

**MITCHELL LAKE AUDUBON CENTER ENTRANCE GATE
MEMORANDUM OF UNDERSTANDING**

RECITALS

This Memorandum of Understanding ("MOU") is entered into by and between the City of San Antonio, a Texas Municipal Corporation ("City") acting by and through its City Manager, and the San Antonio Water System, a wholly owned municipal entity and an agency of the City of San Antonio (hereinafter referred to as SAWS, or "Recipient") by and through its President and Chief Executive Officer, (collectively referred to as the "Parties"), **WITNESSETH:**

WHEREAS, the City has identified that the Audubon Center at Mitchell Lake is an internationally recognized bird habitat that draws visitors from around the world; and

WHEREAS, the Audubon Center is located on SAWS property, and the improvement of the entry ("Project") on the property will benefit the Center, SAWS, and the City; and

WHEREAS, through ordinance 2022-09-15-0674 the City's FY2022 Budget allocated \$265,000 for renovation of the entrance gate to the Mitchell Lake Audubon Center; and

WHEREAS, City Council hereby finds that such expenditure serves a municipal public purpose; **NOW THEREFORE:**

For and in consideration of the following mutual promises and obligations, and for the benefit of the citizens of the City of San Antonio, the parties herein agree as follows:

I. TERM AND SCOPE

1. Each of the foregoing recitals are incorporated into and made a part of this MOU.
2. This MOU shall commence immediately upon the execution by both Parties and shall terminate on the later of December 31, 2024, or upon completion of the Project.
3. Recipient shall provide to City a narrative Scope for the Project, including a background, project summary and timeline, ("Scope") as **Exhibit A**.
4. Recipient shall provide to City its plans and specifications for the Project, including a construction schedule, ("Plans") and such Plans shall be subject to the review and approval of City, acting in its capacity as grantor under this MOU. Recipient 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 Recipient of the burden of obtaining all necessary governmental approvals, including those provided by City through its relevant development departments and relevant boards and commissions and those that may be required from the State of Texas. Nor does City's approval of the Plans release Recipient of the responsibility for the correction of Recipient'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.

5. Recipient shall provide to City a budget for the Project illustrating where City Funds are to be utilized in accordance with this MOU, as well as illustrating all funding for the entire Project if applicable as **Exhibit B**.

II. PAYMENT TO RECIPIENT

6. In consideration of Recipient's performance, in a satisfactory and efficient manner as determined by City, of all services and activities set forth in this MOU, City agrees to provide funding to Recipient on a reimbursement basis in an amount not to exceed \$259,700 with \$5,300 to be retained by the City, for a total funding by City of \$265,000.00, for design and construction improvements to the entry to Mitchell Lake. The City funding provided under this MOU may only be used for the portions of the Project which are dedicated to public use/public purpose. No City funds may be used for Recipient's personal office space or other non-public aspects of the Project.
7. City shall reimburse Recipient on a monthly basis upon receipt and approval of an invoice through the City's Project Reporting Information Management Exchange Link (COSA PRIMElink) within thirty (30) days after receipt of an approved invoice.
8. All requests for reimbursement shall be submitted through the COSA PRIMElink. Recipient shall sign a Business Level Agreement and ensure that all 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 City's Public Works Department ("PW"). Prior to the initial request for reimbursement, Recipient must submit a schedule of values for payment to be approved by PW, which approval shall not be unreasonably withheld, conditioned, or delayed. Any changes to the schedule of values once approved shall be processed and approved as task orders through the portal.
9. Prior to reimbursement, City shall have the right to inspect work completed in a timely and reasonable manner, to ensure conformance with the approved Plans. Invoices should include all supporting documentation that costs have been incurred, as required by City.
10. City agrees to provide Recipient written notice regarding any expenditure for which Recipient has requested reimbursement under this MOU which the City reasonably determines to be outside the permissible parameters of this MOU. Said notice shall provide Recipient thirty (30) days from receipt of said notice to cure the deficiency or refund to the City any sum of money paid by City to Recipient determined to:
 - A. Have not been spent by Recipient strictly in accordance with the MOU terms; or
 - B. Not be supported by adequate documentation to fully justify the expenditure.
11. Upon termination of this MOU, should any expense or charge be subsequently disallowed or disapproved because of any auditing or monitoring by City, Recipient shall refund such amount to City within thirty (30) working days of City's written request wherein the amount disallowed or disapproved shall be specified.

