

<p><b>STATE OF TEXAS</b></p> <p><b>COUNTY OF BEXAR</b></p>	<p>§</p> <p>§</p> <p>§</p>	<p><b>FUNDING AGREEMENT WITH</b></p> <p><b>SAN ANTONIO BOTANICAL SOCIETY</b></p>
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This Agreement is hereby made and entered into by and between the CITY OF SAN ANTONIO (hereinafter referred to as "City"), a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance No. \_\_\_\_\_ dated \_\_\_\_\_, and The San Antonio Botanical Society, (hereinafter referred to as "Grantee"), a Non-profit Corporation, acting by and through its officers, hereto duly authorized.

WHEREAS, City held a Bond Election on May 7, 2022 and received approval from the voters to fund a variety of Parks and Recreation Improvements (Proposition C on the ballot); and

WHEREAS, among the Parks and Recreation projects approved is a project titled "San Antonio Botanical Center" (the "Project", such Project to be completed in accordance with the Scope attached as Exhibit A); and

WHEREAS, the official brochure for the Bond Election described this project as follows: "San Antonio Botanical Center LF: Facilitate the construction of improvements which may include restoration of existing structures such as the Lucille Halsell Conservatory and Greenhouses"; and

WHEREAS, the City has identified Grantee as the appropriate party to contract with for the fulfillment of the public purpose identified in the official bond brochure in accordance with all applicable laws of public funding and the authorizing instruments for the public funding; and

WHEREAS, the City is the fee simple owner of the real property located at 555 Funston Place, San Antonio, TX 78209 and the proposed location of the Project; and

WHEREAS, Grantee has leasehold of the real property located at 555 Funston Place, San Antonio, TX 78209 and the proposed location of the Project; and

WHEREAS, the City has found, by resolution adopted by its City Council, that the programs and services offered by Grantee at the hereinafter-defined and to be completed Project accomplish the public purpose of cultural enrichment of and provision of community services to City residences and, accordingly, the expenditure of proceeds derived from the sale of bonds authorized at the May 7, 2022 City bond election under Proposition C to expand and improve the Project represents a valid expenditure of such bond proceeds; and

WHEREAS, the City's issuance of bonds (such initially City bonds, as well as any City bonds from time to time issued to refund these initial City bonds, the "City Bonds") to fund its contribution obligations hereunder is authorized by applicable Texas law, including the City's Home Rule Charter and the City voters' approval of Proposition C at the May 7, 2022 City bond election, and such contribution shall satisfy in full the City's funding obligation for the project

identified in Proposition C of the City's May 7, 2022 bond election as "San Antonio Botanical Center"; and

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

## **I. TERM**

1.01 This Agreement shall commence on the later of (a) the effective date of the Authorizing Ordinance or (b) the later of the signatures of the two Parties. The Term shall expire upon the earlier to occur of: (a) twenty (20) years, or (b) final payment or discharge of the City Bonds issued to finance the City's contribution to the Project. The Director of Public Works may administratively approve extension of agreement term up to an additional year if deemed necessary by City.

## **II. GENERAL RESPONSIBILITIES OF GRANTEE**

2.01 Provided Grantee receives the funding described in Section V of this Agreement, and subject to the other terms and conditions of this Agreement, including, but not limited to, force majeure provisions, Grantee hereby accepts full responsibility to use reasonable commercial efforts to complete the Project by April 2027, as described in this Agreement.

2.02 The current budget estimates of the Project are approximately \$8,300,000. Grantee shall provide all necessary funding for the Project beyond the City's commitment of \$2,450,000, plus \$50,000 which shall be retained by the City per Section 5.01, for a total of \$2,500,000. In the event that 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 costs over the estimated amount of the Project unless agreed to in writing in the form of an amendment to this Funding Agreement. The City shall fund its commitment hereunder from proceeds derived from its sale of bonds authorized under Proposition C of the City's May 7, 2022 bond election (such City bonds, as well as any City bonds from time to time issued to refund the same, the "City Bonds").

2.03 Unless written notification by Grantee to the contrary is received and approved by City, Grantee's Chief Executive Officer/CEO shall be Grantee's designated representative responsible for the management of this Agreement.

