LB
10/09/14
Item No. 14

AN ORDINANCE 2014-10-09-0779

**AUTHORIZING A THREE-YEAR PROFESSIONAL SERVICE AGREEMENT WITH AD NOVA COMUNICACION ESTRATEGICA S.C. FOR FOREIGN REPRESENTATIVE SERVICES TO ASSIST THE SAN ANTONIO CONVENTION & VISITORS BUREAU IN ITS MARKETING AND TOURISM EFFORTS IN MEXICO, IN AN AMOUNT NOT TO EXCEED $100,000.00 PER YEAR, WITH AN OPTION TO RENEW FOR ONE ADDITIONAL TWO-YEAR TERM, SUBJECT TO CITY COUNCIL APPROVAL.**

* * * * *

**WHEREAS,** one of the important tasks for destination management and marketing organizations is to identify potential markets for growth and the San Antonio Convention and Visitors Bureau ("CVB") vision is to position San Antonio as Mexico's preferred global destination for tourism; and

**WHEREAS,** a Request for Proposals for Foreign Representative Services for San Antonio Travel Industry in Mexico was released on June 26, 2014 and closed on August 1, 2014 and a six-member Evaluation Committee reviewed the six responses and received presentations from three short-listed firms; and

**WHEREAS,** the Evaluation Committee recommends Ad Nova Comunicacion Estrategica S.C. based on the fact that it received the highest collective score and City staff supports this recommendation; **NOW THEREFORE:**

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

**SECTION 1.** The terms and conditions of a three-year Professional Service Agreement with Ad Nova Comunicacion Estrategica S.C. for Mexico Sales Services to assist the CVB in its marketing and tourism efforts in Mexico, in an amount not to exceed $100,000.00 per year, with an option to renew for one additional two-year term, subject to City Council approval, are authorized and approved. The City Manager, or her designee, is authorized to execute the Professional Services Agreement, previously executed by Ad Nova Comunicacion Estrategica S.C., attached to this Ordinance as **Attachment I.**

**SECTION 2.** Funding for this Ordinance is available as part of the Fiscal Year 2015 budget per the table below:

| Amount | General Ledger | Cost Center | Fund |
|---|---|---|---|
| $70,000.00 | 5201040 | 4305020001 | 29006000 |
| $30,000.00 | 5201040 | 4309010001 | 29006000 |
| Total Amt $100,000.00 | | | |

**SECTION 3.** Payment not to exceed the budgeted amount is authorized to Ad Nova Comunicacion Estrategica S.C. and shall be encumbered with a purchase order.

**SECTION 4.** 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 5.** This Ordinance shall take effect immediately upon the receipt of eight affirmative votes; otherwise it shall be effective ten days after its passage.

**PASSED AND APPROVED** this 9th day of October, 2014.

**M A Y O R**
Ivy R. Taylor

**ATTEST:**

Leticia M. Vacek
City Clerk

**APPROVED AS TO FORM:**

Robert F. Greenblum
City Attorney

| | |
|---|---|
| **Agenda Item:** | **14 ( in consent vote: 4, 5, 6, 7, 8, 11, 12, 13, 14, 16, 17, 18, 19 )** |
| **Date:** | 10/09/2014 |
| **Time:** | 09:27:39 AM |
| **Vote Type:** | Motion to Approve |
| **Description:** | An Ordinance authorizing a three-year Professional Service Agreement with Ad Nova Comunicacion Estrategica S.C. for foreign representative services assisting the San Antonio Convention & Visitors Bureau in its marketing and tourism efforts in Mexico, in an amount not to exceed $100,000.00 per year, with an option to renew for one additional two-year term, subject to City Council approval . [Ed Belmares, Assistant City Manager; Casandra Matej, Director, Convention and Visitors Bureau] |
| **Result:** | Passed |

| Voter | Group | Not Present | Yea | Nay | Abstain | Motion | Second |
|---|---|---|---|---|---|---|---|
| Ivy R. Taylor | Mayor | | x | | | | |
| Diego Bernal | District 1 | | x | | | | |
| Keith Toney | District 2 | | x | | | | |
| Rebecca Viagran | District 3 | | x | | | | x |
| Rey Saldaña | District 4 | | x | | | | |
| Shirley Gonzales | District 5 | | x | | | | |
| Ray Lopez | District 6 | | x | | | | |
| Mari Aguirre-Rodriguez | District 7 | | x | | | | |
| Ron Nirenberg | District 8 | | x | | | | |
| Joe Krier | District 9 | x | | | | | |
| Michael Gallagher | District 10 | | x | | | x | |

# Exhibit
# I

**PROFESSIONAL SERVICES AGREEMENT**
**FOR**
**FOREIGN REPRESENTATIVE SERVICES**

STATE OF TEXAS §
§
COUNTY OF BEXAR §

This Agreement is entered into by and between the City of San Antonio, a Texas Municipal Corporation ("City") acting by and through its City Manager, pursuant to Ordinance No. 2014-10-09-____, passed and approved on the 9th day of October, 2014 and Ad Nova Comunicacion Estrategica S.C., by and through its President ("Contractor"), both of which may be referred to herein collectively as the "Parties".

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

## I. DEFINITIONS

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

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

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

"Director" shall mean the director of City's Convention and Visitor's Bureau ("SACVB").

## II. TERM

2.1 Unless sooner terminated in accordance with the provisions of this Agreement, the initial term of this Agreement shall be for a three-year term commencing on October 1, 2014 and terminating on September 30, 2017.

2.2 There shall be one available two-year renewal term and compensation for the renewal term shall be agreed to by the Parties. The Parties shall formally renew the Agreement in writing, setting forth the compensation for the renewal term, and such renewal shall be subject to City Council approval.

2.3 If funding for the entire Agreement is not appropriated at the time this Agreement is entered into, City retains the right to terminate this Agreement at the expiration of each

of City's budget periods, and any subsequent contract period is subject to and contingent upon such appropriation.

## III. SCOPE OF SERVICES

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

**3.1.1 Operational Services** Contractor shall:

a. Provide communication needs/services to include: dedicated San Antonio telephone line, 1 long distance, fax, dedicated San Antonio e-mail address, photocopying, etc.
b. Provide storage for SACVB collateral materials through shared storage with the City of San Antonio CASA Office in Mexico City.
c. Secure courier and postal services for shipping and transporting of SACVB's communications/promotional materials.