III. COMPLIANCE WITH APPLICABLE LAWS

12. Prevailing Wage Rate and Labor Standards
 - A. The Parties agree that the Recipient's standard practice will be followed with regard to the incorporation of provisions of Chapter 2258 of the Texas Government Code, and the "Wage and Labor Standard Provisions" amended in City of San Antonio Ordinance 2008-11-20-1045 (the "PWLSP") and will be made a part of any contract(s) awarded for work on the identified Project. This will include a schedule of the general prevailing rate of per diem wages in this locality for each craft or type of worker needed to perform the particular contract work. In accordance with the PWLSP, contracts will include that any contractor shall forfeit a financial penalty of sixty dollars (\$60.00) for each laborer, workman or mechanic employed for each calendar day, or portion thereof, in which such laborer, workman or mechanic is paid less than the stipulated prevailing wage rates for any work done under that contract by the contractor or any subcontractor employed on the project. The establishment of prevailing wage rates, pursuant to Chapter 2258 of the Texas Government Code, shall not be construed to relieve any contractor from its obligation under any federal or state law, regarding the wages to be paid to or hours worked by laborers, workmen or mechanics, insofar as applicable to the work to be performed hereunder. Contractors will be required to acknowledge that in the execution of the Project, they shall not discriminate in their employment practices against any person because of race, color, religion, sex, pregnancy, sexual orientation, political belief or affiliation, age, disability or genetic information. Contractors will also be required to agree that they will not engage in employment practices which have the effect of discriminating against employees or prospective employees because race, color, religion, sex, pregnancy, sexual orientation, political belief or affiliation, age, disability or genetic information.
 - B. Upon prior written notice, City may audit certified payroll records as necessary and reasonable in accordance with this MOU.
13. Recipient agrees to comply with the City of San Antonio's SBEDA Program Terms and Conditions as attached hereto as **Exhibit C**.
14. Recipient understands and agrees to abide by and adhere to all applicable federal, state and local, laws, rules and regulations, including but not limited to: compliance with the Americans with Disabilities Act, federal and local environmental requirements, City construction and development regulations, as well as prohibitions on contracting pursuant to Texas Government Code Chapter 2252, 2270, 2271, and 2274. Recipient further understands and agrees that it has the duty to obtain all necessary permits for the Project.
15. Recipient understands and agrees to comply with procurement and solicitation requirements that the City is required to perform pursuant to Texas Local Government

Code Chapters 252 and 271, or Texas Government Code Chapters 2254 and 2269, as applicable.

16. Recipient 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.

IV. ACCOUNTABILITY AND AUDIT

17. Recipient agrees that City may carry out reasonable monitoring and evaluation activities to ensure compliance by Recipient with this MOU, and Recipient shall provide reasonable access to City related to such activities, and to ensure Recipient's compliance with all applicable laws, regulations and ordinances related to the performance hereof.
18. Accounting records for all expenditures shall be maintained by Recipient in accordance with generally accepted accounting practices. All of the above-described records shall be subject to audit by the City or its contracted auditor.

V. OPERATION FOR PUBLIC USE

19. Recipient hereby acknowledges that it will construct the Project in a manner consistent with use by the general public. Recipient 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. Further, Recipient shall not employ, nor allow others to employ, discriminatory practices in the use of the Project improvements. Recipient hereby agrees that the programs and use described herein will continue for the Term of this MOU.
20. As the owner of the property upon which the Project will be constructed, Recipient shall be responsible for the operation and maintenance of the Project facility, to include the option to contract with an entity to manage such operation and maintenance. The Recipient acknowledges that all associated costs of operation and management will be the responsibility of Recipient.

VI. LIABILITY AND INSURANCE

21. Recipient shall be responsible for insuring its employees and sub-recipients for Worker's Compensation or Alternative Plan. If a Worker's Compensation Policy is maintained, then for the duration of this MOU, Recipient will attach a waiver of subrogation in favor of the City. Recipient shall be responsible for insuring its own Property, Equipment, Autos and Legal Liability. In no event will the City be required to maintain any insurance coverage for Recipient. City reserves the right to review the insurance requirements during the effective period of this MOU 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 MOU, but in no instance will City allow modification whereupon City may incur increased risk.