2.04 The Director of Public Works (PW) or designee shall be responsible for the administration of this Agreement on behalf of the City until the completion of the City funded portion of the Project.

2.05 Formal notices and communications between City and Grantee pursuant to this Agreement shall be directed to the designated representatives of each as set forth in paragraphs numbered 2.03 and 2.04 hereinabove.

2.06 Grantee shall provide to City a narrative Scope for the Project, including a background, project summary and timeline, (“Scope”) as Exhibit A.

2.07 Grantee 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 Funding Agreement. The Plans as approved by the Grantee and the City are attached as Exhibit B. Grantee shall not make any substantial changes to the Plans without the prior written approval of City, which approval shall not be unreasonably withheld. The approvals given in this Section do not relieve Grantee of the burden of obtaining all necessary governmental or lease approvals, including those provided by City through its relevant development departments, relevant boards and commissions, as well as the State of Texas Commission on Environmental Quality, or any other federal, state, or local permitting requirements. Nor does City’s approval of the Plans 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.

2.08 Grantee shall provide to City a Budget (“Budget”) for the Project illustrating where City Bond Funds are to be utilized in accordance with this agreement, as well as illustrating all funding for the entire Project if applicable as Exhibit C.

2.09 City shall have authority to inspect the Project throughout the construction process to ensure substantial compliance with the Scope and Plans and to request copies of construction inspections performed by Grantee and third parties. Grantee shall use best efforts to cause its design professional to provide periodic certifications of construction certifying that construction has been conducted in substantial compliance with the Plans. Grantee shall submit said certification to the Director of PW or designee at the completion of the Project construction. Grantee shall notify City and City shall have the right to attend all scheduled construction meetings. Grantee shall provide City with a copy of the Certificate of Occupancy upon completion of the Project.

2.10 Beginning on May 1, 2026, and on each succeeding May 1 throughout the Term of the Agreement, Grantee shall provide Director of Parks and Recreation or designee an annual report (“Annual Report”). The Annual Report shall include the following:

2.10.1 Summary description of all activities that occurred during the previous calendar year that were available to the general public, including activity dates, estimated attendance, days and hours that the Project improvements are open to the general public, and the rules and regulations for use.

2.10.2 Evidence of insurance coverage, with City as additional insured, as outlined in **Article XII** below.

2.10.3 Description of material maintenance activities, excluding ordinary and routine maintenance activities, but including capital improvements and any deferred maintenance,

for the previous calendar year and planned material maintenance activities for the upcoming calendar year.

2.10.4 All requirements included in Section 5 of the Lease Agreement between Grantee and the Parks and Recreation Department

### **III. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS**

3.01 **Legal Compliance.** Grantee warrants and represents that it will use best efforts to comply with all Federal, State, and Local laws and regulations and will use reasonable efforts to ensure said compliance by any and all contractors and subcontractors that may work on the Project.

3.02 **Open and competitive contracting.** To the extent applicable, Grantee agrees to abide by Chapters 252, and 271 of the Texas Local Government Code, and Chapters 2254 and 2269 of the Texas Government Code or other open competitive contracting processes which are advertised to the public in a legal and appropriate manner.

3.03 **ADA compliance.** Plans must conform to Americans with Disabilities Act (ADA) 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 Standards**

A. The requirements of Chapter 2258 of the Texas Government Code, entitled "Prevailing Wage Rates," shall apply to this Funding Agreement. Grantee agrees that its construction contractor will be contractually obligated to comply with City Ordinance No. 71312 and its successors such as Ordinance No. 2008-11-20-1045 and to require subcontractors to comply with City Ordinance 71312 and its successors such as Ordinance No. 2008-11-20-1045, and shall not accept affidavits. All applicable contracts shall contain the obligation to comply with the City's Prevailing Wage Rate and Labor Standards.

B. In accordance with the provisions of Chapter 2258 and Ordinance No. 2008-11-20-1045, Grantee shall request prior to advertisement of construction bids, and the City will promptly 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 shall require its construction contractor and all subcontractors 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 shall 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. Grantee shall require its Construction Contractor and all subcontractors to collect and monitor weekly certified payrolls to ensure the prevailing wage is being paid to all workmen. City will audit certified payroll records as necessary in accordance with this Funding 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 provide in its agreement with the Construction Contractor that the Construction Contractor shall 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 any obligation it may have 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 Funding Agreement.