**3.1.2 Sales Calls/Client Training**. Contractor's staff shall make between 7 and 10 personal sales calls and/or client training sessions per month to key travel trade clients on behalf of the CVB, one of which shall be destination training with call centers and/or sales staff. The purpose of the calls is to maintain relationships and/or contact with the travel trade industry and to continue in promoting assets, building awareness, and maintaining a positive image of San Antonio's travel and related products, services and activities that are associated with the San Antonio tourism industry.

**3.1.3 Strategic Direction.** Contractor shall participate in Strategic Direction meetings in San Antonio in development of the Marketing/Advertising/Media plans for Mexico. Contractor shall provide on-going support by sharing their market expertise to help inform marketing plans as needed. Contractor must attend two meetings in San Antonio per year.

**3.1.4 New Programs and Product Expansion.** Contractor shall initiate the development of two creative marketing initiatives. These initiatives should be direct to consumer; with a key partner that will generate awareness as well as room nights for the destination. Some potential partners would be banks, airlines, tour operators, credit cards or retail.

**3.1.5 Consumer and Travel Trade Shows**. Contractor shall represent SACVB by actively participating with visibility in consumer and travel trade shows (that are cost-effective), as an exhibitor to maximize San Antonio's presence and exposure in the marketplace. The intent is to target

a large number of specific travel agents and consumer groups to build awareness of San Antonio's travel products. Contractor shall:

a. Maintain visible presence on-site throughout each of the shows, to represent SACVB's interest to all attendees.
b. Provide assistance to any San Antonio delegates and/or industry partners that are attending the show.
c. Attend all networking functions and provide SACVB with a recap in monthly reports noting activities and be accompanied by a list of contacts made. In addition, provide a synopsis of the attendees met and a recommendation on SACVB's future participation.

**Proposed Annual Travel Shows:**

| Show Name | Date | Responsibility |
|---|---|---|
| Outlet Vuele y Viaje | **May** | Create Product with key Tour Operators, Online Travel Agencies to promote Vacation Packages to be sold to the consumer during this trade show. |
| Expo Mayorista | **February-March** | Attend shows and give presentations on this destination |
| ARLAG | **May** | Staff booth, take appointments and sell destination. |

The following items will be provided to SACVB for each show:

a. List of Leads and/or Tour Operators
b. Actions items and follow up completed by the firm
c. Strategy and recommendations on next steps

**3.1.6 <u>Familiarization ("FAM") Trips for Media and Travel Trade.</u>** Contractor shall coordinate individual and group media and travel trade to San Antonio. SACVB will be responsible for creating the itineraries, as well as securing and funding hotel rooms, ground transportation and additional logistical items that will take place in San Antonio.

a. **Media/Press Trips** Contractor shall coordinate assigned aspects of 2-3 individual and 2-3 group media trips to San Antonio, including:

1. Qualify press invited to participate in media tours by reviewing credentials and/or other appropriate documentation for validation, such as a letter of assignment from the publisher or broadcast medium that has commissioned their work, and for

obtaining copies of recently published articles and/or broadcast work;

2. Provide a list of proposed participants for approval;
3. Send out invitations and make necessary phone calls to secure participants;
4. Work with airlines to secure complimentary or discounted airfare;
5. Conduct follow up surveys to get feedback on experience and or ideas on how to improve for future media trips;
6. FAM's will include travel for 1 agency person to provide support during the FAM; and
7. Send Thank you notes to all participants.

**b. Travel Trade Familiarization/Educational ("FAM") Trips** Contractor shall coordinate assigned aspects of 2-3 individual and 2-3 group Travel Trade trips to San Antonio, including:

1. Qualify press invited to participate in travel trade tours by reviewing credentials and/or other appropriate documentation for validation, such as a letter of assignment from the publisher or broadcast medium that has commissioned their work, and for obtaining copies of recently published articles and/or broadcast work;
2. Provide a list of proposed participants for approval;
3. Send out invitations and make necessary phone calls to secure participants;
4. Work with airlines to secure complimentary or discounted airfare;
5. Conduct follow up surveys to get feedback on experience and or ideas on how to improve;
6. FAM's will include travel for 1 agency person to provide support during the FAM and will act as a staff member with responsibility of hosting our guests;
7. Send thank you notes to all participants; and
8. Provide written feedback from clients on intent to package San Antonio and firm assistance with goal of packaging/including San Antonio in their product offerings.

**3.1.7 <u>Travel Trade and Media Sales Missions</u>** Contractor shall organize and implement an annual Sales Mission that would have a strategic Travel Trade and Media component in two to three Mexico cities. These missions will include participation from SACVB staff as well as local hotels, attractions, and potentially medically-based organizations.

a. Contractor shall ensure that Sales Missions are logically and effectively planned as follows:

1. Schedule appointments with targeted travel trade and media clients;
2. Identify and make recommendations for event venues as well as provide proposed menus for approval by SACVB staff;
3. Prepare itineraries to be provided for each participant;
4. Make arrangements for confirmed host hotel(s) designated specifically for the delegation at discounted rates, as well as ground transportation and other services, as needed; and
5. Work with airlines to secure complimentary or negotiated rate for all participants

b. Contractor shall make necessary provisions to plan and execute a client reception(s), including:

1. Creation of formal invitation with approval from SACVB;
2. Distribution of invitations hand delivered/mail and email;
3. Take RSVPs and make any necessary calls to get RSVP's for the event;
4. Finalize all food, beverage and audio-visual needs; and
5. Entertainment

c. Contractor shall conduct premeeting prior to arrival to review plans for the Sales Mission and conduct orientation meeting in market as well as a post meeting for feedback regarding mission activities.

d. **Post Sales Mission** Contractor shall provide SACVB with the information on how Contractor will follow up on the items below:

1. Name of organizations;
2. Outcome/results each appointment;
3. Recommendations on how to proceed and or next steps;
4. Execute follow -up from Sales Mission; and
5. Provide media value of coverage earned from Sales Mission

**3.1.8** **Brochure Analysis Research** Contractor shall conduct research to include an annual review of all tour operator and other trade programs presently promoting San Antonio. This research would be information directly derived from the tour operators and airlines (if possible) that presently sell San Antonio. This report shall include tour operator company name, key contact, address, phone, e-mail, website, city package, group tours, hotels used, attractions and/or other products offered as well as number of room nights sold and will cover the previous fiscal year (October 1-September 30). Contractor shall submit the first such report to

City no later than November 1, 2015 and shall submit an additional report each November 1 during the term of this Agreement.

