

STATE OF TEXAS     §  
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**FUNDING AGREEMENT WITH  
BROOKS DEVELOPMENT AUTHORITY**

COUNTY OF BEXAR   §

This Funding Agreement (hereinafter referred to as "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. 2018-11-15-0906 dated 11/15/18, and Brooks Development Authority (hereinafter referred to as "Grantee"), a Texas Defense Base Authority and Political Subdivision of the State of Texas as authorized by 397B of the Texas Local Government Code, acting by and through its officers, hereto duly authorized.

WHEREAS, City held a Bond Election on May 6, 2017 and received approval from the voters to fund a variety of Improvements (Proposition 1 on the ballot); and

WHEREAS, in the 2017-2022 Bond Program City identified and earmarked funds in the amount of \$23,400,000.00 for use in the design and construction of three improvement projects; "Brooks City Base South New Braunfels Avenue (Lyster Road to Aviation Landing), Brooks City Base Stinson Corridor (Research Plaza to South Presa Street), and Brooks City Base Inner Circle Road (Louis Bauer Drive to Research Plaza)" (hereinafter referred to jointly and severally as "Project" or "Projects"), as more fully described herein; and

WHEREAS, the City is bound to comply with the terms and conditions contained in the official brochure as presented to the voters; and

WHEREAS, the City has found, by resolution adopted by its City Council, that the programs and services to be provided by Grantee pursuant to this Agreement accomplish the public purpose of creating permanent public improvements to streets, bridges and sidewalks to City residences and, accordingly, the expenditure of proceeds derived from the sale of bonds authorized at the May 6, 2017 City bond election under Proposition # 1 represents a valid expenditure of such bond proceeds; and

WHEREAS, the City's issuance of bonds (such City bonds initially issued, 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 # 1 at the May 6, 2017 City bond election, and such contribution shall satisfy in full the City's funding obligation for the project identified in Proposition 1 of the City's May 6, 2017 bond election as South New Braunfels Avenue, Stinson Corridor, and Inner Circle Road; and

WHEREAS, the City has identified Grantee as the appropriate party to contract with for the fulfillment of the public purpose identified in the 2017-2022 Bond Program official bond brochure as improvements to South New Braunfels, Research Road, and Inner Circle Road in accordance with all applicable laws of public funding and the authorizing instruments for the public funding; and

WHEREAS, Grantee will provide for the design, engineering, planning, and environmental studies and adhering to the Environmental Checklist in Attachment E for the Projects as well as any necessary Project right-of-way acquisitions, which work will be reimbursed by City in accordance with this Agreement; and

WHEREAS, Grantee, in furtherance of Grantee's responsibilities set out in this Agreement, will complete the design, engineering, planning and environmental studies services, and right-of-way acquisitions for the Project, which costs shall be reimbursed by City in accordance with the terms and conditions set out in this Agreement; and

WHEREAS, upon completion of the aforementioned design, engineering, planning, environmental studies, and right-of-way acquisitions by Grantee, City shall be responsible for the construction work associated with the Projects as set out in this Agreement and up to the amount of the funding amount set out in Article V; 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) final payment by the City of all funding under this Agreement, or (b) termination of this Agreement as otherwise provided herein. The Director of the City's Transportation and Capital Improvements ("TCI") department 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 Article 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 for the performance of all services and activities to complete Grantee's portion of the Projects by providing: a complete set of plans and specifications that meet City's requirements including compliance with the Design Guidance Manual, and have been approved by City, by August 30, 2018, as described in this Agreement.

2.02 Unless written notification by Grantee to the contrary is received and approved by City, Grantee's designated representative is Samantha Carneiro, Chief Financial Officer responsible for the management of this Funding Agreement and the point of contact for City on all matters regarding this Funding Agreement

2.03 The Director of TCI or designee shall be responsible for the administration of this Agreement on behalf of the City.

2.04 Communications between City and Grantee shall be directed to the designated representatives of each as set forth in paragraphs numbered 2.03 and 2.02 hereinabove.