**3.05 Environmental.** Grantee shall use reasonable best efforts to ensure construction shall be in accordance with all Federal, State, and local environmental requirements including all City applicable construction and development regulations.

**3.06 Small Business Economic Development Advocacy Program.** Grantee shall use reasonable best efforts to cause its Construction Contractor and all subcontractors to comply with all Small/Minority and Woman Owned Business Terms and Conditions as attached hereto as **Exhibit D**.

**3.07 Compliance with Bond Covenants.** The City's commitment hereunder is funded with City Bonds, which are obligations the interest on which is excluded from the gross income calculations of the holders thereof for the purpose of determining income tax liability under applicable federal law. Maintaining the eligibility of the City Bonds for this tax treatment requires the City's compliance with applicable federal tax law and regulations, which includes agreements regarding the use of City Bonds' proceeds and the use and operation of facilities financed with those proceeds. As the expenditure of the City Bonds' proceeds once delivered to the Grantee, and the use and operation of the completed Project, is under the control of the Grantee, Grantee agrees that it shall not use, or permit the use of, proceeds of the City Bonds, or earnings thereon, or any other amounts or any property, the acquisition, construction, or improvement of which is to be financed directly or indirectly with proceeds of the City Bonds or earnings thereon, in a manner which, if used or permitted to be used, respectively, would cause the interest on City Bonds to be includable in the gross income of the bond owners for federal income tax purposes. Purposes which are not permissible include, but are not limited to religious activities, restaurants, cafes, and retail stores.

**3.08. Compliance with Texas Government Code Chapters 2252, 2270, 2271, and 2274.** Grantee agrees to comply with the applicable restrictions from Texas Government Code Chapters 2252, 2270, and 2271 prohibiting City from contracting with a company that engages in business with Iran, Sudan, or a designated Foreign Terrorist Organization; boycotts Israel; boycotts firearm entities or firearm trade associations; or boycotts energy companies. By signing this Agreement with the City of San Antonio, Grantee hereby verifies they have reviewed the applicable state law restrictions, and warranties compliance with the certification requirements from Texas Government Code §2270.002 and §2274.002, if applicable. City's hereby relies on Grantee's verification. If found to be false, City may terminate the contract for material breach.

#### **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. Further, Grantee shall not employ, and shall use best efforts to cause others not to employ, discriminatory practices in the use of the Project improvements. Grantee hereby agrees that the programs and use described herein will continue for the Term of this Funding Agreement.

4.02 Grantee shall be responsible for the operation and maintenance of the Project facility and all associated costs will be the responsibility of Grantee.

4.03 The Project improvements shall facilitate improvements at the San Antonio Botanical Center which may include restoration of existing structures such as the Lucille Halsell Conservatory and Greenhouses within available funding in accordance with the Plans and provide for its continued operation during the entire term that the City Bonds issued to finance the City's contribution to the Project remain outstanding.

4.04 For the entire term that the City Bonds remain outstanding, Grantee shall operate the Project continuously and in a manner that accomplishes on the City's behalf the public purposes that form the basis for the City's contribution to the Project. Grantee shall satisfy this obligation by using reasonable best efforts to assure, for the duration previously specified, the construction of facility improvements and restoration of existing structures within available funding provided for the Project, once completed, as a ratio of all services provided at the completed Project, shall be at least proportionate to the percentage of the total Project cost funded by the City (assuming a City contribution of \$2,500,000 and an overall Project cost of \$8,300,000).

#### **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 \$2,500,000.

5.02 City shall not be obligated nor liable under this Agreement to any party, other than Grantee and Public Works "hereinafter referred to as PW", for payment of any monies or provision of any goods or services.

5.03 Funding shall consist of reimbursements paid to Grantee for design and construction costs of the Project, not to exceed \$2,450,000, with \$50,000 to be retained by the City, for total funding by City of \$2,500,000. The City funding provided under this Funding Amendment 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 Grantee's personal office space or other non-public aspects of the Project

5.04 Except as otherwise set forth herein, it is further expressly understood and agreed by City and Grantee that this Agreement in no way obligates City's General Fund monies or any other monies or credits of City.