**3.1.9** **Media and Industry Relations** Contractor shall provide earned media coverage valued at a minimum of $2.0 million per year, based on the following percentages:

1. 60% TV, Radio, Print
2. 40% Digital
3. 80% Consumer
4. 20% Trade

**a.** **Media Calls** Contractor shall distribute 12 press releases provided by SACVB per year to inform media about activities in San Antonio in order to promote what is new in San Antonio to key Mexico travel media. This would include travel, trade and consumer media distribution.

**b.** **Media Releases** will be provided by SACVB as needed in advance of the events. In conjunction with SACVB, Contractor must suggest the releases that are the most suitable to the interest of Mexican market and distribute at least one per month to the media. Contractor may be required to translate and/or edit the releases if needed and also distribute to the media databases suggested by Contractor and/or SACVB. Media follow up, copies of the destination coverage (print, radio, online, broadcast etc.), and press reports should be reported on a monthly basis to SACVB. All individual requests, photos, materials or other information should be handled by Contractor. SACVB will provide materials to be distributed by Contractor. Contractor shall initiate special features on San Antonio in travel publications.

**c.** **Photo and Video Library** Contractor shall maintain a photo and video library representing San Antonio for the use of the media and travel professionals.

**3.1.10** **Tour Operator/Travel Industry Support** Contractor shall identify and provide support to tour operators/wholesalers that feature San Antonio, and shall encourage those who do not feature San Antonio to do so. Contractor will review tour operator's San Antonio product offerings and identify opportunities for cooperative advertising and other effective advertising and/or publicity outlets to assist SACVB in increasing product sales, in pursuit of economic development opportunities.

**3.1.11** **REPORTING**

**a.** **Monthly Reports** Contractor shall submit a monthly report to SACVB, which shall provide complete details listing all services performed, and the outcome of activities, by the 15th of each month, including media and publicity back up. This report shall be

e-mailed and couriered, in original hard copy, to be received by the 15th of each month. Reports should include the following based on activities included:

1. Number of travel trade sales calls and/or in-agency seminars made in person including name, company name, address, phone, email, and notes regarding calls;
2. Number of media pitches made including name, publication name, address, phone, email, circulation, etc;
3. Number of telemarketing/prospecting calls to potential clients including name, company name, address, phone, and email, results of calls;
4. Number of inquiries, trade, media and consumer, fulfilled;
5. Monthly reporting of earned media;
6. List of notable initiatives and results of those initiatives;
7. Details regarding media stories generated, and include name of the publication, circulation, etc;
8. Provide details regarding co-op marketing or partnership efforts, as necessary;
9. Copies of consumer advertisements regarding San Antonio;
10. Information regarding the representation of CVB's interest at trade and consumer trade shows;
11. Information regarding familiarization trips (FAMS) hosted, if any;
12. List of other relevant tourism events, meetings and/or conferences attended or organized for the purpose of promoting tourism to San Antonio; and
13. A monthly status report on year to date goals

b. **Contract Summary Report** At the end of each fiscal year, Contractor shall provide a comprehensive report to SACVB which shall include:

1. A statement regarding the attainment of goals and objectives;
2. A summary of the outcome of any notable events or activities and/or changes; and
3. Recommendations for continued Sales and Marketing efforts, as well as feedback regarding the potential for added initiatives in the regions
4. Contract Summary Report shall be due 30 days after each fiscal year during the term of this Agreement.

c. **Tour Operator Product Report** This report, referenced above in Subsection 3.1.8 Brochure Analysis Research, shall include tour

operator company, key contact, address, phone, email, website, city package, group tours, San Antonio hotels used, annual volume by room nights (if available), perecentages of individual and group business. This report will cover proceeding year product offerings and will be due on an agreed upon date set by SACVB and Contractor.

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

## IV. COMPENSATION TO CONTRACTOR

4.1 In consideration of Contractor's performance in a satisfactory and efficient manner, as determined solely by Director, of all services and activities set forth in this Agreement, City agrees to pay Contractor an annual amount not to exceed $100,000.00 as total compensation, to be paid to Contractor as follows:

4.1.1 Contractor shall invoice City for payment due by the 15th of every month during the term of this Agreement. Each year, the first invoice shall be for $8,333.37 and the remaining invoices shall be for $8,333.33 each.

4.1.2 City shall pay all invoices within fifteen days of receipt, subject to Sections 3.2 and 4.3.

4.1.3 In the event of early termination of this Agreement, Contractor shall return all unearned funds to City within 30 calendar days of such termination.

4.2 Contractor may provide additional related services under this Agreement, such as translation, at a rate agreed to in advance and in writing by the Parties. Contractor shall also provide the services set forth in Subsection 3.1.1(c) and City shall be responsible for the associated costs. Contractor shall invoice City for such services within 15 calendar days of providing such services and invoices will be paid as provided for in Section 4.1.

4.3 Final acceptance of work products and services require written approval by City. The approval official shall be Director. Final payment will be made to Contractor following written approval of the final work products and services by Director. City shall

not be obligated or liable under this Agreement to any party, other than Contractor, for the payment of any monies or the provision of any goods or services.

## V. OWNERSHIP OF DOCUMENTS

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

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

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

## VII. TERMINATION

7.1 For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term as stated in Article II. 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 thirty (30) calendar 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 Contractor default in the performance of this Agreement in a manner stated in this section 7.4 below, same shall be considered an event of default. City shall deliver written notice of said default specifying such matter(s) in default. Contractor shall have fifteen (15) calendar days after receipt of the written notice, in accordance with Article VIII. Notice, to cure such default. If Contractor fails to cure the default within such fifteen-day cure period, City shall have the right, without further notice, to terminate this Agreement in whole or in part as City deems appropriate, and to contract with another contractor to complete the work required in this Agreement. City shall also have the right to offset the cost of said new Agreement with a new contractor against Contractor's future or unpaid invoice(s), subject to the duty on the part of City to mitigate its losses to the extent required by law.

