

AN ORDINANCE

2013-01-17-0022

AUTHORIZING A FUNDING AGREEMENT WITH THE SAN ANTONIO CHILDREN'S MUSEUM IN AN AMOUNT NOT-TO-EXCEED \$1,800,000.00; AND, AUTHORIZING PAYMENT SUBJECT TO THE AVAILABILITY OF FUNDS.

* * * * *

WHEREAS, the San Antonio Children’s Museum (“Museum”) has begun the process of relocating from its present location to new facilities to be constructed at 2800 Broadway, San Antonio, Texas; and

WHEREAS, at an election held on May 12, 2012, the voters of the City of San Antonio voted to authorize the issuance of general obligation bonds to finance certain public projects referred to as “Library, Museum & Cultural Arts Improvements,” including the relocation and expansion of the Museum; and

WHEREAS, subject to the sale of such bonds, the City shall provide up to \$1,800,000.00 to the Museum for use in accordance with the proposed Funding Agreement; **NOW THEREFORE:**

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

SECTION 1. The terms and conditions of a Funding Agreement with the San Antonio Children’s Museum for an amount not to exceed \$1,800,000.00, subject to the availability of bond proceeds, are authorized and approved and the City Manager, or her designee, is authorized to execute the Funding Agreement. A copy of the Funding Agreement, previously executed by the Museum, is attached to this Ordinance as **Exhibit I**.

SECTION 2. City Code Section 29-11 shall not apply to sidewalks constructed as part of the project funded under the Funding Agreement.

SECTION 3. Payment in an amount not to exceed \$1,800,000.00 in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 40-00406, Children’s Museum, is authorized to be encumbered and made payable to San Antonio Children’s Museum for infrastructure improvements.

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.

L.B
1/17/13
Item #10A

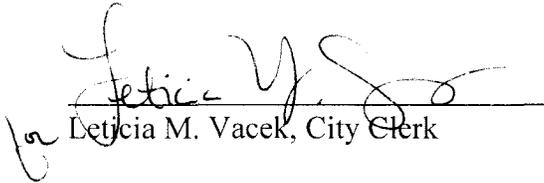
SECTION 5. This Ordinance shall take effect immediately upon the receipt of eight affirmative votes; otherwise it shall be effective ten days after its passage.

PASSED AND APPROVED this 17th day of January, 2013.



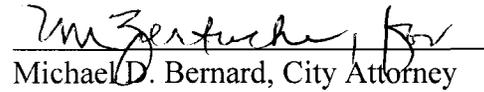
M A Y O R
Julián Castro

ATTEST:



Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

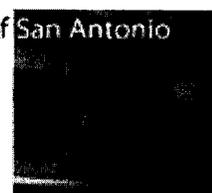


Michael D. Bernard, City Attorney



Request for
COUNCIL
ACTION

City of San Antonio



Agenda Voting Results - 10A

Name:	4, 5, 6, 7, 8, 10A, 10B, 10C, 10D, 12A, 12B, 13, 15, 16, 17						
Date:	01/17/2013						
Time:	09:25:30 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing the negotiation and execution of a funding agreement with San Antonio Children's Museum in an amount not-to-exceed \$1,800,000.00 and authorizing payment.						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x			x	
Ivy R. Taylor	District 2		x				
Leticia Ozuna	District 3		x				
Rey Saldaña	District 4		x				x
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9	x					
Carlton Soules	District 10		x				

Exhibit I

This Agreement (the "Agreement") is hereby made and entered into by and between the CITY OF SAN ANTONIO (referred to herein as the "City"), a Texas municipal corporation, and acting by and through its City Manager pursuant to Ordinance No. _____ dated _____, 2012 and THE SAN ANTONIO CHILDREN'S MUSEUM (referred to herein as "Grantee"), a Texas non-profit corporation, acting by and through its duly authorized officers (the City and Grantee herein sometimes referred to individually each as a "Party" and collectively as the "Parties").

WHEREAS, Grantee intends to relocate the San Antonio Children's Museum (the "Museum") from its present location to new facilities to be constructed on certain real property owned by Grantee and commonly known as 2800 Broadway, San Antonio Texas (the "Museum Property"); and

WHEREAS, at an election held on May 12, 2012 (the "2012 Bond Election"), the voters of the City of San Antonio voted to authorize the issuance of general obligation bonds to finance certain public projects, including certain projects approved under Proposition 4 at the Bond Election and referred to therein as the "Library, Museum & Cultural Arts Improvements" (the "Proposition 4 Projects"); and

WHEREAS, among the Proposition 4 Projects approved at the 2012 Bond Election is a project described in the official brochure for the Bond Election presented to the voters (the "Brochure") as follows: "Children's Museum LF: Leverage funding for the Children's Museum relocation and expansion to increase its accessibility to San Antonio families and provide additional education programming to young children" (the "Children's Museum LF"); and