22. Any and all of the employees of Recipient, wherever located, while engaged in the performance of any work required by the City under this MOU shall be considered employees of Recipient only, and not of the City, and any and all claims that may arise from the Workers' Compensation Act on behalf of said employees while so engaged shall be the sole obligation and responsibility of Recipient.
23. City and SAWS acknowledge they are subject to, and comply with, the applicable provisions of the Texas Tort Claims Act, as set out in the Texas Civil Practice and Remedies Code, Section 101.001 et. seq. and the remedies authorized therein regarding claims or causes of action that may be asserted by third parties for accident, injury, or death. Neither Party assumes any indemnification obligation under this MOU.
24. It is expressly understood and agreed that in the execution of this MOU, neither of the Parties waives or shall be deemed hereby to waive any immunity or defense that would otherwise be available to it against claims arising in the exercise of governmental powers or functions.

VII. NOTICE TO PARTIES

25. For purposes of this MOU, all official communications and notices between the parties shall be deemed sufficient if in writing and mailed, registered or certified mail, postage prepaid, to the addresses set forth below:

City: Razi Hosseini, P.E., Director, Public Works Department
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

SAWS: Julie Valadez, RA, AIA, PMP, Project Manager Architectural Services
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

Notices of changes of address by either party must be made in writing delivered to the other party's last known address within five (5) business days of the change.

VIII. MISCELLANEOUS PROVISIONS

26. Any literature, signs, or print advertising of any type appearing on any medium which refers to, or which is paid for by funds received as a result of this MOU shall contain the words, "Paid for by The City of San Antonio."
27. This MOU is not assignable and funds received as a result hereof shall only be used by

the parties stated herein.

28. Except when the terms of this MOU expressly provide otherwise, any alterations, additions, or deletions to the terms hereof shall only be by amendment in writing executed by both City and Recipient under authority granted by formal action of the Parties' respective governing bodies. The Parties further understand and agree that changes in local, state and federal rules, regulations or laws applicable hereto, may occur during the term of this MOU and that any such changes shall be automatically incorporated into this MOU without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.
29. In the event Recipient fails to meet any of its obligations under this MOU, fails to use the funds for the purposes set out herein, Recipient shall refund to the City the total amount provided under this MOU. Recipient shall pay City such funds no later than thirty (30) days from the date City requests such funds from Recipient.
30. None of the performance rendered hereunder shall involve, and no portion of the funds received hereunder shall be used, directly or indirectly, for the construction, operations, maintenance or administration of any sectarian or religious facility or activity, nor shall said performance rendered or funds received be utilized so as to benefit, directly or indirectly, any such sectarian or religious facility or activity.
31. If any provision of this MOU is for any reason held to be unconstitutional, void, or invalid, the remaining provisions or sections contained herein shall remain in effect and the section so held shall be reformed to reflect the intent of the parties.
32. This MOU shall be construed under and in accordance with the laws of the United States and the State of Texas, and all obligations of the Parties are performable in Bexar County, Texas. The Parties agree that venue for any litigation arising from this MOU shall lie in Bexar County, Texas.
33. The captions and headings appearing in this MOU are inserted merely to facilitate reference and are not to be considered a part of this MOU and in no way shall they affect the interpretation of any of the provisions of this MOU.
34. The signers of this MOU represent, warrant, assure, and guarantee he or she has full legal authority to execute this MOU on behalf of the Parties and to bind the Parties to all of the terms, conditions, provisions, and obligations herein contained.
35. Except as expressly limited herein, the Parties shall have all remedies, at law or equity, for any cause of action based on this MOU.
36. This MOU and its attachments, if any, constitute the entire and integrated agreement between the parties hereto and contain all of the terms and conditions agreed upon, and supersede all prior negotiations, representations, or contracts, either oral or written.

IN WITNESS WHEREOF, the parties have caused this MOU to be duly executed in multiple counterparts, each of which shall constitute an original effective the ____ day of _____, 2023

("Effective Date").