## **VI. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY GRANTEE**

6.01 Grantee agrees to maintain readily identifiable records that shall 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 reasonable 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, including a detailed accounting of the expenditure of amounts received from the City hereunder, for so long as the City Bonds remain outstanding, but not less than four (4) years from the completion of the Project.

6.03 City shall reimburse Grantee upon receipt and approval of a monthly invoice through the City's Project Reporting Information Management Exchange Link (COSA PRIMElink) within thirty (30) days after receipt of an approved invoice.

6.04 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 PW. Prior to the initial request for reimbursement, Grantee 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.

6.05 Prior to reimbursement, City shall 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.

6.06 City agrees to provide Grantee written notice regarding any expenditure for which Grantee has requested reimbursement under this Agreement which the City reasonably determines, after consultation with Grantee and/or the Construction Contractor, to be outside the permissible parameters of this Agreement. Said notice shall provide Grantee thirty (30) days from receipt of

said notice to cure the deficiency or refund to the City any sum of money paid by City to Grantee determined to:

- (A) Have not been spent by Grantee strictly in accordance with the terms of this Agreement; or
- (B) Not be supported by adequate documentation to fully justify the expenditure.

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

## **VII. ALLOWABLE EXPENDITURES**

7.01 Upon preparation of a construction plan and budget 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 construction 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 applicable city, state and federal laws, regulations and ordinances affecting Grantee's operations hereunder. All funds paid by City shall be in furtherance of and/or for permanent public improvements. Only the following categories of costs shall be considered allowable:

- (A) Construction contract and change orders
- (B) Construction contingencies
- (C) Architectural/Engineering Design Contract and Amendments

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 the terms of this Agreement and all applicable city, state and federal laws, regulations and/or ordinances.

7.02 The following shall not be considered allowable costs under this Agreement:

- (A) Personnel costs, salaries or wages paid directly by Grantee or an affiliated organization of Grantee
- (B) Travel and travel-related expenses
- (C) Costs or fees for consultant and/or professional services, except for those directly related to the Project (including but not limited to costs and fees of the Architect)
- (D) Costs or fees associated with attendance of Grantee at meetings, seminars, or conferences
- (E) Costs or fees associated with regular maintenance and operation of Grantee
- (F) Fundraising



(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 City.

(H) Advertising

7.03 Written requests for prior approval shall be Grantee's responsibility and shall be made thirty (30) days in advance of the required date for approval in order to permit a thorough review by 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 report heretofore or hereafter provided to City is, and shall be, complete and accurate in all material respects as of the date shown on the information, data, or report, and that since said date, shall not have undergone any significant adverse change without written notice to City.

(B) It is financially stable and capable of fulfilling, and possesses internally or will outsource duties to acquire the sophistication to fulfill its obligations under this Agreement. Grantee shall provide City prompt written notice of any adverse material change in the financial condition of Grantee that may materially and adversely affect its obligations hereunder.

(C) No litigation or proceedings are presently pending, or to Grantee's knowledge, threatened, against Grantee that would have a material adverse effect on Grantee or its operations.

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

## **IX. ACCESSIBILITY OF RECORDS**

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

9.02 Grantee agrees and represents that it shall cooperate with City, at no charge to the City, to satisfy, to the extent required by law, any and all requests for information received by City under the Texas Public Information Act or related laws pertaining to this Agreement.

