRANTOR'S satisfaction, and (iv) a final Certificate of Occupancy has been issued for the Parking Facility by the proper governmental authority and delivered to the City of San Antonio.

2.04 Unless written notification by GRANTEE to the contrary is received and approved by CITY, GRANTEE'S President/CEO shall be GRANTEE'S designated representative responsible for the administration of this AGREEMENT on behalf of GRANTEE.

2.05 The Parks and Recreation Director ("Director") or his designee, is responsible for the administration of this AGREEMENT on behalf of CITY.

2.06 Communications between CITY and GRANTEE shall be directed to the designated representatives of each as set forth in Sections 2.05 and 2.06 hereinabove.

2.07 GRANTEE may enter into one or more construction contracts and shall oversee construction of the Parking Facility based on plans approved by the City's Historic and Design Review Commission (HDRC) on December 19, 2007 ("Plans"). Any modifications to the Plans shall be subject to the prior review and approval of the Director and CITY shall notify GRANTEE in writing of CITY'S approval or disapproval (and reasons therefore) within ten (10) days of GRANTEE'S submittal of proposed modifications to the Plans, along with reasonable detailed documentation in support thereof. GRANTEE shall process the Plans through the CITY for routine governmental review of design and building requirements prior to commencement of any work requiring such review. CITY acknowledges that GRANTEE shall have no liability for

the design and engineering of the Parking Facility other than to oversee construction as set forth herein and CITY'S only recourse for design, engineering and other consulting errors and omissions shall be against the design, engineering and other consultants and GRANTEE hereby assigns all necessary rights that it has secured in contracting for such professional and consulting services related to the project to CITY. CITY shall have no recourse against GRANTEE for design, engineering or other consulting errors and omissions.

2.08 GRANTEE hereby acknowledges that the Parking Facility will be constructed on land owned by CITY and GRANTEE shall have no ownership interest in the Parking Facility or underlying land provided however, the Parking Facility will be open to the public when complete and GRANTEE and its employees and patrons shall have the right to use the Parking Facility.

2.09 GRANTEE has agreed to assume certain maintenance responsibilities for the completed Parking Facility and those responsibilities and rights will be documented in a future Memorandum of Understanding between the Parties.

III. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS

3.01 GRANTEE warrants and represents that it will comply with all Federal, State and Local laws and regulations applicable to GRANTEE, and to GRANTEE'S use of City Funds, and GRANTEE will use all reasonable efforts, to ensure compliance of the Parking Facility with all Federal, State, and local laws, including such compliance by any and all contractors and subcontractors that may work on the Parking Facility.

3.02 To the extent applicable, in connection with its activities hereunder, GRANTEE agrees to abide by the bidding laws which apply to CITY use of CITY funds, including without limitation, Chapter 252 of the Texas Local Government Code, or other competitive contracting processes allowed for as exceptions to Chapter 252. GRANTEE further agrees, to the extent applicable, to abide by and contractually obligate all GRANTEE's contractors to abide by, Public Works construction laws, including Government Code provision providing for performance and payment bonds on certain Public Works contracts, as well as the Prevailing Wage Rate regulations required for certain Public Works Contracts.

3.03 GRANTEE and CITY will cooperate with each other to ensure compliance with the applicable provisions of the City of San Antonio Small Business Economic Development Advocacy Ordinance (Ordinance No. 2007-04-12-0396 in connection with awards of any construction contracts for the Parking Facility). Grantee may obtain authoritative interpretations and guidance for such compliance from the City's Department of Economic Development.

3.04 If applicable, the Plans must conform to Americans with Disabilities Act requirements and must be approved by the Texas Department of Licensing and Regulation before construction may begin.

IV. LEGAL AUTHORITY

4.01 GRANTEE represents, warrants, assures, and guarantees that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this AGREEMENT and to perform the responsibilities herein required.

4.02 GRANTEE represents, warrants, assures and guarantees that the undersigned has full legal authority to execute this AGREEMENT on behalf of GRANTEE and to bind GRANTEE to all terms, performances and provisions herein contained.

V. PERFORMANCE BY GRANTEE

5.01 GRANTEE, in accordance and compliance with the terms, provisions and requirements of this AGREEMENT, shall oversee, and manage construction of the Parking Facility in accordance with the provisions of this Agreement.