WHEREAS, the City is bound to comply with the terms and conditions contained in the Brochure and the Brochure allocated Three Million and No/100 Dollars (\$3,000,000.00) (the "Bond Allocation") to the Children's Museum LF; and

WHEREAS, the City intends to apply a portion of the Bond Allocation to acquire from Grantee two tracts of land totaling 1.775 acres and located at the intersection of Humphrey Avenue and Margaret Street (the "Parking Parcel"), pursuant to the Purchase Contract with Grantee attached hereto as **Exhibit A** (the "Sales Contract"), and thereupon enter into the Lease Agreement with Grantee attached hereto as **Exhibit B** (the "Lease"), which shall permit Grantee to use the Parking Parcel for public and employee parking in support of the Museum and other uses as set forth in the Lease; and

WHEREAS, pursuant to the terms, conditions and provisions set forth herein, the City also intends to apply a portion of the Bond Allocation to the design and construction of the Project (defined below) that will support the Museum's relocation and expansion; and

WHEREAS, the City has identified Grantee as the appropriate party to contract with for the fulfillment of the Project (defined below), in accordance with all applicable laws and the authorizing instruments for the public funding; and

WHEREAS, the public benefits to be gained from the Project are: (a) supporting the provision of cultural facilities available to the citizens of San Antonio, operated under non-profit regulations as indicated in the Determination Letter from the Internal Revenue Service, attached and incorporated herein as **Exhibit C**, and (b) improvements along the public right-of-way.

NOW THEREFORE, the Parties severally and collectively agree, and by the execution hereof are bound, to the mutual obligations and to the performance and accomplishment of the tasks herein.

I. TERM

The term of this Agreement shall commence on the date whereupon both Parties have executed this Agreement (the "Effective Date") and continue until the later of (a) the expiration of 20 years from the effective date of this Agreement or (b) final repayment by the City of all bonds providing funding for the Funding Agreement, as those bonds may be refinanced from time to time, unless terminated sooner as otherwise provided in this Agreement (the "Term"). The Term of this Funding Agreement shall coincide with the term of the Lease.

II. GENERAL RESPONSIBILITIES OF GRANTEE

2.01 The funding provided under this Agreement is contingent upon the final execution of Exhibits A and B.

2.02 Grantee is responsible for the design and construction of (a) a parking lot for buses, Grantee employees and the public on City Parcel ("Parking Lot") and (b) the Utility Relocation Work (defined in Section 7.01 herein); and (c) improvements such as angle in parking, sidewalks, curb gutter and lighting in the public right-of-way along Broadway directly in front of the Museum Property in compliance with the approved Plans described below (collectively, the "Project"). Grantee will complete design and construction of the Project by December 31, 2015, subject to Force Majeure.

2.03 Grantee shall provide all necessary funding for the Project beyond the City's commitment of \$1,800,000.00, which includes \$63,694 for City costs associated with Project oversight, and provide evidence to City that any additional funds necessary for the Project have been secured prior to the receipt of any funding under this Agreement. In the event the scope of the Project is adjusted downward, the City shall have the option of adjusting its commitment downward accordingly. City is not responsible for any cost overruns unless agreed to in writing in accordance with this Agreement.

2.04 Grantee shall provide to City the Grantee's plans and specifications for the Project, including an anticipated construction schedule ("Plans"), and such Plans shall be subject to the review and approval of City, acting in its capacity as grantor under this Agreement. After

approval by City, the Plans shall be attached and incorporated into this Agreement as **Exhibit D** and Grantee shall not make any substantial changes to the Plans without the prior written approval of City. The approvals given in this Section do not relieve Grantee of the burden of obtaining all necessary governmental approvals, including those provided by City through its relevant development departments and relevant boards and commissions including the Historic and Design Review Commission, and the State of Texas Commission on Environmental Quality (Article 9102). City's approval of the Plans does not release Grantee of the responsibility for the correction of Grantee's mistakes, errors or omissions contained in the Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved.

2.05 Grantee shall submit all future change orders to the CIMS Director or his designee for review and written approval to ensure their compatibility with the Plans.

2.06 Unless written notification by Grantee to the contrary is received by City, Grantee's Executive Director shall be Grantee's designated representative responsible for the management of this Agreement and the point of contact for City on all matters regarding this Agreement.

2.07 City shall have authority to inspect the Project throughout the construction process to ensure compliance with the Plans. Grantee shall cause its design or construction professional to provide periodic certifications of construction certifying that construction has been conducted in compliance with the Plans. Upon request by City, any and all construction drawings must be certified by a qualified engineer or architect licensed by the State of Texas, and must conform to all applicable federal, state and local laws and regulations. Grantee shall submit said certification to the CIMS Director or his designee at the completion of the Project construction. City shall have the right to withhold funding until such certifications are provided.