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

2.06 The portion of the Project, for which Grantee is responsible, includes the design, engineering, planning and environmental studies, and necessary right-of-way acquisitions as described in Exhibit A. Grantee's design and engineering of the Projects shall include preparation of full and complete Construction Documents for work associated with the construction of three street projects with approximately seventy (70) to eighty-six (86) feet of Right-of-Way (ROW) including signalized intersections, storm drains, drainage channel excavation, storm water detention systems, a 10-foot sidewalk/multi-use path, SAWS potable mains, SAWS recycled water mains, dry utility conduit for CPS Energy, dry utility conduit for telecommunications, erosion controls, landscaping and irrigation. The extensions of S. New Braunfels, Research Plaza, and Inner Circle are necessary to support development occurring at and around Grantee's property including industrial, commercial, retail and residential development. The design will include storm water detention facilities that will be necessary to support the roadway drainage as well as potential future development along each of the right-of-ways.

2.07 Grantee shall prepare and provide to City all design documents, including without limitation, those for use in constructing the Project, performing the work, and rendering the Project fully operational, and shall include without limitation signed and sealed detailed plans, drawings, specifications, manuals, and related materials prepared by registered architect/licensed engineer ("Construction Documents"). All Construction Documents shall comply with City's Design Guidance Manual. All Construction Documents shall be submitted to City for review and approval acting in its capacity as grantor under this Funding Agreement. Grantee agrees to make any changes necessary to ensure Construction Documents meet all requirements set out in the City's Design Guidance Manual. The Construction Documents will be owned and utilized by City in bidding out the construction of the Project. Grantee shall make any changes to the Construction Documents City deems necessary to ensure that the Construction Documents are in a form that City finds acceptable to bid out the construction of the Project. City's approval and acceptance of the Construction Documents is a prerequisite for City initiating any work associated with the construction of the Project to include the bidding out of the Project.

2.08 After approval by City, the Plans shall be attached to and incorporated into this Agreement as Exhibit B and Grantee shall make no substantial changes to the Plans without the prior written approval of City. If Grantee desires to make changes to the Plans after City has approved such Plans, Grantee shall submit such changes to the TCI Director or his or her designee for review and written approval to ensure their compatibility with the Plans.

2.09 The approvals given in this Article II do not relieve Grantee of the burden of obtaining all necessary governmental approvals, including those provided by City through its relevant development departments and relevant boards and commissions, Texas Historical Commission, Texas Parks and Wildlife, Texas Commission on Environmental Quality (Article 9102), United States Fish and Wildlife, United States Army Corp of Engineers, and any other regulatory agency, as required. Nor does City's approval of the Plans release Grantee of the responsibility for the accuracy and completeness of the Plans and 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.

2.10 Grantee shall provide to City a budget for the Design and any other required items illustrating where City Bond Funds are to be utilized in accordance with this Agreement, as well as illustrating all funding for the entire portion of the Project for which Grantee is responsible as Exhibit C.

2.11 Grantee shall provide to City all environmental due diligence documentation including, but not limited to those studies outlined in the "Environmental Requirements Checklist for Funding Agreement Projects" as Exhibit E. Environmental studies shall include, but not limited to, Risk Assessments, Water Quality, Cultural Resources (archeology / historical), Endangered Species, Karst features, Water Pollution Abatement Plan, National Environmental Policy Act (NEPA) documentation, USACE Jurisdictional Determinations, etc. Should the Grantee or such designated representative believe that a certain study is not required, documentation detailing the justification for not conducting the study must be provided. In the event affected media is encountered during the preliminary assessments, Grantee will be responsible for development and implementation of remedial activities prior to or during construction. Those expenses will be directly applied to the overall construction budget. Brooks City Base may need to provide a designated location on their property to reuse the affected or excess soils per regulatory standards.

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

3.01 Grantee warrants and represents that it will comply with all Federal, State and Local laws and regulations and will use all reasonable efforts to ensure said compliance by any and all consultants, sub-consultants, contractors and subcontractors that may work on Grantee's portion of the Project.

3.02 To the extent applicable, Grantee agrees to abide by Chapters 252, and 271 of the Texas Local Government Code, and Chapters 2254 and 2267 of the Texas Government Code or other open competitive contracting processes, which are advertised to the public in a legal and appropriate manner.

3.03 Plans must conform to Americans with Disabilities Act requirements and must be approved by the Texas Department of Licensing and Regulation before construction may begin. Inspections and final approval shall be the responsibility of Grantee.