(Signatures to follow)

CITY OF SAN ANTONIO

SAN ANTONIO WATER SYSTEM

By: Roderick Sanchez
ASSISTANT CITY MANAGER

Date: _____



By: Robert R. Puente
PRESIDENT/CEO

Date: 5/19/2023

APPROVED AS TO FORM:

Andy Segovia
CITY ATTORNEY

Exhibit A
PROJECT SCOPE

EXHIBIT A – SCOPE OF PROJECT

Audubon Center Entrance at Mitchell Lake

The San Antonio Water System (SAWS) will be redeveloping the public Entrance of the Audubon Center at Mitchell Lake (10750 Pleasanton Rd) to represent the world-class birding location.

The scope of work shall include:

Design Services:

- Site Survey / Geotech services
- Civil Engineer services
- MEP services
- Landscape services, with temporary irrigation plan
- Architectural services, for sign, gates, gabion walls, and coordination of project

Construction Scope Components:

Site Modifications / Demolition

- Removal of all existing entry gate components, to include but not limited to metal archway, fencing, signs, card access, bollards, concrete island, etc.
- Modify and remove existing vegetation to accommodate new entry design
- Remove portion of existing drive to accommodate new entry design
- Portions of existing interior roads to be removed and rerouted to accommodate new entry road and design

New Construction - Entry Gate, Sign, & Walls:

- New Marquee sign within landscaped island
 - Lighting within landscape to illuminate marquee sign
 - Island shall include new card reader pedestal with push/talk security camera for visitors
- Ornamental Dual-Gate Entrance/Exit gates with SAWS approved gate operators.
- Gabion Stone Walls, constructed with proper footings
- Steel wire panel fence between gabion walls

Landscape:

- Canopy trees for marquee sign island
- Understory trees for marquee sign island
- Soil conditioning for all exposed soil within work area
- Native grass (seed) for all new soil and redeveloped areas where site work was removed.
- Temporary irrigation and water supply, shall include watering plan

Roads & Curbs:

- Entry drive (asphalt pavement with curbs) with turn around lane
- Rework existing drive to be exit lane only, prepped, seal crack overlay applied, then final overlay applied to allow existing road to be congruent with new roads.

Exhibit B
PROJECT BUDGET

Mitchell Lake Audubon Entry**ELEMENTS**

ENTRY GATE / SIGN / WALLS	\$ 254,575.00		
LANDSCAPE	\$ 69,488.52		
ROADS & CURBS	\$ 209,262.50		
CONSTRUCTION ESTIMATE		\$ 533,326.02	
ESTIMATE TO REMOVE CPS POLE	\$ 15,000.00		
ESTIMATED TOTAL		\$ 548,326.02	
CONSULTANT FEES			
LANDSCAPE and ENGINEERING FEES		\$ 102,500.00	
TOTAL PROJECT BUDGET		\$ 650,826.02	

CITY FUNDING

\$ 259,700.00

SAWS FUNDING

\$ 391,126.02

Exhibit C

**SMALL BUSINESS ECONOMIC DEVELOPMENT
ADVOCACY (SBEDA) PROGRAM
Mitchell Lake Audubon Center Gate**

Exhibit C

SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY (SBEDA) PROGRAM Mitchell Lake Audubon Center Gate

A. SBEDA Program

City has adopted a Small Business Economic Development Advocacy Ordinance (Ordinance No. 2016-05-19-0367 and as amended, also referred to as "SBEDA" or "the SBEDA Program"), which is posted on City's Economic Development (hereafter referred to as "EDD") website page and also is available in hard copy form upon request to City. The SBEDA Ordinance Compliance Provisions contained in this Exhibit C are governed by the terms of said Ordinance, as well as by the terms of the SBEDA Ordinance Policy & Procedure Manual established by City, pursuant to said Ordinance, and any subsequent amendments to this referenced SBEDA Ordinance and SBEDA Policy & Procedure Manual in effect as of the date of the execution of this Agreement. Unless defined in a contrary manner herein, terms used in this Exhibit C 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.