2.08 On or prior to January 31, 2014, and on or prior to each succeeding January 31 throughout the Term of the Agreement, Grantee shall provide to City an annual report ("Annual Report"). The Annual Report shall include the following:

A. Description of all activities occurring at the Museum Property that occurred during the previous calendar year that were available to the general public, including activity dates, estimated attendance, days and hours that the Museum was open to the general public and the days and hours the Parking Lot was open to the general public and the rules and regulations for the Parking Lot's use.

B. Evidence of insurance coverages, with City as additional insured, as outlined in Section 12 below.

C. Description of all maintenance activities related to the Project, including routine, capital, and any deferred maintenance, for the previous calendar year and planned maintenance activities related to the Project for the upcoming calendar year.

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 during the term of this Agreement, whether or not Grantee's activities are related to the Project, and will use all reasonable efforts to ensure said compliance by any and all contractors and subcontractors that may work on the Project.

3.02 To the extent applicable, Grantee agrees to abide by Chapters 252, and 271 of the Texas Local Government Code, and Chapters 2254 and 2267 of the Texas Government Code or other competitive contracting processes allowed for as express exceptions to these laws.

3.03 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. Inspections and final approval shall be the responsibility of Grantee.

3.04 PREVAILING WAGE RATE AND LABOR STANDARD PROVISIONS.

A. The requirements of Chapter 2258 of the Texas Government Code, entitled "Prevailing Wage Rates," shall apply to this Agreement. Grantee agrees that its construction contractor will comply with City Ordinance No. 71312 and its successors such as Ordinance No. 2008-11-20-1045 and will require subcontractors to comply with City Ordinance 71312 and its successors such as Ordinance No. 2008-11-20-1045 and shall not accept affidavits.

B. In accordance with the provisions of Chapter 2258 and Ordinance No. 2008-11-20-1045, Grantee shall request upon advertisement of construction bids for the Project, and the City will provide Grantee with the appropriate wage determination which includes the general prevailing rate of per diem wages in this locality for each craft or type of workman needed to perform the construction work. The Grantee is required, and shall require its construction contractor and all subcontractors for the Project to comply with each updated schedule of the general prevailing rates in effect at the time the Grantee calls for bids for construction of a given phase. The Grantee is further required to cause the latest prevailing wage determination decision to be included in bids and contracts with the Grantee's general contractor and all subcontractors for construction of each Phase of the Project. Grantee is responsible for and shall collect and monitor weekly certified payrolls and perform site visits to ensure the prevailing wage is being paid to all workmen. City will audit certified payroll records as necessary in accordance with this Agreement.

C. Upon audit of the records and certified payrolls under this section, should the City or its auditors find any violations, the Grantee shall cause its Project construction contractor to forfeit as a penalty to the City \$60.00 for each laborer, workman, or mechanic employed, for each calendar day, or portion thereof, that such laborer, workman or mechanic is paid less than the said stipulated rates for any work done under said contract, by the contractor or any subcontractor. The establishment of prevailing wage rates in accordance with Chapter 2258, Texas Government Code shall

not be construed to relieve the Grantee from its obligation under any federal or state law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed under this Agreement.

3.05 ENVIRONMENTAL. Construction of the Project shall be in accordance with the all local, state and federal environmental requirements including all City applicable construction and development regulations as well as federal Environmental Protection Agency (EPA), Texas Department of State Health Services (TDSHS) and Texas Commission on Environmental Quality (TCEQ) rules and regulations and all other regulations and laws relating to the environment, asbestos containing materials, Hazardous Substances or exposure to such and shall develop and operate the Project in accordance with the terms and conditions of this Agreement.

3.06 SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY 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 which Grantee must comply with are contained in Exhibit E of this Agreement, which is attached hereto and incorporated herein, and 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.

IV. OWNERSHIP, USE OPERATIONS

4.01 Grantee hereby acknowledges that it will construct the Project in a manner consistent with use by the general public. Grantee hereby agrees that the operating hours of the facility will facilitate frequent use by the general public and that the scheduling of use, rules and regulations, and other operational practices will not unreasonably limit access by the general public to use and enjoy the Project improvements. The Parking Lot will be reserved for Museum patrons and employees during business hours, but shall be open to the general public after hours. Grantee hereby agrees that the use described above will continue for the Term of this Agreement.

4.02 Grantee shall be responsible for the operation and maintenance of the Project and all associated costs will be the responsibility of Grantee, The City shall be responsible for future improvements and maintenance to sidewalks and streets.

4.03 The Project shall be open to the public during the entire term of the Lease and the term of the bonds issued in connection with the Project ("Bonds").

V. FUNDING AND ASSISTANCE BY CITY

5.01 City shall reimburse Grantee for all eligible expenses incurred hereunder. Notwithstanding any other provisions of this Agreement, the total of all payments and other obligations made or incurred by City hereunder shall not exceed the sum of \$1,800,000.00, which includes \$63,694 to cover City's Project oversight costs.