5.02 Prior to commencement of construction (other than the relocation of trees) of the Parking Facility, GRANTEE shall provide CITY with a project budget reflecting all expenses including, but not limited to, general contractor contracts, project management, permitting, landscaping, and all other fees associated with the Plans and construction of the Parking Facility (the "Budget"). If the Budget amount exceeds $3,750,000, GRANTEE and the CITY shall work together in good faith to value engineer the Parking Facility and revise the Plans and take other actions reasonably necessary in order to reduce the Budget to an amount which does not exceed $3,750,000. If Both Parties agree that additional funding is required for completion of the Project, an extension of the Term of the Agreement for twelve additional months will be granted by the CITY. Any additional CITY funding above $3,750,000 will be at the discretion of the City Council. Nothing herein constitutes a forward commitment of funds on the part of the CITY for the completion of the facility should it exceed the current budgeted amount of $3.75 Million.

VI. FUNDING AND ASSISTANCE BY CITY

6.01 In consideration of GRANTEE'S performance of all services and activities set forth in this AGREEMENT, CITY agrees to provide payment of $3,750,000 to GRANTEE within Twenty-five (25) days after approval of the Ordinance by City Council to be used for eligible expenses incurred hereunder as set forth in the Budget or otherwise expressly approved by CITY.

6.02 CITY shall not be obligated nor liable under this AGREEMENT to any party, other than GRANTEE, for payment of any monies or provision of any goods or services.

VII. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY GRANTEE

7.01 GRANTEE understands and agrees that it shall maintain a numbered interest bearing account in an FDIC insured financial institution for the receipt and disbursement of all

funds received pursuant to this AGREEMENT and further agrees that all checks and withdrawals from such account shall have itemized documentation in support thereof pertaining to the use of CITY funds provided under this AGREEMENT. All interest earned on funds in the account shall be applied to the allowable costs of construction of the Parking Facility in accordance with the provisions hereof.

7.02 After the review and approval of invoices for allowable expenses by GRANTEE's architect and GRANTEE, GRANTEE shall forward such invoices to CITY for review and approval. CITY shall notify GRANTEE in writing of CITY'S approval or disapproval (and reasons therefore) within seven (7) calendar days of GRANTEE'S submittal of all invoices. Prior to authorization of payments by CITY, CITY will have the right to inspect work completed to ensure conformance with the Plans. GRANTEE shall not pay any invoices without the prior written approval of CITY. GRANTEE hereby agrees to promptly pay all invoices after approval by CITY.

7.03 GRANTEE agrees to maintain records that will provide accurate, current, separate, and complete disclosure of the status of any funds received pursuant to this AGREEMENT. GRANTEE further agrees:

(A) That maintenance of said records shall be in compliance with all terms, provisions, and requirements of this AGREEMENT and with all generally accepted accounting practices; and

(B) That GRANTEE's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

7.04 GRANTEE agrees to retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials (hereinafter "records") pertaining to activities pertinent to this AGREEMENT for a minimum of four (4) years from the completion of the Parking Facility.

7.05 CITY agrees to provide GRANTEE written notice regarding any expenditure the CITY reasonably determines to be outside the permissible parameters of this AGREEMENT within seven (7) days of CITY's receipt of the request required by Section 7.04 above. Said notice will provide GRANTEE thirty (30) days from receipt of said notice to cure the deficiency or refund to the CITY any sum of money paid by CITY to GRANTEE determined to:

(A) Have not been spent by GRANTEE strictly in accordance with the terms of this AGREEMENT; or

(B) Not be supported by adequate documentation to fully justify the expenditure.

7.06 Upon termination of this AGREEMENT, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in section 7.05 above

as a result of any auditing or monitoring by CITY, GRANTEE shall refund such amount to CITY within thirty (30) working days of CITY's written request therefor wherein the amount disallowed or disapproved shall be specified. In addition, any unused funds shall be returned to CITY within thirty (30) days following the termination of this Agreement.

VIII. ALLOWABLE EXPENDITURES AND OWNERSHIP OF PROPERTY

8.01 GRANTEE shall submit the Budget to CITY in accordance with Section 5.02 hereof for approval of any costs to be paid from funds received hereunder and CITY shall notify GRANTEE in writing of CITY'S approval or disapproval (and reasons therefore) within ten (10) days after GRANTEE'S submittal of the proposed Budget, along with reasonably detailed documentation in support thereof. Costs shall be considered allowable only if so approved in GRANTEE'S Budget, or otherwise approved in advance by CITY in writing, and incurred directly and specifically in the performance of and in compliance with this AGREEMENT and with all city, state and federal laws; regulations and ordinances affecting GRANTEE's operations hereunder. CITY acknowledges that the amount of $175,000.00 for relocation of trees is approved as a reimbursable expense hereunder. Only costs associated with the Parking Facility, as outlined in Section 2.01 above and in an amount not to exceed $3,750,000 shall be considered allowable unless otherwise expressly approved by CITY. If GRANTEE desires to make changes to the Budget, GRANTEE shall submit such proposed changes to CITY for review and approval and CITY shall notify GRANTEE in writing of CITY'S approval or disapproval (and reasons therefor) within ten (10) days after GRANTEE'S submittal of the proposed change along with reasonably detailed documentation in support thereof.