B. SBEDA Program Compliance – Affirmative Procurement Initiatives

City has applied the following contract-specific Affirmative Procurement Initiatives to this Agreement. Grantee hereby acknowledges and agrees the selected API requirement also shall 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:

M/WBE Subcontracting Program. In accordance with SBEDA Ordinance Section III. D. 2. (d), this contract is being awarded pursuant to the M/WBE Subcontracting Program. The Grantee agrees to subcontract at least **twenty-three percent (21%)** of its prime contract value to certified M/WBE firms headquartered or having a Significant Business Presence within the San Antonio Metropolitan Statistical Area (SAMSA).

Segmented M/WBE Goal. In accordance with SBEDA Ordinance Section III. D. 2. (e), this contract is being awarded pursuant to Segmented M/WBE Goals. The Grantee agrees to subcontract at least **two percent (2%)** of the contract value to a certified African American Business Enterprise (AABE) firm headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). This **two percent (2%)** subcontracting goal will also count toward the aforementioned **twenty-three percent (21%)** M/WBE subcontracting goal.

Grantee shall submit a **Subcontractor/Supplier Commitment Form** to City with this funding agreement. Failure to include a completed, signed copy of the Subcontractor/Supplier Commitment Form acknowledging the subcontracting goal(s) for this funding will render this contract voidable. *As the comprehensive scope of work is established*, Grantee agrees to submit a Subcontractor/ Supplier Utilization Plan with the names of the certified M/WBE and AABE Subcontractors to be used by Grantee on this contract, the respective percentages of the total prime

contract dollar value to be awarded and performed by each M/WBE and AABE Subcontractor, and documentation including a description of each M/WBE and AABE Subcontractor's scope of work and confirmation of each M/WBE and AABE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount is to be attached and incorporated by reference into the material terms of this Agreement.

In the absence of a waiver granted by the SBO, the failure of Grantee to attain this subcontracting goal for M/WBE and AABE firm participation in the performance of a Commercially Useful Function under the terms of its contract shall be a material breach and grounds for termination of the contract with the CITY, 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 M/WBE and AABE subcontracting goal, 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.

C. Contract Requirements and Commitment

Grantee understands and agrees the following provisions shall be requirements of this Funding Agreement and Grantee, in acknowledging these requirements, commits to comply with these provisions.

Waiver Request - Grantee may request, for good cause, a full or partial Waiver of **specified subcontracting goal(s)** by submitting the *Respondent/ Vendor Subcontracting Waiver Request* form (available at <http://www.sanantonio.gov/SBO/Forms.aspx>). Grantee's Waiver request fully must document Consultant, Sub-Consultant, Contractor, Subcontractor and/or Supplier unavailability despite Grantee's good faith efforts to comply with the goal. Such documentation shall include all good faith efforts made by Grantee including, but not limited to, which Consultants, Sub-Consultants, Contractors, Subcontractors and/or Suppliers were contacted (with phone numbers, e-mail addresses and mailing addresses, as applicable) and the method of contact.

D. SBEDA Program Compliance – General Provisions

Grantee acknowledges and accepts the terms of 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, such terms are part of Grantee's Scope of Work, as referenced in City's Funding Agreement, forming the basis for a Funding Agreement award and subsequent execution of this Agreement. These SBEDA Ordinance requirements, guidelines and procedures hereby are incorporated by reference into this Agreement and are considered by the Parties hereto to be material terms. Grantee's agreement fully to comply with these SBEDA program terms is a material condition for being awarded this Funding Agreement by City. Without limitation, Grantee further agrees to the following terms as part of its contract compliance responsibilities under City's 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 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 contract, 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 contract with the 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 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 GRANTEE's Subcontractor / Supplier Utilization Plan, the 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 the 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 acknowledges that the CITY will not execute a contract or issue a Notice to proceed for this project until the GRANTEE for this project have registered and/or maintained active status in the CITY's Centralized Vendor Registration System (CVR), and GRANTEE has represented to CITY which primary commodity codes each Subcontractor will be performing under for this contract. CITY recommends all Subcontractors to be registered in the CVR.