5.02 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.

5.03 Funding shall consist of reimbursements paid to Grantee for the Allowable Expenditures set forth below, not to exceed \$1,800,000.00, which includes \$63,694 to cover City's Project oversight costs. The City funding provided under this Agreement shall only be used for the portions of the Project which are dedicated to public use/public purpose.

5.04 All funding provided by City shall come from available bond proceeds. City shall not be responsible for the payment of any eligible expenses until sufficient bond funds are available.

5.05 The Director of CIMS or his designee shall be responsible for the administration of this Agreement on behalf of City and the point of contact for all communication regarding this Agreement from Grantee.

VI. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY GRANTEE

6.01 Grantee agrees to maintain readily identifiable 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.

6.02 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 permanently. Records will be retained by Grantee in an electronic format.

6.03 Grantee 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 Project in accordance with the provisions hereof.

6.04 City shall reimburse Grantee on a monthly basis upon receipt and approval of an invoice through the City's Project Reporting Information Management Exchange Link (COSA PRIMElink) or any other updated program used by City for this purpose. City shall pay approved invoices within 60 days of receipt from Grantee, subject to Section 5.04.

6.05 All requests for reimbursement shall be submitted through the COSA PRIMElink. Grantee shall sign a Business Level Agreement and ensure that all of its employees or representatives utilizing PRIMElink sign and comply with an Individual User Agreement. Such requests for reimbursement shall be completed on PRIMElink and/or utilizing forms and instructions approved by CIMS. Prior to the initial request for reimbursement, Grantee must submit a schedule of values for payment to be approved by CIMS, which approval shall not be unreasonably withheld, conditioned, or delayed. Any changes to the schedule of values once approved will be processed and approved as task orders through the portal.

6.06 Prior to reimbursement, City will have the right to inspect work completed to ensure conformance with the approved Plans. Invoices should include all supporting documentation that costs have been incurred, as required by City.

6.07 City agrees to provide Grantee written notice regarding any expenditure the City reasonably determines to be outside the permissible parameters of this Agreement. Said notice will provide Grantee 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.

6.08 Upon termination of this Agreement, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in Section 6 as a result of any auditing or monitoring by City, Grantee shall refund such amount to City within 30 working days of City's written request specifying the amounts disallowed or disapproved.

VII. ALLOWABLE EXPENDITURES

7.01 Subject to the terms, provision and conditions hereof, Grantee shall receive funding hereunder related to the Project:

- (a) the design and construction of a surface parking lot on the Parking Parcel;
- (b) the design and construction of improvements to the public right-of-way adjoining and surrounding the Museum Property and Parking Parcel, including (but not limited to) the construction of on-street parking, sidewalks, curbs, storm gutters, drainage improvements, landscaping and street lighting in the public right-of-way along Broadway directly in front of the Museum Property, all in compliance with the Plans;
- (c) the design and construction of improvements to provide pedestrian access between the Parking Parcel and Museum Property, including access across the existing public right-of-way between such parcels that the City intends to vacate and abandon; and/or

(d) the removal of utility poles from the public right-of-way along Broadway and/or Humphrey Avenue and the relocation and/or burial of the utility services currently utilizing such utility poles (the "Utility Relocation Work").

7.02 Upon preparation of Plans and budget for Project by Grantee, Grantee shall submit said budget to City for approval of any costs to be paid from funds received hereunder. Costs shall be considered allowable only if so approved in Grantee's Project 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.

7.03 Only the following categories of costs shall be considered allowable expenditures under this Agreement ("Allowable Expenditures"):

(A) The cost and expense of constructing the Project, including the payments made under any construction contracts related thereto and any payments made to the responsible utility companies for Utility Relocation Work;

(B) The cost and expense incurred with respect to any construction change orders approved by the City as required in Section 2.05;

(C) The cost and expense incurred in designing the Project, including payments made to any architectural firm or engineering firm employed by Grantee for the design of the Project that satisfy the requirements of this Agreement;

(D) The cost and expense of evaluating the site conditions pertinent to the design and construction of the Project, including without limitation soil reports, environmental reports, surveys, and geotechnical reports;

(E) Costs or fees paid for consultant and/or professional services incurred in connection with the Project or Grantee's performance under this Agreement; and

(F) Advertising expenses related to bidding of construction contracts, compliance with any API, goals or API Plans adopted by the City's SBEDA or other notices required by law or this Agreement.

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, for the public purpose/public use stated herein, and in compliance with all applicable city, state and federal laws, regulations and/or ordinances.