7.4.1 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; or
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, Contractor shall affect an orderly transfer to City or to such person(s) or firm(s) as the City may designate, at no additional cost to City, all completed or partially completed documents, papers, records, charts, reports, and any other materials or information produced as a result of or pertaining to the services rendered by Contractor, or provided to Contractor, hereunder, regardless of storage medium, if so requested by City, or shall otherwise be retained by Contractor in accordance with Article VI. Records Retention. Any record transfer shall

be completed within thirty (30) calendar days of a written request by City and shall be completed at Contractor's sole cost and expense. Payment of compensation due or to become due to Contractor is conditioned upon delivery of all such documents, if requested.

7.7 Within forty-five (45) calendar days of the effective date of completion, or termination or expiration of this Agreement, Contractor shall submit to City its claims, in detail, for the monies owed by City for services performed under this Agreement through the effective date of termination. Failure by Contractor to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of City and constitute a **Waiver** by Contractor of any and all right or claims to collect moneys that Contractor may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

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

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

## VIII. NOTICE

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

If intended for City, to: City of San Antonio
Attn: Casandra Matej, Director
Convention and Visitor's Bureau
203 South St. Mary's Street
San Antonio, Texas 78205

If intended for Contractor, to: Ad Nova Comunicacion Estrategica S.C.
Attn: Benjamin Diaz
Gutemberg 176/Colonia Anzures, Delegacion Miguel Hidalgo
Mexico City, Distrito Federal 11590

## IX. INTELLECTUAL PROPERTY

9.1 All Intellectual Property that is created, conceived, reduced to practice or made by Contractor during the regular course of or arising out of this Agreement, whether alone or in conjunction with others, subject to any third party licensed rights, (the "Work") shall be and will remain the sole and exclusive proprietary property of City. The Work shall be deemed a "work for hire" within the meaning of the copyright laws of the United States, and ownership of the Work and all rights therein, including all rights under the Visual Artists' Rights Act of 1990, shall be solely vested in City. Contractor further agrees to develop and execute any documents, give all oaths or testimony, and otherwise give all assistance deemed by City to be necessary or desirable to secure, maintain, or defend City's ownership of the Work.

9.2 Contractor is required to set out in its contracts with other agencies and any other party who is not employed by Contractor ("Third Party") that all intellectual property created, conceived, reduced to practice or made by Third Party, pursuant to such contract (the "Third Party Work"), shall be and will remain the sole and exclusive proprietary property of City. Further, the contract shall inform Third Party that the Third Party Work shall be deemed a "work for hire" within the meaning of the copyright laws of the United States, and ownership of the Work and all rights therein, including all rights under the Visual Artists' Rights Act of 1990, shall be solely vested in City. Contractor is further required to give all assistance deemed by City to be necessary or desirable to secure, maintain, or defend City's ownership of the Third Party Work.

9.3 Contractor shall pay all royalties and licensing fees for the use of third party intellectual property. **CONTRACTOR INDEMNIFIES and HOLDS CITY HARMLESS from the payment of any royalties, damages, losses or expenses including attorney's fees for suits, claims or otherwise, growing out of infringement or alleged infringement of copyrights, patents, materials, methods or other intellectual property used under this Agreement. CONTRACTOR shall DEFEND CITY against all suits for infringement of any Intellectual Property rights.** Further, if Contractor has reason to believe that the design, service, process or product specified is an infringement of the intellectual property rights of a third party, it shall immediately (within 24 hours) give such information to City.

## X. INSURANCE

10.1 Prior to the commencement of any work under this Agreement, Contractor shall furnish copies of all required endorsements and a completed Certificate(s) of Insurance to City's Convention and Visitors Bureau, which shall be clearly labeled "Mexico Sales Services" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. City will not accept Memorandum of Insurance or Binders as proof of insurance. The certificate(s) or form must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly

from the insurer's authorized representative to City. City shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the Convention and Visitors Bureau. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

10.2 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 coverage's 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.

10.3 A contractor's financial integrity is of interest to 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, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:

| Type | Amounts |
|---|---|
| TYPE | AMOUNTS |
| | |
| 1. Workers' Compensation<br>2. Employers' Liability | Statutory<br>$500,000/$500,000/$500,000 |
| 3. Broad form Commercial General Liability Insurance to include coverage for the following:<br>a. Premises/Operations<br>*b. Independent Contractors<br>c. Products/Completed Operations<br>d. Personal/Advertising Injury<br>e. Contractual Liability<br>f. Damage to property rented by you | 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<br><br>f. $100,000 |
| 4. Business Automobile Liability<br>a. Owned/leased vehicles<br>b. Non-owned vehicles<br>c. Hired Vehicles | Combined Single Limit for Bodily Injury and Property Damage of $1,000,000 per occurrence |
| 5. Professional Liability (Claims-made basis) To be maintained and in effect for no less than two years subsequent to the completion of the professional service. | $1,000,000 per claim, to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error, or omission in professional services. |

| | |
|---|---|

10.4 As they apply to the limits required by City, City shall be entitled, upon request and without expense, to receive copies of the policies, declaration page and all endorsements thereto, 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: Convention and Visitors Bureau
203 South St. Mary's Street
San Antonio, Texas 78205

10.5 Contractor 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 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, Contractor shall provide a replacement Certificate of Insurance and applicable endorsements to City. City 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.

10.7 In addition to any other remedies the City may have upon Contractor's failure to provide and maintain any insurance or policy endorsements to the extent and within

the time herein required, City shall have the right to order Contractor to stop work hereunder, and/or withhold any payment(s) which become due to Contractor hereunder until Contractor demonstrates compliance with the requirements hereof.

10.8 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.

10.9 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 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 and that no claim or action by or on behalf of City shall be limited to insurance coverage provided.