## **X. MONITORING AND EVALUATION**

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

## **XI. INDEMNITY**

**11.01 GRANTEE AGREES TO FULLY AND UNCONDITIONALLY PROTECT, INDEMNIFY, DEFEND AND HOLD HARMLESS CITY, ITS ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS, AND REPRESENTATIVES FROM AND AGAINST ANY AND ALL COSTS, EXPENSES, REASONABLE ATTORNEY FEES, REASONABLE EXPERT FEES, FINES, PENALTIES, PROCEEDINGS, ACTIONS, DEMANDS, CLAIMS, SUITS, LOSSES OR LIABILITIES FOR INJURIES TO PROPERTY, INJURIES TO PERSONS (INCLUDING DEATH), AND FROM ANY OTHER COSTS, EXPENSES, REASONABLE ATTORNEY FEES, REASONABLE EXPERT FEES, FINES, PENALTIES, PROCEEDINGS, ACTIONS, DEMANDS, CLAIMS, SUITS, LOSSES OR LIABILITIES OF ANY AND EVERY KIND AND NATURE WHATSOEVER ARISING IN ANY MANNER, DIRECTLY OR INDIRECTLY, OUT OF OR IN CONNECTION WITH OR IN THE COURSE OF OR INCIDENTAL TO, ANY OF THE GRANTEE'S WORK OR OPERATIONS HEREUNDER OR IN CONNECTION HERewith, REGARDLESS OF CAUSE OR OF THE SOLE, JOINT, COMPARATIVE OR CONCURRENT NEGLIGENCE OR GROSS NEGLIGENCE OF THE CITY, ITS ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS, AND REPRESENTATIVES.**

11.02 In the event that Grantee and City are found to be 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 government immunity available to City under Texas law and without waiving any defenses of the parties under Texas law.

11.03 The provisions of this **Article XI** are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Grantee shall advise City in writing within twenty-four (24) hours of any claim or demand against City or Grantee related to or arising out of Grantee's activities under this Agreement.

## **XII. INSURANCE & BONDS**

12.01 No later than 30 days before commencement of work by the Construction Contractor on the Project, Grantee must provide a completed Certificate(s) of Insurance to CITY's Finance Department. The certificate must be:

- Clearly labeled with the "San Antonio Botanical Center" in the Description of Operations block;

- Completed by an agent and signed by a person authorized by the insurer to bind coverage on its behalf (CITY will not accept Memorandum of Insurance or Binders as proof of insurance);.
- Properly endorsed and have the agent's signature, and phone number,

Certificates may be mailed or sent via email, directly from the insurer's authorized representative. CITY shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by CITY'S Finance Department. No officer or employee, other than CITY'S Risk Manager, shall have authority to waive this requirement.

If the City does not receive copies of insurance endorsement, then by executing this Agreement, Grantee certifies and represents that its endorsements do not materially alter or diminish the insurance coverage for the Project.

The City's Risk Manager reserves the right to modify the insurance coverages, their limits, and deductibles prior to the scheduled event or during the effective period of this Agreement based on changes in statutory law, court decisions, and changes in the insurance market which presents an increased risk exposure.

Grantee shall obtain and maintain in full force and effect for the duration of this Agreement, at Grantee's sole expense, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M. Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below. If the Grantee claims to be self-insured, they must provide a copy of their declaration page so the CITY can review their deductibles:

<u>TYPE</u>	<u>AMOUNTS</u>
1. Workers' Compensation 2. Employers' Liability	Statutory \$1,000,000/\$1,000,000/\$1,000,000
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/Advertising Injury e. Contractual Liability f. Explosion, Collapse, Underground Property Hazard Liability g. Damage to property rented by Grantee	For <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage  h. \$300,000
4. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles c. Hired Vehicles	<u>Combined Single Limit</u> for <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence

5. Builder's Risk (if applicable)	All Risk Policy written on an occurrence basis for 100% replacement cost during construction phase of any new or existing structure.
6. Environmental Insurance –(Contractor's Pollution Liability (Claims-made coverage)	\$1,000,000 per occurrence; \$2,000,000 general aggregate for claims associated with hazardous materials, to include spills and mitigation.
7. Umbrella or Excess Liability Coverage	\$2,000,000 per occurrence combined limit Bodily Injury (including death) and Property Damage. (per occurrence limit depends on scope of operation)
8. Professional Liability (Claims-made Coverage)	\$1,000,000 per claim damages by reason of any act, malpractice, error, or omission in the professional service.  Coverage to be maintained and in effect for no less than two years subsequent to the completion of the professional service.
*if applicable	

12.02 Absent waiver or an exception by the City, Grantee must require, by written contract, that all subcontractors providing goods or services under this Agreement obtain the same insurance coverages required of Grantee and provide a certificate of insurance and endorsement that names Grantee and CITY as additional insureds. Grantee shall provide CITY with subcontractor certificates and endorsements before the subcontractor starts work.