For more information please see link: <http://www.sanantonio.gov/SBO/Compliance>

E. Violations, Sanctions and Penalties

In addition to the above terms, Grantee acknowledges and agrees it is a violation of the SBEDA Ordinance and shall be deemed to have committed a material breach of this Agreement if Grantee:

1. fraudulently obtains, retains, attempt to obtain, or aids 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 falsifies, conceals or covers up by a trick, scheme or device, a material fact or makes any false, fictitious or fraudulent statements or representations, or makes use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statements or entries pursuant to the terms of the SBEDA Ordinance;
3. willfully obstructs, impedes or attempts to obstruct or impede any authorized official or employee investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;
4. fraudulently obtains, attempts to obtain or aids 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. makes 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 of entity violating the provisions of this **clause** 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
5. Disqualification of GRANTEE or other business firm from eligibility for providing goods or services to the City for a period not to exceed two years (upon City Council approval).

F. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, Grantee represents and warrants 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, 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 Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s), Suppliers vendors or commercial customers, nor shall Grantee retaliate against any person for reporting instances of such discrimination. Grantee shall provide equal opportunity for Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s), Suppliers and vendors to participate in all of Grantee's 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 City's Relevant Marketplace. Grantee understands and agrees 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. Grantee's certification of its compliance with this Commercial Nondiscrimination Policy, as submitted to City pursuant to the solicitation for this Agreement, hereby is incorporated into the material terms of this Agreement. Grantee shall incorporate this Commercial Nondiscrimination Policy clause into each of its Consultant(s), Sub-Consultant(s), Contractor(s) Subcontractor(s) and Supplier agreements entered into pursuant to City contracts.

G. Prompt Payment

Upon execution of this Agreement, Grantee shall be required to submit to City accurate progress payment information with each invoice, with regard to each of its Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and Suppliers, including HUBZone Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and Suppliers, to ensure Grantee's reported subcontract participation is accurate. Grantee shall pay its Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and Suppliers in compliance with Chapter 2251, Texas Government Code (known as the "Prompt Payment Act") within ten (10) days of receipt of payment from City. In the event of Grantee's noncompliance with these prompt payment provisions, 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 Agreement.

H. Definitions

Affirmative Procurement Initiatives (hereafter referred to as "API") – refers to various Small Business Enterprise, Minority Business Enterprise, and/or Women Business Enterprise (hereafter referred to as "S/M/WBE") Program tools and Solicitation Incentives that are used to encourage greater prime contract 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 (hereafter referred to as "CVR") – refers to a mandatory electronic system wherein City requires all prospective Consultants, Sub-Consultants, Contractors and Subcontractors 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 City. The CVR-assigned identifiers also are used by City's Goal Setting Committee for measuring relative availability and tracking utilization of SBE and M/WBE (as defined herein) firms by Industry or commodity codes and for establishing annual aspirational Goals and contract-by-contract Subcontracting Goals.

Certification or "Certified" – refers to the process by which City's Small Business Office (hereafter referred to as "SBO") staff determines a firm to be a bona-fide small, minority-, women-owned or emerging small business enterprise. Emerging Small Business Enterprises (hereafter referred to as "ESBEs") automatically are eligible for Certification as SBEs. Any firm may apply for multiple Certifications covering 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/or 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 – means a 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 also must 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 actually is performing, 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 Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s), Suppliers 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 – means the documentation of Grantee’s intent to comply with S/M/WBE Program Goals and procedures including, but are not limited to, the following:

(1) documentation reflecting Grantee’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 Consultant’s posting of a bond covering the work of SBE or M/WBE Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by Grantee and the solicitation; and documentation of consultations with trade associations and Consultant(s),

Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers representing the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers). 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 – means a business certified by the 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 all of the following criteria:

1. The business is owned and Controlled by U.S. citizens;
2. At least thirty five percent (35%) of the business's employees must reside in a HUBZone; and
3. The business's 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 – means the 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 – means an adult person that is of legal majority age.

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

Minority/Women Business Enterprise (hereafter referred to as "M/WBE") – refers to a firm certified as a Small Business Enterprise and also is certified as either a Minority Business Enterprise or as a Women Business Enterprise, is at least fifty-one percent (51%) owned, managed and controlled by one or more Minority Group Members and/or women and is ready, willing and able to sell goods or services to be purchased by City.