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

## XI. INDEMNIFICATION

**11.1 CONTRACTOR covenants and agrees to INDEMNIFY, DEFEND and HOLD HARMLESS CITY, ITS ELECTED OFFICIALS, OFFICERS AND EMPLOYEES against any and all claims, lawsuits, judgments, cost, liens, losses, expenses, fees (including attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought that may ARISE OUT OF OR BE OCCASIONED OR CAUSED BY THE NEGLIGENT ACT, ERROR, OR OMISSION OF CONTRACTOR, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONTRACTOR OR SUBCONTRACTOR OF CONTRACTOR, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES. THE INDEMNITY PROVIDED FOR IN THIS SECTION SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF CITY, ITS ELECTED OFFICIALS, OFFICERS OR EMPLOYEES. IN THE EVENT CONTRACTOR 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.**

**11.2 The provisions of this INDEMNIFICAITON are solely for the benefit of the Parties hereto and not intended to create or grant any rights, contractual or**

**otherwise, to any other person or entity.**

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

11.4 Defense Counsel City shall have the right to select or to approve defense counsel to be retained by Contractor in fulfilling its obligation hereunder to defend and indemnify City, unless such right is expressly waived by City in writing. Contractor shall retain City-approved defense counsel within seven (7) business days of City's written notice that City is invoking its right to indemnification under this Agreement. If Contractor fails to retain counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Contractor shall be liable for all costs incurred by City. City shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

11.5 Employee Litigation – In any and all claims against any party indemnified hereunder by any employee of Contractor, 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 Contractor or any subcontractor under worker's compensation or other employee benefit acts.

## XII. ASSIGNMENT AND SUBCONTRACTING

12.1 Contractor 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 Contractor. Contractor, its employees or its subcontractors shall perform all necessary work.

12.2 All work to be subcontracted under this Agreement shall be approved by City of San Antonio City Council, as evidenced by passage of an ordinance, prior to the provision of any services by said subcontractor. Notwithstanding the foregoing, changes may be made to Contractor's SBEDA Plan with the written approval of Director and City's SBEDA Program Manager, without requiring additional approval of the City Council, regardless of whether a subcontractor listed on that plan is also identified in this paragraph.

12.3 Any work or services approved for subcontracting hereunder shall be subcontracted only by written contract and, unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Agreement. Compliance by subcontractors with this Agreement shall be the responsibility of Contractor. City shall in no event be obligated to any third party, including any subcontractor of Contractor, for performance of services or payment of fees. Any

references in this Agreement to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by the City Council.

12.4 Except as otherwise stated herein, Contractor 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. As a condition of such consent, if such consent is granted, Contractor shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor Contractor, assignee, transferee or subcontractor.

12.5 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 Contractor assign, transfer, convey, delegate, or otherwise dispose of any part of all or any part of its right, title or interest in this Agreement, City may, at its option, cancel this Agreement and all rights, titles and interest of Contractor shall thereupon cease and terminate, in accordance with Article VII. Termination, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by Contractor shall in no event release Contractor from any obligation under the terms of this Agreement, nor shall it relieve or release Contractor from the payment of any damages to City, which City sustains as a result of such violation.

## XIII. INDEPENDENT CONTRACTOR

13.1 Contractor covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of City; that Contractor shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between City and Contractor, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint venturers between City and Contractor. 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 Contractor under this Agreement and that the Contractor has no authority to bind the City.

## XIV. SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY (SBEDA)

14.1 SBEDA Program City has adopted a Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531 and as amended, also referred to as "SBEDA" or "the SBEDA Program"), which is posted on the City's Economic Development (EDD) website page and is also available in hard copy form upon request to City. The SBEDA Ordinance Compliance Provisions contained in this section of the Agreement are governed by the terms of this Ordinance, as well as by the

terms of the SBEDA Ordinance Policy & Procedure Manual established by City pursuant to this Ordinance, and any subsequent amendments to this referenced SBEDA Ordinance and SBEDA Policy & Procedure Manual that are effective as of the date of the execution of this Agreement. Unless defined in a contrary manner herein, terms used in this section of the Agreement shall be subject to the same expanded definitions and meanings as given those terms in the SBEDA Ordinance and as further interpreted in the SBEDA Policy & Procedure Manual.

14.2 Definitions

**Affirmative Procurement Initiatives (API)** – Refers to various Small Business Enterprise, Minority Business Enterprise, and/or Women Business Enterprise ("S/M/WBE") Program tools and Solicitation Incentives that are used to encourage greater Prime and subcontract participation by S/M/WBE firms, including bonding assistance, evaluation preferences, subcontracting goals and joint venture incentives. (For full descriptions of these and other S/M/WBE program tools, see Section III. D. of Attachment A to the SBEDA Ordinance.)

**Certification or "Certified"** – the process by which the Small Business Office (SBO) staff determines a firm to be a bona-fide small, minority-, women-owned, or emerging small business enterprise. Emerging Small Business Enterprises (ESBEs) are automatically eligible for Certification as SBEs. Any firm may apply for multiple Certifications that cover each and every status category (e.g., SBE, ESBE, MBE, or WBE) for which it is able to satisfy eligibility standards. The SBO staff may contract these services to a regional Certification agency or other entity. For purposes of Certification, City accepts any firm that is certified by local government entities and other organizations identified herein that have adopted Certification standards and procedures similar to those followed by the SBO, provided the prospective firm satisfies the eligibility requirements set forth in this Ordinance in Section III.E.6 of Attachment A.

**Centralized Vendor Registration System (CVR)** – a mandatory electronic system wherein City requires all prospective Respondents and Subcontractors that are ready, willing and able to sell goods or services to the City to register. The CVR system assigns a unique identifier to each registrant that is then required for the purpose of submitting solicitation responses and invoices, and for receiving payments from City. The CVR-assigned identifiers are also used by the Goal Setting Committee for measuring relative availability and tracking utilization of SBE and M/WBE firms by Industry or commodity codes, and for establishing Annual Aspirational Goals and Contract-by-Contract Subcontracting Goals.