Expenditures of the funds provided under this AGREEMENT shall only be allowed if incurred directly and specifically in the performance of and in compliance with this AGREEMENT and all applicable city, state and federal laws, regulations and/or ordinances.

8.02 The following shall not be considered allowable costs under this AGREEMENT:

- Personnel costs, salaries or wages paid directly by GRANTEE
- Travel
- Costs or fees for consultant and/or professional services, except for those directly related to the Parking Facility
- Costs or fees associated with attendance at meetings, seminars, or conferences, except as outlined in this AGREEMENT
- Costs or fees associated with regular maintenance and operation
- Fundraising
- Equipment and Furnishings except as set forth in the Budget and as indicated on the approved plans

8.03 Procurements and/or purchases which must be approved pursuant to the terms of this AGREEMENT shall be conducted entirely in accordance with all applicable terms, provisions and requirements hereof.

IX. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

9.01 GRANTEE further represents and warrants that as of the date hereof:

(A) All information, data or reports heretofore or hereafter provided to CITY is, shall be, and shall remain complete and accurate in all material respects as of the date shown on the information, data, or report, and that since said date shown, shall not have undergone any significant change without written notice to CITY.

(B) It is financially stable and capable of fulfilling its obligations under this AGREEMENT and that GRANTEE shall provide CITY immediate written notice of any adverse material change in the financial condition of GRANTEE that may materially and adversely effect its obligations hereunder.

(C) No litigation or proceedings are presently pending or to GRANTEE'S knowledge, threatened against GRANTEE, except for a lawsuit styled *Michael A. Giguere v. The Witte Museum et al*, Cause No. 2002-CI-03360 filed in the 166th Judicial District Court in Bexar County, Texas, which GRANTEE does not consider to be of material consequence.

(D) None of the provisions contained herein contravene or in any way conflict with the authority under which GRANTEE is doing business or with the provisions of any existing indenture or agreement of GRANTEE.

X. ACCESSIBILITY OF RECORDS

10.01 At any time during normal business hours and as often as CITY may deem necessary, upon three (3) days written notice, GRANTEE shall make all of its records pertaining to this AGREEMENT available to CITY or any of its authorized representatives, and shall permit CITY or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

10.02 GRANTEE agrees and represents that it will cooperate with CITY, at no charge to the CITY, to satisfy, to the extent required by law, any and all requests for information received by CITY under the Texas Public Information Act or related laws pertaining to this AGREEMENT.

XI. MONITORING AND EVALUATION

11.01 GRANTEE agrees that CITY may carry out reasonable monitoring and evaluation activities, and GRANTEE shall provide reasonable access to CITY for such activities, so as to ensure compliance by GRANTEE with this AGREEMENT and with all other laws, regulations and ordinances related to the performance hereof.

XII. INDEMNITY

12.01 **GRANTEE COVENANTS AND AGREES TO FULLY REIMBURSE, INDEMNIFY, AND HOLD HARMLESS, CITY AND THE ELECTED OFFICIALS, AGENTS, EMPLOYEES, OFFICERS, DIRECTORS, VOLUNTEERS, CONTRACTORS, SUBCONTRACTORS, CONSULTANTS, SUB-CONSULTANTS 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 GRANTEE'S NEGLIGENT ACTIVITIES OR OMISSIONS UNDER THIS AGREEMENT, INCLUDING ANY NEGLIGENT ACTS OR OMISSIONS OF ANY AGENT, OFFICER, DIRECTOR, OR EMPLOYEE OF GRANTEE, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES, BUT EXPRESSLY EXCLUDING ANY ACTS OR OMISSIONS OF CONTRACTOR AND ANY EMPLOYEES, AGENTS, OFFICERS, DIRECTORS, REPRESENTATIVES, CONSULTANTS, AND SUB-CONTRACTORS OF CONTRACT WHILE IN THE EXERCISE OF THE PERFORMANCE OF THE RIGHTS OR DUTIES UNDER THIS AGREEMENT, 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 THE 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 GRANTEE 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. GRANTEE SHALL PROMPTLY ADVISE CITY IN WRITING OF ANY CLAIM OR DEMAND AGAINST CITY OR GRANTEE KNOWN TO GRANTEE AND**