If a loss results in litigation, then the CITY is entitled, upon reasonable request and without expense to the City, to receive copies of the policies, declaration page and all endorsements. Grantee must comply with such requests within 10 days by submitting the requested insurance documents to the CITY at the following address:

City of San Antonio  
Attn: Finance Department  
Purchasing Division  
P.O. Box 839966  
San Antonio, Texas 78283-3966

12.03 Grantee's insurance policies must contain or be endorsed to contain the following provisions:

- Name CITY and 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 CITY. The endorsement requirement is not applicable for workers' compensation and professional liability policies.

- Endorsement that the "other insurance" clause shall not apply to CITY where CITY is an additional insured shown on the policy. CITY's insurance is not applicable in the event of a claim.

- Contractor shall submit a waiver of subrogation to include, workers' compensation, employers' liability, general liability and auto liability policies in favor of CITY; and

- Provide 30 days advance written notice directly to CITY of any suspension, cancellation, non-renewal or materials change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.

12.04 Within ten (10) calendar days of a suspension, cancellation, material change in coverage, or non-renewal of coverage, Grantee shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend Grantee's performance should there be a lapse in coverage at any time during this Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

12.05 In addition to any other remedies CITY may have upon Grantee's failure to provide and maintain any insurance or policy endorsements to the extent and within the time required, CITY may order Grantee to stop work and/or withhold any payment(s) which become due to Grantee under this Agreement until Grantee demonstrates compliance with requirements.

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

12.07 Grantee's insurance shall be deemed primary and non-contributory with respect to any insurance or self - insurance carried by City for liability arising out of operations under this Agreement.

12.08 The insurance required is in addition to and separate from any other obligation contained in this Agreement and no claim or action by or on behalf of City shall be limited to insurance coverage provided.

12.09 Grantee and any subcontractor are responsible for all damage to their own equipment and/or property result from their own negligence.

12.10 Payment and Performance Bonds Required. Contractor shall provide a payment bond and performance bond made payable to the City of San Antonio in the full amount of the contract price. If this is an annual contract with estimated quantities, the bonds shall be in the amount of the estimated contract price for a one year period. No surety shall be accepted by City that is in default, delinquent on any bonds or that is a party to any litigation against City. All bonds shall be made and executed on either the City's standard forms or in a form acceptable to City. Each bond shall be approved by City and shall be executed by not less than one (1) corporate surety that is authorized and admitted to do business in the State of Texas, is licensed by the State of Texas to issue surety bonds, is listed in the most current United States Department of the Treasury List of Acceptable Sureties and is otherwise acceptable to City. Each bond shall be executed by Contractor and the surety and shall specify that legal venue for enforcement of each

bond exclusively shall lie in Bexar County, Texas. Each surety shall designate an agent resident in Bexar County, Texas to which any requisite statutory notices may be delivered and on which service of process may be had in matters arising out of the surety ship. Each bond must be furnished in compliance with the statutory requirements of Texas Government Code, Chapter 2253. These bonds must be executed and delivered to City prior to commencement of work under this contract.

### **XIII. NONDISCRIMINATION**

13.01 As a party to this contract, Grantee 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.

### **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 the performance of services required to be performed under this Agreement. Grantee further covenants that in the performance of this Agreement, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

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

14.03 No member of City's governing body or of its staff who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this Agreement shall:

- (A) Participate in any decision relating to this Agreement which may affect his or her personal interest or the interest of any corporation, partnership, or association in which he or she has a direct or indirect interest;
- (B) Have any direct or indirect interest in this Agreement or the proceeds thereof.

### **XV. POLITICAL 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.

### **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 by Grantee, shall, upon receipt, become the property of City (provided that the Grantee shall be entitled to maintain copies of all of the foregoing materials).

## **XVII. CONTRACTING**

17.01 Any work or services contracted hereunder shall be contracted only by written contract or agreement and, unless specific waiver is granted in writing by City, shall be subject by its terms to each and every provision of this Agreement. Compliance by contractors with this Agreement shall be the responsibility of Grantee. Grantee is responsible to ensure that all local, state and federal permits and approvals required for the activities under 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.