7.04 The following shall not be Allowable Expenditures under this Agreement:

(A) Personnel costs, salaries or wages paid directly by Grantee or other similarly -affiliated organization;

- (B) Travel and travel-related expenses;
- (C) Costs or fees for consultant and/or professional services, except for those incurred in connection with the Project or in Grantee's performance under this Agreement;
- (D) Costs or fees associated with attendance at meetings, seminars, or conferences;
- (E) Costs or fees associated with regular maintenance and operation;
- (F) Fundraising expenses;
- (G) Equipment and furnishings, except for items of a capital nature which are being provided by Grantee's general contractor and shown on the approved Plans and specifically approved by the City; and
- (H) Advertising expenses, except for those permitted by Subsection 7.01 (F).

7.05 Written requests for prior approval shall be Grantee's responsibility and shall be made 30 days from date necessary to permit a thorough review by the City. 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.

VIII. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

8.01 Grantee further represents and warrants that:

A. All information, data or reports heretofore or hereafter provided to City is and shall be complete and accurate as of the date shown on the information, data, or report. Grantee shall notify the City in the event of any material change affecting the information, data or reports heretofore or hereafter provided to City.

B. It is financially stable and capable of fulfilling its obligations under this Agreement. 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.

D. No provision contained herein contravenes or in any way conflicts with the authority under which Grantee is doing business or with the provisions of any existing indenture or agreement of Grantee.

IX. ACCESSIBILITY OF RECORDS & MONITORING

9.01 At any time and as often as the City may deem necessary, upon three business (3) days prior written notice, Grantee shall make the Records available to the City or any of its authorized representatives, and shall permit the City or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

9.02 To the extent required by law, Grantee shall cooperate with the City to satisfy requests for information received by the City under the Texas Public Information Act or related laws pertaining to this Agreement.

9.03 Grantee agrees that the City may carry out reasonable monitoring and evaluation activities so as to ensure compliance by Grantee with this Agreement and with all other laws, regulations and ordinances related to the performance hereof, and Grantee shall provide reasonable access to the City related to such activities.

X. TERMINATION

10.01 City shall have the right to terminate this Agreement for non-compliance, in whole or in part, at any time before the date of completion of the Term whenever City determines that Grantee has failed to comply with any term of this Agreement, subject to the cure period. City will provide Grantee with written notification as to the nature of the non-compliance, and give Grantee a 60-day period from the date of the City's written notification to cure any issue of non-compliance. Should Grantee fail to cure any default within this period of time, City may terminate this Agreement immediately by providing written notice to Grantee, withhold further payments to Grantee and seek repayment of any and all funds disbursed by City.

10.02 In the event of termination of the Lease, for any reason, City shall have the right to immediately terminate this Agreement by providing written notice to Grantee. Upon termination of this Agreement, Grantee must pay City a sum equal to the unamortized amount of money received by Grantee under this Agreement. Amortization is straight-line over the life of the Bonds as such Bonds may be refinanced from time to time.

10.3 The Parties shall have the right to seek any remedy at law to which they may be entitled, in addition to termination, if Grantee defaults under the material terms of this Agreement and fails to cure such default within the cure period set forth above subject to any and all lawful defenses, counterclaims, offsets, settlements, deductions or credits to which Grantee may be entitled.

XI. INDEMNITY

11.01 Grantee covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, the City and the elected officials, employees, officers, directors, volunteers and representatives of the City, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but

not limited to, personal or bodily injury, death and property damage, made upon the City directly or indirectly arising out of, resulting from or related to Grantee's activities under this Agreement, including any acts or omissions of Grantee, any agent, officer, director, representative, employee, consultant or subcontractor of Grantee, and their respective officers, agents, employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of the City, its officers or employees, in instances 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 FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

11.02 The provisions of this **INDEMNITY** are solely for the benefit of the Parties hereto and not indented to create or grant any rights, contractual or otherwise, to any other person or entity. Grantee shall advise the City in writing within 24 hours of any claim or demand against the City or Grantee known to Grantee related to or arising out of Grantee's activities under this Agreement and shall see to the investigation and defense of such claim or demand at Grantee's cost. The City shall have the right, at its option and at its own expense, to participate in such defense without relieving Grantee of any of its obligations under this paragraph.

11.03 **Defense Counsel** - City shall have the right to select or to approve defense counsel to be retained by Grantee in fulfilling its obligation hereunder to defend and indemnify City, unless such right is expressly waived by City in writing. Grantee 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 Grantee fails to retain counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Grantee 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.

11.04 **Employee Litigation** - In any and all claims against any party indemnified hereunder by any employee of Grantee, 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 Grantee or any subcontractor under worker's compensation or other employee benefit acts.

11.05. Acceptance of the Plans by the City shall not constitute nor be deemed a release of the responsibility and liability of Grantee, its employees, associates, agents or subcontractors for the accuracy and competency of their designs, work drawings, Plans and specifications or other documents; nor shall such acceptance be deemed an assumption of responsibility or

liability by the City for any defect in the designs, drawings, Plans and specifications or other documents prepared for the Project.