**Commercially Useful Function** – an S/M/WBE firm performs a Commercially Useful Function when it is responsible for execution of a distinct element of the work of the contract and is carrying out its responsibilities by actually performing, staffing, managing and supervising the work involved. To perform a Commercially Useful Function, the S/M/WBE firm must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quantity and quality, ordering the material, and installing (where applicable) and paying for the material itself. To

determine whether an S/M/WBE firm is performing a Commercially Useful Function, an evaluation must be performed of the amount of work subcontracted, normal industry practices, whether the amount the S/M/WBE firm is to be paid under the contract is commensurate with the work it is actually performing and the S/M/WBE credit claimed for its performance of the work, and other relevant factors. Specifically, an S/M/WBE firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of meaningful and useful S/M/WBE participation, when in similar transactions in which S/M/WBE firms do not participate, there is no such role performed. The use of S/M/WBE firms by Contractor to perform such "pass-through" or "conduit" functions that are <u>not</u> commercially useful shall be viewed by City as fraudulent if Contractor attempts to obtain credit for such S/M/WBE participation towards the satisfaction of S/M/WBE participation goals or other API participation requirements. As such, under such circumstances where a commercially useful function is not actually performed by the S/M/WBE firm, Contractor shall not be given credit for the participation of its S/M/WBE subcontractor or joint venture partner towards attainment of S/M/WBE utilization goals, and Contractor and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

**Evaluation Preference** – an API that may be applied by the Goal Setting Committee ("GSC") to Construction, Architectural & Engineering, Professional Services, Other Services, and Goods and Supplies contracts that are to be awarded on a basis that includes factors other than lowest price, and wherein responses that are submitted to City by S/M/WBE firms may be awarded additional Points in the evaluation process in the scoring and ranking of their proposals against those submitted by other prime contractors or respondents.

**Good Faith Efforts** – documentation of Contractor's intent to comply with S/M/WBE Program Goals and procedures including, but not limited to, the following: (1) documentation within a solicitation response reflecting the Respondent's commitment to comply with SBE or M/WBE Program Goals as established by the GSC for a particular contract; or (2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., timely advertisements in appropriate trade publications and publications of wide general circulation; timely posting of SBE or M/WBE subcontract opportunities on the City of San Antonio website; solicitations of bids/proposals/qualification statements from all qualified SBE or M/WBE firms listed in the Small Business Office's directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Contractor's posting of a bond covering the work of SBE or M/WBE Subcontractors; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by the Respondent; and documentation of consultations with trade associations and consultants that represent the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Subcontractors.) The appropriate form and content of Contractor's Good Faith

Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

**HUBZone Firm** – a business that has been certified by U.S. Small Business Administration for participation in the federal HUBZone Program, as established under the 1997 Small Business Reauthorization Act. To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and Controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its Principal Place of Business must be located in a HUBZone within the San Antonio Metropolitan Statistical Area. [See 13 C.F.R. 126.200 (1999).]

**Independently Owned and Operated** – ownership of an SBE firm must be direct, independent and by Individuals only. Ownership of an M/WBE firm may be by Individuals and/or by other businesses provided the ownership interests in the M/WBE firm can satisfy the M/WBE eligibility requirements for ownership and Control as specified herein in Section III.E.6. The M/WBE firm must also be Independently Owned and Operated in the sense that it cannot be the subsidiary of another firm that does not itself (and in combination with the certified M/WBE firm) satisfy the eligibility requirements for M/WBE Certification.

**Individual** – an adult person that is of legal majority age.

**Industry Categories** – procurement groupings for the City of San Antonio inclusive of Construction, Architectural & Engineering (A&E), Professional Services, Other Services, and Goods & Supplies (i.e., manufacturing, wholesale and retail distribution of commodities). This term may sometimes be referred to as "business categories."

**Minority/Women Business Enterprise (M/WBE)** – firm that is certified as a Small Business Enterprise and also as either a Minority Business Enterprise or as a Women Business Enterprise, and which is at least fifty-one percent (51%) owned, managed and Controlled by one or more Minority Group Members and/or women, and that is ready, willing and able to sell goods or services that are purchased by the City of San Antonio.

**M/WBE Directory** – a listing of minority- and women-owned businesses that have been certified for participation in City's M/WBE Program APIs.

**Minority Business Enterprise (MBE)** – any legal entity, except a joint venture, that is organized to engage in for-profit transactions, which is certified a Small Business Enterprise and also as being at least fifty-one percent (51%) owned, managed and controlled by one or more Minority Group Members, and that is ready, willing and able to sell goods or services that are purchased by City. To qualify as an MBE, the enterprise shall meet the Significant Business Presence requirement as defined herein. Unless otherwise stated, the term "MBE" as used in the SBEDA Ordinance is not inclusive of women-owned business enterprises (WBEs).

**Minority Group Members** – African-Americans, Hispanic Americans, Asian Americans and Native Americans legally residing in, or that are citizens of, the United States or its territories, as defined below:

> African-Americans: Persons having origins in any of the black racial groups of Africa as well as those identified as Jamaican, Trinidadian, or West Indian.
>
> Hispanic-Americans: Persons of Mexican, Puerto Rican, Cuban, Spanish or Central and South American origin.
>
> Asian-Americans: Persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.
>
> Native Americans: Persons having no less than 1/16$^{th}$ percentage origin in any of the Native American Tribes, as recognized by the U.S. Department of the Interior, Bureau of Indian Affairs and as demonstrated by possession of personal tribal role documents.

**Originating Department** – City department or authorized representative of City which issues solicitations or for which a solicitation is issued.

**Payment** – dollars actually paid to Contractors and/or Subcontractors and vendors for City contracted goods and/or services.

**Points** – the quantitative assignment of value for specific evaluation criteria in the vendor selection process used in some Construction, Architectural & Engineering, Professional Services, and Other Services contracts (e.g., up to 10 points out of a total of 100 points assigned for S/M/WBE participation as stated in response to a Request for Proposals).

**Prime Contractor** – the vendor or contractor to whom a purchase order or contract is issued by the City of San Antonio for purposes of providing goods or services for the City. For purposes of this Agreement, this term refers to Contractor.

**Relevant Marketplace** – the geographic market area affecting the S/M/WBE Program as determined for purposes of collecting data for the MGT Studies, and for determining eligibility for participation under various programs established by the SBEDA Ordinance, is defined as the San Antonio Metropolitan Statistical Area (SAMSA), currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson.

**Respondent** – a vendor submitting a bid, statement of qualifications, or proposal in response to a solicitation issued by City. For purposes of this Agreement, Contractor is the Respondent.

**Responsible** – a firm which is capable in all respects to fully perform the contract requirements and has the integrity and reliability which will assure good faith performance of contract specifications.

**Responsive** – a firm's submittal (bid, response or proposal) conforms in all material respects to the solicitation (Invitation for Bid, Request for Qualifications, or Request for Proposal) and shall include compliance with S/M/WBE Program requirements.