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

Minority Business Enterprise (hereafter referred to as "MBE") – means any legal entity, except a joint venture, organized to engage in for-profit transactions, certified a Small Business Enterprise and is at least fifty-one percent (51%) owned, managed and controlled by one or more Minority Group Members, as defined below, and is ready, willing and able to sell goods or services to be purchased by City. To qualify as a MBE, the enterprise shall meet the Significant Business Presence requirement defined herein. Unless otherwise stated, the term MBE, as used

in City's Ordinance, is not inclusive of women-owned business enterprises.

Minority Group Members – refers to 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 with origins in any of the black racial groups of Africa.

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 – refers to a City department or authorized representative of City managing the contract.

Payment – refers to the dollars actually paid to Grantee and/or Grantee's Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s), Suppliers and/or vendors for City-contracted goods and/or services.

Prime Consultant – refers to a Consultant, under contract to City, to whom a purchase order or contract is issued by City for the purposes of providing goods or services to City. For purposes of this Agreement, this term refers to Grantee.

Relevant Marketplace – means the geographic market area affecting the S/M/WBE Program, as determined for purposes of collecting data for NERA Economic Consulting and for determining eligibility for participation under various programs established by City's SBEDA Ordinance, defined as the San Antonio Metropolitan Statistical Area (as defined herein), which currently includes the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson.

Respondent – refers to an entity submitting a bid, Statement of Qualifications or Proposal in response to a solicitation issued by City. For purposes of this agreement, Grantee is Respondent.

Responsible – means a firm capable in all respects fully to perform the contractual requirements outlined in City's solicitation and has the integrity and reliability to assure good faith performance of all project specifications.

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

SBE Directory – refers to a listing of small businesses certified for participation in City's SBE Program APIs.

Significant Business Presence – defined as an established place of business in one or more of the eight (8) counties making up the SAMSA, from which twenty percent (20%) of the entity's full-time, part-time and contract employees regularly are 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. To qualify for this Program, a S/M/WBE must be headquartered or have a *significant business presence* for at least one (1) year within the Relevant Marketplace

Small Business Enterprise (hereafter referred to as "SBE") – means a corporation, partnership, sole proprietorship or other recognized legal entity existing for the purpose of making a profit, is independently owned and operated by Individuals legally residing in or are citizens of the United States or its territories, meets the U.S. Small Business Administration (hereafter referred to as "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 (hereafter referred to as "SBO") – means the office within City's EDD Department primarily responsible for general oversight and administration of the S/M/WBE Program.

Small Business Office Manager (hereafter referred to as "SBO Manager") – refers to the Assistant Director of EDD 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 also is responsible for enforcement of Grantee, Consultant and vendor compliance with contract participation requirements and ensuring that overall SBEDA Program goals and objectives are met.

Small Minority Women Business Enterprise Program (hereafter referred to as "S/M/WBE Program") – refers to the combination of SBE Program and M/WBE Program features contained in the SBEDA Ordinance.

Sub-Consultant – means any vendor of Grantee providing goods or services to Grantee in furtherance of Grantee's performance under an agreement, contract or purchase order with City. A copy of each binding agreement between Grantee and its Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and Suppliers shall be submitted to City in writing prior to execution of this Agreement and any modification to this Agreement.

Suspension – means the temporary stoppage of a SBE or M/WBE firm's beneficial participation in City's S/M/WBE Program for a finite period of time, due to the cumulative contract payments the S/M/WBE firm received during a fiscal year exceeding 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, as set forth in Section III.E.13 of Attachment A to the SBEDA Ordinance.

Sub-Consultant/Supplier Utilization Plan – refers to the binding part of this Agreement stating

Grantee's commitment for the use of Joint Venture Partners and/or Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers in the performance of this Agreement, stating the name, scope of work and dollar value of work to be performed by each of Grantee's Joint Venture partners and/or Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers in the course of the performance of this Agreement, specifying the S/M/WBE Certification category for each Joint Venture partner and/or Consultant, Sub-Consultant, Contractor, Subcontractor and/or Supplier, as approved by the SBO Manager. Additions, deletions or modifications of the Joint Venture partner or and Consultant, Sub-Consultant, Contractor, Subcontractor and/or Supplier names, scopes of work or dollar values of work to be performed requires an amendment to this Agreement approved by the EDD Manager or his/her designee.

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