RELATED TO OR ARISING OUT OF GRANTEE'S NEGLIGENT ACTIVITIES OR OMISSIONS UNDER THIS AGREEMENT, AND SHALL SEE TO THE INVESTIGATION AND DEFENSE OF SUCH CLAIM OR DEMAND AT GRANTEE'S COST. NOTWITHSTANDING ANY CONDITION IMPOSED BY A POLICY OF INSURANCE TO WHICH GRANTEE 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 UNDER THIS AGREEMENT WITHOUT RELIEVING GRANTEE OF ANY OF ITS OBLIGATIONS UNDER THIS AGREEMENT.

12.02 **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 AGREEMENT, CAUSED BY THE NEGLIGENCE OF CITY AND/OR ITS EMPLOYEES.**

XIII. INSURANCE

13.01 GRANTEE shall cause the construction contract(s) to require the Contractor to obtain all insurance coverages with minimum limits of not less than those limits delineated in Section 13.04 (Insurance table) and otherwise comply with this Section XIII and require each vendor and sub-contractor subcontracted by the Contractor to comply with the same to the extent applicable and provide a Certificate of Insurance and Endorsement that names the Contractor, GRANTEE, and the CITY as an additional insured. Grantee shall further require indemnification from any Contractor Grantee hires.

13.02 Prior to the commencement of any construction work on the Parking Facility the Contractor shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the CITY, which shall be clearly labeled "*Brackenridge Park Parking Facility*" 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 authorize payments or perform under this Agreement until such certificate and endorsements have been received and approved by the CITY. No officer or employee, other than the CITY's Risk Manager, shall have authority to waive this requirement.

13.03 CITY reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by CITY's Risk

Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will CITY allow modification whereupon CITY may incur increased risk.

13.04 Contractor's financial integrity is of interest to the CITY; therefore, subject to Contractor's right to maintain reasonable deductibles in such amounts as are approved by CITY. Contractor shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Contractor'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:

TYPE	AMOUNTS
1. Workers' Compensation 2. Employers' Liability	Statutory $1,000,000/$1,000,000/$1,000,000
3. Commercial General Liability Insurance to include coverage for the following: a. Premises operations *b. Independent Contractors c. Products/completed operations d. Personal Injury e. Contractual Liability f. Broad form property damage, to include fire legal liability	For Bodily Injury and Property Damage of $1,000,000 per occurrence; $2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage
4. 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
5. Builders Risk	100% of value of construction cost.

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

City of San Antonio
Attn: Parks & Recreation Department
P.O. Box 839966

San Antonio, Texas 78283-3966

13.06 With respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

- Name the CITY, GRANTEE, and their respective officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY and/or GRANTEE, with the exception of the workers' compensation and professional liability polices;

- Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio and GRANTEE where the CITY and GRANTEE are additional insured shown on the policy;

- Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the CITY and GRANTEE.

- Provide thirty (30) calendar days advance written notice directly to CITY and GRANTEE 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.

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

13.08 Nothing herein contained shall be construed as limiting in any way the extent to which Contractor may be held responsible for payments of damages to persons or property resulting from Contractor's or its subcontractors' performance of the work covered under this Agreement.

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

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

XIV. COMPLIANCE WITH SMALL, MINORITY AND WOMAN-OWNED BUSINESS ENTERPRISES POLICY, NON-DISCRIMINATION AND EQUAL EMPLOYMENT OPPORTUNITY POLICY

14.01 GRANTEE is hereby advised that it is the policy of the City of San Antonio that Small, Minority or Woman-owned Business Enterprises (SMWBE) shall have the maximum practical opportunity to participate in the performance of public contracts. In all events, GRANTEE shall comply with the CITY's Small Business Economic Development Advocacy Program, contained in San Antonio Ordinance No. 2007-04-12-0396, and the amendments thereto in connection with the award of the construction contract(s). Said ordinances are incorporated herein for all purposes, as if fully set forth herein. GRANTEE agrees that GRANTEE will not discriminate against any individual or group on account of race, color, sex, age, religion, national origin or disability and will not engage in employment practices which have the effect of discriminating against employees or prospective employees because of race, color, religion, national origin, sex, age or disability. GRANTEE further agrees that GRANTEE will abide by all applicable terms and provisions of CITY's Non-Discrimination Policy, CITY's Small, Business Economic Development Acacy (SBEDA) Policy and CITY's Equal Opportunity Affirmative Action Policy, these policies being available in CITY's Department of Economic Development, Division of Internal Review and the City Clerk's Office in connection with the Parking Facility.