## **XVIII. CHANGES AND AMENDMENTS**

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

18.02 It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this Agreement. 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 City, which approval shall not be unreasonably withheld or delayed after construction of the Project is completed. Any attempt at transfer, pledge or other assignment that is not approved by the City 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 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 hereto and contains all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the parties hereto unless same be in writing, dated subsequent to the date hereof and duly executed by the Parties.

### **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:

**If to City:**

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

**If to Grantee**

Sabina Carr, Chief Executive Officer  
San Antonio Botanical Society  
555 Funston Place  
San Antonio, Texas, 78209



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

#### **XXIV. PARTIES BOUND**

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

#### **XXV. RELATIONSHIP OF PARTIES**

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

#### **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.

#### **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. DEFAULT**

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

29.02 In no event shall this Agreement or City's use of the Leased Premises be terminated prior to the final payment or discharge of the City Bonds. As long as reimbursement has not been made by City for authorized expenses, the City's failure to perform any required actions under this

Agreement shall give rise to Grantee's right, upon 60 days written notice to City, to undertake to perform any such actions and to receive reimbursement from City for the cost of performing such actions. After reimbursement has been made by City for authorized expenses, any breach or violation by City to this Agreement of the provisions herein contained shall give rise immediately to the right on the part of Grantee, at its option, upon thirty (30) days' written notice to City, unless such breach or violation is cured prior to the expiration of the notice period, to cancel this Agreement or to seek any remedy which now is or may be provided by law, whether or not stated herein. No waiver by either party of a breach or violation shall be construed or held to be a waiver of any succeeding or preceding breach or violation of the same or any other provision herein contained.

### **XXX. LEGAL AUTHORITY**

30.01 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.

30.02 The signer of this Agreement for Grantee represents, warrants, assures and guarantees 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.

### **XXXI. FORCE MAJEURE**

31.01 If City or Grantee is delayed or prevented from performing any of their respective obligations under this Agreement by reason of strike, labor troubles, or any cause whatsoever beyond such party's reasonable control, the period of such delay or prevention shall be deemed added to the time herein provided for the performance of any such obligation by the delayed party.

### **XXXII. CONDITIONS TO AGREEMENT**

32.01 This Agreement, and all obligations of the parties hereunder, is expressly made conditioned on the mutual final agreement to the terms and conditions of the Funding Agreement attached hereto.

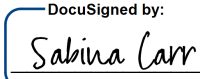
**(Signatures Appear on the Following Page)**

**EXECUTED IN DUPLICATE ORIGINALS**, each of which shall have the full force and effect of an original this the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**CITY OF SAN ANTONIO**

By: \_\_\_\_\_  
Roderick Sanchez,  
Assistant City Manager  
City of San Antonio

**SAN ANTONIO BOTANICAL SOCIETY,**  
a non-profit corporation

By:  \_\_\_\_\_  
Sabina Carr, Chief Executive Officer  
San Antonio Botanical Society

**APPROVED AS TO FORM:**

\_\_\_\_\_  
CITY ATTORNEY

## EXHIBIT A

### SCOPE

#### **Project Background:**

The San Antonio Botanical Garden's Lucile Halsell Conservatory is an award-winning, one-of-a-kind space. Built in 1982, this 40,000 sq. ft. complex sits within the heart of San Antonio's Cultural Corridor and replicates a variety of natural ecosystems for plants to thrive. Due to the facilities' aging systems and outdated accessibility, essential repairs and updates are necessary to keep its doors open for another 40 years. In addition to the Conservatory renovation the Botanical Garden has also planned to complete an outdoor lighting update, principally in older parts of the garden grounds. With more evening activation, this improvement will increase accessibility, drive additional events, and create a safer experience for Garden guests.

#### **Project Description:**

The project is a complete restoration of the five glass houses that make up the Lucile Halsell Conservatory. The project will be divided into five separate phases. With each building a phase, the Garden will address structural and building systems, glass and glazing and cosmetic issues identified in the Assessment Report by respected project experts Harper-Brawner. The most significant portion of the project scope will be the replacement of glass, hundreds of large glass sections that make up the five glass houses. The vast majority of the glass is significantly aged and requires replacement with more up to date sealants and glazing system. Also, in the scope of the project, renovated bathrooms and office space will be necessary to accommodate growing visitation and staff.