**San Antonio Metropolitan Statistical Area (SAMSA)** – also known as the Relevant Marketplace, the geographic market area from which City's MGT Studies analyzed contract utilization and availability data for disparity (currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson).

**SBE Directory** - a listing of small businesses that have been certified for participation in City's SBE Program APIs.

**Significant Business Presence** – to qualify for this Program, a S/M/WBE must be headquartered or have a *significant business presence* for at least one year within the Relevant Marketplace, defined as: an established place of business in one or more of the eight counties that make up the San Antonio Metropolitan Statistical Area (SAMSA), from which 20% of its full-time, part-time and contract employees are regularly based, and from which a substantial role in the S/M/WBE's performance of a Commercially Useful Function is conducted. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a significant business presence.

**Small Business Enterprise (SBE)** – a corporation, partnership, sole proprietorship or other legal entity for the purpose of making a profit, which is Independently Owned and Operated by Individuals legally residing in, or that are citizens of, the United States or its territories, and which meets the U.S. Small Business Administration (SBA) size standard for a small business in its particular industry(ies) and meets the Significant Business Presence requirements as defined herein.

**Small Business Office (SBO)** – the office within the Economic Development Department (EDD) of City that is primarily responsible for general oversight and administration of the S/M/WBE Program.

**Small Business Office Manager** – the Assistant Director of the EDD of City that is responsible for the management of the SBO and ultimately responsible for oversight, tracking, monitoring, administration, implementation and reporting of the S/M/WBE Program. The SBO Manager is also responsible for enforcement of contractor and vendor compliance with contract participation requirements, and ensuring that overall Program goals and objectives are met.

**Small Minority Women Business Enterprise Program (S/M/WBE Program)** – the combination of SBE Program and M/WBE Program features contained in the SBEDA Ordinance.

**Subcontractor** – any vendor or contractor that is providing goods or services to a Prime Contractor or Contractor in furtherance of the Prime Contractor's performance under a contract or purchase order with City. A copy of each binding agreement between the

Contractor and its subcontractors shall be submitted to City prior to execution of this Agreement and any contract modification agreement.

**Suspension** – the temporary stoppage of the SBE or M/WBE firm's beneficial participation in City's S/M/WBE Program for a finite period of time due to cumulative contract payments the S/M/WBE firm received during a fiscal year that exceed a certain dollar threshold as set forth in Section III.E.7 of Attachment A to the SBEDA Ordinance, or the temporary stoppage of Contractor's and/or S/M/WBE firm's performance and payment under City contracts due to the CITY's imposition of Penalties and Sanctions set forth in Section III.E.13 of Attachment A to the SBEDA Ordinance.

**Subcontractor/Supplier Utilization Plan** – a binding part of this Agreement, attached and incorporated herein as Exhibit I, which states Contractor's commitment for the use of Joint Venture Partners and/or Subcontractors/Suppliers in the performance of this Agreement, and states the name, scope of work, and dollar value of work to be performed by each of Contractor's Joint Venture partners and Subcontractors/Suppliers in the course of the performance of this contract, specifying the S/M/WBE Certification category for each Joint Venture partner and Subcontractor/Supplier, as approved by the SBO Manager. Additions, deletions or modifications of the Joint Venture partner or Subcontractor/Supplier names, scopes of work, of dollar values of work to be performed requires an amendment to this Agreement to be approved by the EDD Director or designee.

**Women Business Enterprises (WBEs)** - any legal entity, except a joint venture, that is organized to engage in for-profit transactions, that is certified for purposes of the SBEDA Ordinance as being a Small Business Enterprise and that is at least fifty-one percent (51%) owned, managed and Controlled by one or more non-minority women Individuals that are lawfully residing in, or are citizens of, the United States or its territories, that is ready, willing and able to sell goods or services that are purchased by the City and that meets the Significant Business Presence requirements as defined herein. Unless otherwise stated, the term "WBE" as used in this Agreement is not inclusive of MBEs.

14.3 SBEDA Program Compliance – General Provisions

As Contractor acknowledges that the terms of City's SBEDA Ordinance, as amended, together with all requirements, guidelines, and procedures set forth in the City's SBEDA Policy & Procedure Manual are in furtherance of City's efforts at economic inclusion and, moreover, that such terms are part of Contractor's scope of work as referenced in City's formal solicitation that formed the basis for contract award and subsequent execution of this Agreement, these SBEDA Ordinance requirements, guidelines and procedures are hereby incorporated by reference into this Agreement, and are considered by the Parties to this Agreement to be material terms. Contractor voluntarily agrees to fully comply with these SBEDA program terms as a condition for being awarded this Agreement by City. Without limitation, Contractor further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. Contractor shall cooperate fully with the Small Business

Office and other City departments in their data collection and monitoring efforts regarding Contractor's utilization and payment of Subcontractors, S/M/WBE firms, and HUBZone firms, as applicable, for their performance of Commercially Useful Functions on this Agreement including, but not limited to, the timely submission of completed forms and/or documentation promulgated by SBO, through the Originating Department, pursuant to the SBEDA Policy & Procedure Manual, timely entry of data into monitoring systems, and ensuring the timely compliance of its Subcontractors with this term;

2. Contractor shall cooperate fully with any City or SBO investigation (and shall also respond truthfully and promptly to any City or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of Contractor or its Subcontractors or suppliers;

3. Contractor shall permit the SBO, upon reasonable notice, to undertake inspections as necessary including, but not limited to, contract-related correspondence, records, documents, payroll records, daily logs, invoices, bills, cancelled checks, and work product, and to interview Subcontractors and workers to determine whether there has been a violation of the terms of this Agreement;

4. Contractor shall immediately notify the SBO, in writing, on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to Contractor's Subcontractor/Supplier Utilization Plan for this Agreement, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by Contractor to replace the Subcontractor/Supplier in accordance with the applicable Affirmative Procurement Initiative. All proposed changes to the Subcontractor/Supplier Utilization Plan including, but not limited to, proposed self-performance of work by Contractor of work previously designated for performance by Subcontractor or supplier, substitutions of new Subcontractors, terminations of previously designated Subcontractors, or reductions in the scope of work and value of work awarded to Subcontractors or suppliers, shall be subject to advanced written approval by the Originating Department and the SBO.