XII. INSURANCE & BONDS

12.01 Prior to the commencement of any work under this Agreement, Grantee shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to the City’s Capital Improvements Management Services (CIMS) Department, which shall be clearly labeled “San Antonio Children’s Museum - 2012 Bond Project” 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. The City will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) 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 the City. The City shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the City’s Capital Improvements Management Services Department. No officer or employee, other than the City’s Risk Manager, shall have authority to waive this requirement.

12.02 The City reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by City’s Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will City allow modification whereby City may incur increased risk.

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

<u>TYPE</u>	<u>AMOUNTS</u>
1. Workers' Compensation	Statutory
2. Employers' Liability	\$500,000/\$500,000/\$500,000
3. Broad form Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations b. Independent Contractors c. Products/Completed Operations d. Personal Injury	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

e. Contractual Liability f. Explosion, Collapse, Underground g. Environmental Impairment/ Impact – sufficiently broad to cover disposal liability. h. Damage to property rented by you	\$100,000
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. Builder's Risk	All Risk Policy written on an occurrence basis for 100% replacement cost during construction phase of any new or existing structure.

12.04 Grantee agrees to require, by written contract, that all contractors and subcontractors of Grantee working on the Project obtain the same insurance coverages required of Grantee herein, and provide a certificate of insurance and endorsement that names Grantee and the City as additional insureds. Grantee shall provide the City with said certificate and endorsement prior to the commencement of any work by such contractor or subcontractor. This provision may be modified by City's Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this agreement. Such modification may be enacted by letter signed by City's Risk Manager, which shall become a part of the contract for all purposes.

12.05 As they apply to the limits required by the City, the 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). Grantee 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. Grantee shall pay any costs incurred resulting from said changes.

City of San Antonio
Attn: Capital Improvements Management Services Department
P.O. Box 839966
San Antonio, Texas 78283-3966

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

(A) Name the City, its 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, with the exception of the workers' compensation and professional liability policies;

(B) 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;

(C) Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of the City; and

(D) Provide advance written notice directly to the 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.

12.07 Within five calendar days of a suspension, cancellation or non-renewal of coverage, Grantee shall provide a replacement Certificate of Insurance and applicable endorsements to the City. The City shall have the option to suspend Grantee'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.

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

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

12.10 It is agreed that Grantee'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.

12.11 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 the City shall be limited to insurance coverage provided.

12.12 City shall not be responsible for damage resulting from the Project to the equipment and/or property of Grantee and any contractors or subcontractors of Grantee..

12.13 With respect to the Project, Grantee shall comply with Texas Government Code Chapter 2253 provisions regarding performance and payment bonds on certain "Public Works"

contracts (copies of required bonds must be provided to the City prior to the start of construction).

XIII. NONDISCRIMINATION

13.01 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 Project, which said discrimination Grantee acknowledges is prohibited.

XIV. CONFLICT OF INTEREST

14.01 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 its performance 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.

14.02 Grantee further covenants that no member of its governing body or of its staff shall possess any separate interest in, or use their position in a manner that 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.

14.03 No member of the 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; nor
- B. Have any direct or indirect interest in this Agreement or the proceeds thereof.

XV. POLITICAL OR RELIGIOUS ACTIVITY

15.01 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.

15.02 None of the performances rendered by Grantee under this Agreement shall involve, and no portion of the funds received by Grantee under this Agreement shall be used in support of, any sectarian or religious activity, nor shall any facility used in the performance of this Agreement be used for sectarian instruction or as a place of religious worship.

XVI. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL

16.01 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 to City by Grantee, shall, upon receipt, become the property of City.

XVII. CONTRACTING

17.01 Any work or services related to the Project 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 Grantee's responsibility. Grantee is responsible to ensure that all local, state and federal permits and approvals required by or for this Agreement are obtained.

17.02 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.

17.03 By signing this Agreement, Grantee certifies that it will not award any funds provided under this Agreement to any party which it knows to be debarred, suspended or otherwise excluded from or ineligible for participation in programs with the City.

XVIII. CHANGES AND AMENDMENTS

18.01 Unless this Agreement expressly provides 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.

18.02 It is understood and agreed by the Parties that each Party shall comply with any changes in local, state and federal rules, regulations or laws applicable hereto that 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.

XIX. ASSIGNMENTS

19.01 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 the City. Any attempt at transfer, pledge or other assignment shall be void *ab initio* and shall confer no rights upon any third person.

XX. SEVERABILITY OF PROVISIONS

20.01 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.

XXI. NON-WAIVER OF PERFORMANCE

21.01 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.

21.02 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.

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

XXII. ENTIRE AGREEMENT

22.01 This Agreement constitutes the final and entire agreement between the Parties 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 unless the same are in writing, dated subsequent to the date hereof and duly executed by the Parties.

22.02 INCORPORATION OF ATTACHMENTS. Each of the Attachments listed below is an essential part of the Agreement, which governs the rights and duties of the Parties.