14.02 GRANTEE agrees that if material deficiencies in any aspect of its SMWBE utilization plan as set out in its project are found or if GRANTEE does not meet the SMWBE goals as specified by the CITY's Department of Economic Development, whichever is less, as a result of a review or investigation conducted by CITY's Department of Economic Development, GRANTEE will be required to submit a written report to CITY's Department of Economic Development. GRANTEE will also be required to submit a supplemental Good Faith Effort Plan (GFEP) indicating efforts to resolve any deficiencies.

XV. NONDISCRIMINATION

15.01 GRANTEE covenants that it, or agents, employees or anyone under its control, will not discriminate against any individual or group on account of race, color, sex, age, religion, national origin, handicap or familial status, in employment practices or in the use of or admission to the premises, which said discrimination GRANTEE acknowledges is prohibited.

XVI. CONFLICT OF INTEREST

16.01 GRANTEE covenants that neither it nor any member of its governing body or of its staff presently has any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this AGREEMENT. GRANTEE further covenants that in the performance of this AGREEMENT, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

16.02 GRANTEE further covenants that no member of its governing body or of its staff shall possess any interest in, or use their position for, a purpose that is or gives the appearance of being motivated by desire for private gain for themselves or others, particularly those with which they have family, business, or other ties.

16.03 No member of CITY'S governing body or of its staff who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this AGREEMENT shall:

(A) Participate in any decision relating to this AGREEMENT which may affect his or her personal interest or the interest of any corporation, partnership, or association in which he or she has a direct or indirect interest;

(B) Have any direct or indirect interest in this AGREEMENT or the proceeds thereof.

XVII. POLITICAL ACTIVITY

17.01 None of the activities performed hereunder shall involve, and no portion of the funds received hereunder shall be used, either directly or indirectly, for any political activity including, but not limited to, an activity to further the election or defeat of any candidate for public office or for any activity undertaken to influence the passage, defeat or final content of local, state or federal legislation.

XVIII. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL

18.01 All finished or unfinished reports, documents, data, studies, surveys, charts, drawings, maps, models, photographs, designs, plans, schedules, or other appended documentation to any proposal or contract, and any responses, inquiries, correspondence and related material submitted by GRANTEE, shall, upon receipt, become the property of CITY.

XIX. CONTRACTING

19.01 Any work or services contracted hereunder shall be contracted only by written contract or agreement and, unless specific waiver is granted in writing by CITY, shall be subject by its terms to each and every provision of this AGREEMENT. Compliance by contractors with this AGREEMENT shall be the responsibility of GRANTEE. GRANTEE is responsible to ensure that all permits required for the activities under this AGREEMENT are obtained.

19.02 CITY shall in no event be obligated to any third party, including any sub-contractor of GRANTEE, for performance of or payment for work or services.

XX. CHANGES AND AMENDMENTS

20.01 Except when the terms of this AGREEMENT expressly provide otherwise, any alterations, additions, or deletions to the terms hereof shall only be by amendment in writing executed by both CITY and GRANTEE under authority granted by formal action of the Parties' respective governing bodies.

20.02 It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this AGREEMENT and that any such changes shall be automatically incorporated into this AGREEMENT without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

XXI. ASSIGNMENTS

21.01 GRANTEE shall not transfer, pledge or otherwise assign this AGREEMENT, any interest in and to same, or any claim arising thereunder, without first procuring the written approval of CITY. Any attempt at transfer, pledge or other assignment shall be void *ab initio* and shall confer no rights upon any third person.

XXII. SEVERABILITY OF PROVISIONS

22.01 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.

XXIII. DEFAULT

23.01 Upon default by GRANTEE in the performance of its obligations hereunder, CITY shall give GRANTEE notice of the same and GRANTEE shall have 30 days following receipt of written notice of default from CITY (or such reasonably longer time as may be necessary provided GRANTEE commences the cure within 30 days and continuously and diligently pursues the cure to completion) to cure such default. If GRANTEE fails to timely cure such default, CITY may pursue all remedies available in law or at equity and/or other rights CITY may have in this Agreement; provided that it is expressly agreed that neither Party hereto shall have the right to seek consequential or punitive damages against the other for any default under this Agreement.