The current landscape lighting in the older parts the Botanical Garden is limited and outdated. The proposed plan will replace older fixtures with newer and less power consuming fixtures which will ultimately reduce power consumption and costs. With the addition of new garden spaces, lighting will be added to help highlight features and pathways to keep them accessible during the evening.

#### **Project Budget:**

Thanks to the 2022 City Bond and a portion of the Midtown Cultural TIRZ contributions, the Garden will be able to make the critical the improvements included in the Conservatory Restoration. The Garden has also raised \$800K in private dollars to support the project. A total of \$7M will be allocated toward the conservatory restoration, with the remaining dollars allocated towards master planning and an outdoor lighting plan for older parts of the Garden (for safety during evening happenings.)

#### **Project Timeline:**

The project is expected to bid by the end of February 2023, allowing March-April 2023 for Contractor review, May 2023 Contractor interview/ selection and July- August 2023 starting construction. Given the complexity of the projects, the Garden expects to be completed by 2025. A comprehensive marketing effort will target the public and key stakeholders to reinforce the benefits of the project to ensure transparency.

**EXHIBIT B  
PROJECT PLANS**

**(Plans will be added once finalized)**

## EXHIBIT C

### ESTIMATED PROJECT BUDGET

A	C	D	E	F
Project Line Items	Partner/ Agency Funds (Rounded to the nearest tenth)	City Funds- Bond	City Funds- TIRZ	Total Line Item Cost equals
Restrooms and Breakroom design	\$72,050.00			\$72,050.00
Lighting Design and Consultant	\$3,450.00			\$3,450.00
Master Planning			\$500,000.00	\$500,000.00
Harper Brawner Design and Construction Documents	\$318,050.00			\$318,050.00
Harper Brawner Assessment	\$35,807.00			\$35,807.00
Restrooms and Breakroom construction	\$370,643.00			\$370,643.00
Lighting Updates installation			\$280,000.00	\$280,000.00
Glass removal and replacement and rack and pinion		\$1,400,000.00	\$4,000,000.00	\$5,400,000.00
Removal and replacement of neoprene closures		\$22,000.00		\$22,000.00
Interior Cleaning		\$15,850.00		\$15,850.00
Below grade waterproofing		\$179,500.00		\$179,500.00
Repairs to landscape irrigation		\$4,250.00		\$4,250.00
Expansion joint repairs, sealant replacement and new sealant at walkways		\$46,000.00		\$46,000.00
Concrete repairs, planters and stone benches		\$65,500.00		\$65,500.00
				\$19,500.00
Clean and prepare soffits, provide sawcut kerf and apply coating		\$19,500.00		
Paint and wall coating		\$26,500.00		\$26,500.00
Hydraulic cement cove joints and overlay concrete		\$24,150.00		\$24,150.00
Fern Grotto repairs		\$60,000.00		\$60,000.00
Contingency Percentage		\$295,670.00		\$295,670.00
Bonding Costs		\$85,370.00		\$85,370.00
Project Management (assuming 18 mo)			\$135,000.00	\$135,000.00
Environmental Controls Installation		\$205,710.00	\$85,000.00	\$290,710.00
City Mgmt Fee 2%		\$50,000.00		\$50,000.00
Totals	\$800,000.00	\$2,500,000.00	\$5,000,000.00	\$8,300,000.00

BOND	\$2,500,000.00
MidTown Tax Increment Reinvestment Zone	\$5,000,000.00
Private Fund Match (SABOT)	\$800,000.00
Total	\$8,300,000.00

## Exhibit D

### SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY (SBEDA) PROGRAM San Antonio Botanical Center

#### 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 1 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 1 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 percent (20%)** 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 **three percent (3%)** 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 **three percent (3%)** subcontracting goal will also count toward the aforementioned **twenty percent (20%)** 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 require the Construction Contractor 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 7of 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 1/16<sup>th</sup> 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.

**EXHIBIT E**  
**LEASE AGREEMENT (IF APPLICABLE)**