Exhibit A – Sales Contract

Exhibit B -- Lease Agreement

Exhibit C – Determination Letter from the Internal Revenue Service

Exhibit E – SBEDA Ordinance Compliance Provisions

XXIII. NOTICES

23.01 For purposes of this Agreement, all official communications and notices among the Parties shall be deemed sufficient if in writing and mailed, registered or certified mail, postage prepaid, to the addresses set forth below:

CITY: Director Capital Improvements Management
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

GRANTEE: San Antonio Children's Museum
ATTN: Executive Director
305 East Houston Street
San Antonio, TX 78205

With copy to: Steven L. Golden
Golden Steves Cohen & Gordon LLP
300 Convent Street, Suite 2600
San Antonio, TX 78205

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 business days of such change.

XXIV. FORCE MAJURE

24.01 City or Grantee may grant temporary relief from any deadline for performance of any term of this Agreement if either Party is prevented from compliance and performance by an act of war, order of legal authority, act of God, terrorism, social unrest, strike, natural disaster, supply shortage, or other unavoidable cause not attributed to the fault or negligence of the Party. To obtain an extension based upon Force Majeure, Grantee must provide written notice to City of the occurrence of the Force Majeure event within 10 days following the date that Grantee becomes aware of the event and the fact that it will delay Grantee's performance of its obligations under this Agreement. City will not unreasonably withhold its consent.

XXV. RELATIONSHIP OF PARTIES

25.01 Grantee is an independent contractor. Nothing contained herein shall be deemed or construed by the Parties hereto, or by any third party, as creating the relationship of employer and employee, officer, principal and agent, partners, joint venturers or any other similar such relationship between the Parties.

XXVI. TEXAS LAW TO APPLY

26.01 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 and venue of any court action brought directly or indirectly by reason of this Agreement shall be in Bexar County, Texas.

XXVII. GENDER

27.01 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.

XXVIII. CAPTIONS

28.01 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.

XXIX. LEGAL AUTHORITY

29.01 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.

29.02 The signer of this Agreement for Grantee represents warrants and assures that he or she has full legal authority to execute this Agreement on behalf of Grantee and to bind Grantee to all terms, performances and provisions herein contained.

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

EXECUTED IN DUPLICATE ORIGINALS, each of which shall have the full force and affect of an original this the ___ day of _____, 2012.

CITY OF SAN ANTONIO,
a Texas Municipal Corporation

SAN ANTONIO CHILDREN'S MUSEUM,
a 501(C)3 Non-profit

Sheryl Sculley
CITY MANAGER

Vanessa L. Hurd
Name: VANESSA L HURD
Title: Executive Director

ATTEST:

Leticia Vacek
CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY

Exhibit A
Sales Contract

Exhibit B
Lease Agreement

Exhibit C
Determination Letter from the Internal Revenue Service

Exhibit D
Plans
(to be added after execution)

Exhibit E
SBEDA Ordinance Compliance Provisions

A. Definitions

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.

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.)

Centralized Vendor Registration System (CVR) – a mandatory electronic system wherein City requires all prospective Subcontractors that are ready, willing and able to sell goods or services to 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 the 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.

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, the 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.

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 Grantee to perform such “pass-through” or “conduit” functions that are not commercially useful shall be viewed by City as fraudulent if Grantee 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, Grantee 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 Grantee and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

Good Faith Efforts – documentation of Grantee’s intent to comply with S/M/WBE Program Goals and procedures including, but not limited to, 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 Grantee; 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 Grantee’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 City 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 City.

M/WBE Directory – a listing of minority- and women-owned businesses that have been certified for participation in the 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 this 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 1/16th 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 Grantee and/or Subcontractors and vendors for City contracted goods and/or services.

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 Grantee.

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.

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 the City's SBE Program APIs.

SBE Subcontracting Program – an API in which Prime Contractors or vendors are required to make Good Faith Efforts to subcontract a specified percentage of the value of prime contract dollars to certified SBE firms. Such subcontracting goals may be set and applied by the GSC on a contract-by-contract basis to those types of contracts that provide subcontract opportunities for performing Commercially Useful Functions wherein there have been ongoing disparities in the utilization of available SBE Subcontractors.

When specified by the GSC, the SBE Subcontracting Plan or Good Faith Efforts plan submitted by Grantee may also be required to reflect Good Faith Efforts that a Prime Contractor or vendor has taken (or commits to taking in the case of solicitations that do

not include a detailed scope of work or those in which price cannot be considered a factor in evaluation), toward attainment of subcontracting goals for SBE firms.

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 the City. A copy of each binding agreement between Grantee 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 Grantee's and/or S/M/WBE firm's performance and

payment under City contracts due to 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 which states Grantee's commitment for the use of Joint Venture Partners and/or Subcontractors/Suppliers in the performance of this contract Agreement, and states the name, scope of work, and dollar value of work to be performed by each of Grantee's Joint Venture partners and Subcontractors/Suppliers in the course of the performance of this Agreement, 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 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.