23.02 Upon default by CITY in the performance of its obligations hereunder GRANTEE shall give CITY notice of the same and CITY shall have 30 days following receipt of written notice of default from GRANTEE (or such reasonably longer time as may be necessary provided CITY commences the cure within 30 days and continuously and diligently pursues the cure to completion) to cure such default. If CITY fails to timely cure such default, GRANTEE may pursue all remedies available in law or equity and/or other rights GRANTEE may have in this Agreement, subject to the limitations set forth in Section 23.01.

XXIV. NON-WAIVER OF PERFORMANCE

24.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this AGREEMENT shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of 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.

24.02 No act or omission of either Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to either Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

24.03 No representative or agent of CITY may waive the effect of the provisions of this Article without formal action from the City Council.

XXV. ENTIRE AGREEMENT

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

XXVI. NOTICES

26.01 For purposes of this AGREEMENT, all official communications and notices among the Parties shall be deemed sufficient if in writing and shall be (1) mailed, registered or certified mail, postage prepaid, return receipt requested, or (2) delivered by a nationally recognized overnight air or ground courier service to the addresses set forth below:

CITY: Director Parks and Recreation
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

GRANTEE: President/CEO
Witte Museum
3801 Broadway
San Antonio, Texas 78209-6396

Such Notice shall be deemed received within three (3) days after deposit in the U.S. mail or on the first business day after deposit with an overnight air or ground courier service. Notice of

change of address by either Party must be made in writing and mailed to the other Party's last known address within five (5) business days of such change.

XXVII. PARTIES BOUND

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

XXVIII. RELATIONSHIP OF PARTIES

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

XXIX. ASSIGNMENT OF WARRANTIES

29.01 Upon completion of the Parking Facility, all available construction, product and material warranties, including any and all warranties given by Contractor, shall be provided and/or assigned to CITY. This Agreement shall be deemed to operate as an assignment of the same. CITY acknowledges that GRANTEE shall have no liability for construction defects and CITY'S only recourse for construction defects shall be against the Contractor and/or providers of equipment and materials, provided however, GRANTEE shall reasonably cooperate with CITY at no material cost to GRANTEE, to pursue the correction of such defects. This provision shall survive termination of this Agreement.

XXX. TEXAS LAW TO APPLY

30.01 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.

XXXI. GENDER

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

XXXII. CAPTIONS

32.01 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.

EXECUTED IN DUPLICATE ORIGINALS, each of which shall have the full force and effect of an original this the ___ day of _____, 2008.

CITY OF SAN ANTONIO

By: _____
Sheryl Sculley
City Manager

THE WITTE MUSEUM

By: _____
Marise McDermott
President and CEO

ATTEST: _____
CITY CLERK

APPROVED AS TO FORM:

_____
CITY ATTORNEY

RE: ordinance 2008-03-13-0208; March 13, 2008

Request for COUNCIL

City of San Antonio

Agenda Voting Results - 22

Name:	6, 7, 9, 10, 11, 13, 19, 20, 21, 22, 23A, 23B
Date:	03/13/2008
Time:	12:10:54 PM
Vote Type:	Motion to Approve
Description:	An Ordinance approving a Funding Agreement with the San Antonio Museum Association, d/b/a The Witte Museum for the expenditure of up to $3,750,000.00 for construction of the Brackenridge Park parking facility, located in District 9. [Frances A. Gonzalez, Assistant City Manager; Malcolm Matthews, Director, Parks and Recreation]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Phil Hardberger	Mayor		x				
Mary Alice P. Cisneros	District 1		x				x
Sheila D. McNeil	District 2		x				
Jennifer V. Ramos	District 3		x				
Philip A. Cortez	District 4	x					
Lourdes Galvan	District 5		x				
Delicia Herrera	District 6		x			x	
Justin Rodriguez	District 7		x				
Diane G. Cibrian	District 8		x				
Louis E. Rowe	District 9		x				
John G. Clamp	District 10		x				

CMS or Ordinance Number: OR00000200803130208

TSLGRS File Code: 1000-05

Document Title:
ORD - Approving a funding agreement with the San Antonio Museum Association, D/B/A The Witte Museum for the expenditure up to $3,750,000.00 for the

Ordinance Date: 3/13/2008