5. Contractor shall immediately notify the Originating

Department and SBO of any transfer or assignment of this Agreement, as well as any transfer or change in its ownership or business structure.

6. Contractor shall retain all records of its Subcontractor payments for this contract for a minimum of four years or as required by state law, following the conclusion of this contract or, in the event of litigation concerning this contract, for a minimum of four years or as required by state law following the final determination of litigation, whichever is later.

7. In instances wherein the SBO determines that a Commercially Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in a Contractor's Subcontractor / Supplier Utilization Plan, Contractor shall not be given credit for the participation of its S/M/WBE or HUBZone subcontractor(s) or joint venture partner(s) toward attainment of S/M/WBE or HUBZone firm utilization goals, and the CONTRACTOR and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

8. Contractor acknowledges that City will not execute this Agreement until Contractor and each of its Subcontractors for this project have registered and/or maintained active status in City's Centralized Vendor Registration System, and Contractor has represented to City which primary commodity codes each registered Subcontractor will be performing under for this Agreement.

14.4 SBEDA Program Compliance – Affirmative Procurement Initiatives

City has applied the following contract-specific Affirmative Procurement Initiatives to this Agreement. Contractor hereby acknowledges and agrees that the selected API requirement shall also be extended to any change order or subsequent contract modification and, absent SBO's granting of a waiver, that its full compliance with the following API terms and conditions are material to its satisfactory performance under this Agreement:

**SBE Prime Contract Program.** In accordance with the SBEDA Ordinance, Section III. D. 5. (d), this Agreement is being awarded pursuant to the SBE Prime Contract Program, and as such, Contractor affirms that if it is presently certified as an SBE, Contractor agrees not to subcontract more than 49% of the contract value to a non-SBE firm; **and**

**M/WBE Prime Contract Program.** In accordance with the SBEDA Ordinance, Section III. D. 6. (d), this Agreement is being awarded pursuant to the M/WBE Prime Contract Program and as such, Contractor affirms that if it is presently certified as an M/WBE (see *Minority/Women Business Enterprise* definition), Contractor agrees not to subcontract more than 49% of the contract value to a non-M/WBE firm.

14.5 Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, Contractor represents and warrants that it has complied with throughout the course of this solicitation and contract award process, and will continue to comply with, City's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, Contractor shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation or, on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring or commercial treatment of Subcontractors, vendors, suppliers, or commercial customers, nor shall the company retaliate against any person for reporting instances of such discrimination. The company shall provide equal opportunity for Subcontractors, vendors and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the CITY's Relevant Marketplace. The company understands and agrees that a material violation of this clause shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification of the company from participating in City contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party. Contractor's certification of its compliance with this Commercial Nondiscrimination Policy as submitted to City pursuant to the solicitation for this contract is hereby incorporated into the material terms of this Agreement. Contractor shall incorporate this clause into each of its Subcontractor and supplier agreements entered into pursuant to City contracts.

G. Prompt Payment

Upon execution of this Agreement by Contractor, Contractor shall be required to submit to City accurate progress payment information with each invoice regarding each of its Subcontractors, including HUBZone Subcontractors, to ensure that the Contractor's reported subcontract participation is accurate. Contractor shall pay its Subcontractors in compliance with Chapter 2251, Texas Government Code (the "Prompt Payment Act") within ten days of receipt of payment from City. In the event of Contractor's noncompliance with these prompt payment provisions, no final retainage on the Prime Contract shall be released to Contractor, and no new City contracts shall be issued to the Contractor until City's audit of previous subcontract payments is complete and payments are verified to be in accordance with the specifications of the Agreement.

H. Violations, Sanctions and Penalties

In addition to the above terms, Contractor acknowledges and agrees that it is a violation of the SBEDA Ordinance and a material breach of this Agreement to:

1. Fraudulently obtain, retain, or attempt to obtain, or aid another in fraudulently obtaining, retaining, or attempting to obtain or retain Certification status as an SBE, MBE, WBE, M/WBE, HUBZone firm, Emerging M/WBE, or ESBE for purposes of benefitting from the SBEDA Ordinance;

2. Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of the SBEDA Ordinance;

3. Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;

4. Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of the SBEDA Ordinance; and

5. Make false statements to any entity that any other entity is, or is not, certified as an S/M/WBE for purposes of the SBEDA Ordinance.

Any person who violates the provisions of this section shall be subject to the provisions of Section III. E. 13. of the SBEDA Ordinance and any other penalties, sanctions and remedies available under law including, but not limited to:

1. Suspension of contract;

2. Withholding of funds;

3. Rescission of contract based upon a material breach of contract pertaining to S/M/WBE Program compliance;

4. Refusal to accept a response or proposal; and

5. Disqualification of Contractor or other business firm from eligibility for providing goods or services to City for a period not to exceed two years (upon City Council approval).

## XV. CONFLICT OF INTEREST

15.1 Contractor 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, Contractor 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. Contractor further warrants and certifies that is has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City's Ethics Code.

## XVI. AMENDMENTS

16.1 Except where the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both City and Contractor, and subject to approval by the City Council, as evidenced by passage of an ordinance, when necessary.

## 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 Contractor warrants and certifies that Contractor 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 Contractor shall provide and perform all services required under this Agreement in compliance with all applicable federal, state and local laws, rules and regulations.

## XX. NONWAIVER OF PERFORMANCE

20.1 Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. In case of City, such changes must be approved by the 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.

21.3 Non-Discrimination As a party to this Agreement, Contractor understands and agrees to comply with the *Non-Discrimination Policy* of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein.

## XXII. LEGAL AUTHORITY

22.1 The signer of this Agreement for Contractor represents, warrants, assures and guarantees that he has full legal authority to execute this Agreement on behalf of Contractor and to bind Contractor 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. ENTIRE AGREEMENT

25.1 This Agreement, together with its authorizing ordinance and attachment, 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 be effective October 1, 2014.

| **City of San Antonio** | **Ad Nova Comunicacion Estrategica S.C.** |
|---|---|
| Sheryl Sculley<br>City Manager | Benjamin Diaz<br>President |

ATTEST:

City Clerk

Approved as to Form:

City Attorney

EXHIBIT I: Contractor's Subcontractor/Supplier Utilization Plan