B. SBEDA Program Compliance – General Provisions

As Grantee acknowledges that the terms of the City's SBEDA Ordinance, as amended, together with all requirements, guidelines, and procedures set forth in City's SBEDA Policy & Procedure Manual are in furtherance of City's efforts at economic inclusion and, moreover, that such terms are part of Grantee's scope of work under this Agreement, and as such 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. Grantee voluntarily agrees to fully comply with these SBEDA program terms as a condition for being awarded this Agreement by City. Without limitation, Grantee further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. Grantee shall cooperate fully with the Small Business Office and other City departments in their data collection and monitoring efforts regarding Grantee's utilization and payment of Subcontractors, S/M/WBE firms, and HUBZone firms, as applicable, for their performance of Commercially Useful Functions on this contract 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. Grantee 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 Grantee or its Subcontractors or suppliers;
3. Grantee 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. Grantee shall immediately notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to Grantee'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 Grantee 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 Grantee 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. Grantee shall immediately notify the Originating Department and SBO of any transfer or assignment of its Agreement with City, as well as any transfer or change in its ownership or business structure.
6. Grantee shall retain all records of its Subcontractor payments for this Agreement as required by Section 6.02.
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 Grantee's Subcontractor / Supplier Utilization

Plan, Grantee 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 Grantee and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

8. Grantee warrants that Grantee and each of its Subcontractors for this Project have registered and/or maintained active status in the City's Centralized Vendor Registration System, and Grantee has represented to City which primary commodity codes each registered Subcontractor will be performing under for this Agreement.

C. SBEDA Program Compliance – Affirmative Procurement Initiatives

City has applied the following contract-specific Affirmative Procurement Initiatives to this contract. Grantee 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 Subcontracting Program. In accordance with SBEDA Ordinance Section III. D. 1. (c), this Agreement is being awarded pursuant to the SBE Subcontracting Program. Grantee agrees to subcontract at least *twenty-eight percent (28%)* of its prime contract value to certified SBE firms headquartered or have a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). The Subcontractor / Supplier Utilization Plan that Grantee submitted to City prior to execution of this Agreement, and that contains the names of the certified SBE Subcontractors to be used by Grantee on this Agreement, the respective percentages of the total prime contract dollar value to be awarded and performed by each SBE Subcontractor, and documentation including a description of each SBE Subcontractor's scope of work and confirmation of each SBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount is hereby attached to this Agreement as Exhibit I and incorporated by reference into the material terms of this Agreement.

M/WBE Subcontracting Program. In accordance with SBEDA Ordinance Section III. D. 2. (b), this Agreement is being awarded pursuant to the M/WBE Subcontracting Program. Grantee agrees to subcontract at least *nineteen percent (19%)* of its prime contract value to certified S/M/WBE firms headquartered or have a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). The Subcontractor / Supplier Utilization Plan that Grantee submitted to City prior to execution of this Agreement, which is attached hereto as Exhibit I, contains the names of the certified S/M/WBE Subcontractors to be used by Grantee on this Agreement, the respective percentages of the total prime contract dollar value to be awarded and performed by each S/M/WBE Subcontractor, and documentation including a description

of each S/M/WBE Subcontractor's scope of work and confirmation of each S/M/WBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount.

In the absence of a waiver granted by the SBO, the failure of Grantee to attain this subcontracting goal for SBE or M/WBE firm participation in the performance of a Commercially Useful Function under the terms of this Agreement shall be a material breach and grounds for termination of this Agreement, and may result in debarment from performing future City contracts, withholding of payment for retainage equal to the dollar amount of the underutilization below the agreed upon SBE or M/WBE subcontracting goals, and/or shall be subject to any other remedies available under the terms of this Agreement for violations of the SBEDA Ordinance, or under any other law.

D. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, Grantee represents and warrants that it will comply with City's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, Grantee 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. Grantee 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. Grantee 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 Grantee 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.

E. Prompt Payment

Grantee shall submit to City accurate progress payment information with each invoice regarding each of its Subcontractors, including HUBZone Subcontractors, to ensure that Grantee's reported subcontract participation is accurate. Grantee 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 Grantee's noncompliance with these prompt payment provisions, no final retainage on the Prime Contract shall be released to Grantee, and no new City contracts shall be issued to Grantee until City's audit of previous subcontract payments is complete and payments are verified to be in accordance with the specifications of the contract.

F. Violations, Sanctions and Penalties

In addition to the above terms, Grantee 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 SBEDA Ordinance in a manner described above 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 Agreement;
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 Grantee, or any related business firm, from eligibility for providing goods or services to the City for a period not to exceed two years (upon City Council approval).