3.04 Archeological Discoveries. In the event that Grantee discovers, or, in performing its environmental due diligence should have discovered, any previously unrecorded and/or unknown archeological sites and/or resource related to archeological resource discoveries., Grantee shall immediately stop all activities in the vicinity of the discovery and notify the City Archeologist (210-207-7306) and/or the State Historic Preservation Office (SHPO). Grantee will be responsible for all costs associated with any required subsequent investigation, which may include testing and mitigation of such archeological resource discovery prior to the start of construction. In the possibility that human remains may be found during the course of the construction, all applicable laws pertaining to human remains will be followed and Grantee will responsible for all costs associated with this effort.

In the event that Grantor during construction of the Project discovers any unforeseen archeological resource not reasonable discoverable in Grantee's environmental due diligence, Grantor shall immediately stop all activities in the vicinity of the discovery and notify the City Archeologist (210-207-7306) and/or the State Historic Preservation Office (SHPO). Grantor will be responsible for all costs associated with the preservation and/or removal of such archeological resource discovery which costs are part of the project budget and shall in no event be in addition to the funding amounts set out in Article V.

3.05 Hazmat Discoveries. In the event a hazmat related incident or unforeseen condition is discovered during construction, all activities in the vicinity of the discovery shall cease and City's project manager and Texas Commission on Environmental Quality (TCEQ) shall be notified immediately. Grantee or Grantee designee will be responsible for all costs associated with obtaining a licensed environmental contractor and remediating the environmental issue in accordance with TCEQ regulations.

3.06 Small Business Economic Development Advocacy Program - Grantee shall 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. In addition, purposes which are not permissible include, but are not limited to religious activities, restaurants, cafes, and retail stores.

3.08 No Boycotting of Israel. Texas Government Code §2270.002 provides that a governmental entity may not enter into a contract with a company for goods or services, unless the contract contains a written verification from the company that it:

- (1) does not boycott Israel; and
- (2) will not boycott Israel during the term of the contract.

"Boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

"Company" means a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations that exists to make a profit.

By signing this Agreement with the City of San Antonio, Grantee hereby verifies that it does not boycott Israel, and will not boycott Israel during the term of the contract. 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 shall not employ, nor allow others 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 City shall be responsible for the solicitation and construction of the Project (South New Braunfels Avenue (Lyster Road to Aviation Landing), Stinson Corridor (Research Plaza to South Presa Street), and Inner Circle Road (Louis Bauer Drive to Research Plaza) To the extent applicable, City 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.

4.03 Upon completion of the Project, City shall be responsible for the operation and maintenance of the street.

#### **V. FUNDING AND ASSISTANCE BY CITY**

5.01 City shall reimburse Grantee for eligible expenses incurred for the design, engineering, planning, environmental studies, and any necessary acquisition for the Project up to \$2,664,948.31 as further defined in **Exhibit C**. Regardless of the total actual costs incurred by Grantee for the design, engineering, planning and environmental studies for the Project and notwithstanding any other provisions of this Agreement, the total of all payments made and other obligations to Grantee hereunder shall not exceed the sum of \$2,664,948.31.

5.02 The current budget estimate for the entire Project, to include design, engineering, planning, environmental studies, environmental remediation, archeological studies and construction, is \$23,400,000. Upon City's approval, Grantee shall receive up to \$2,664,948.31 for the design, engineering, acquisition, planning and environmental studies for Project. Grantee is solely responsible for and shall provide all necessary funding for the design, engineering, planning and environmental studies in excess of the City's commitment of \$2,664,948.31 City is not responsible for any costs over the budgeted amount of \$2,664,948.31 for the design, engineering, planning and environmental studies, and necessary right-of-way acquisitions for the Project. The remaining \$20,735,051.69 will be retained by the City to complete the Project. In the event that the scope of the project is adjusted downward, the City shall have the option of adjusting its commitment downward accordingly.

5.03 Grantee will provide to City their plans and specifications for the Project, as well as all environmental studies and permits and such plans and environmental studies shall be subject to the review and approval by City. Grantee will be responsible for any remediation costs and environmental oversight services associated with the improvements of the project. Grantee will also be responsible for complying with the Capital Project Soil Relocation Policy for any excess soil that cannot be reused on the project. Costs associated with both remediation services and Soil Relocation Policy will be part of the remaining budget of \$20,735,051.69. Any costs overruns associated with Soil Relocation Policy will be the responsibility of the Grantee to cover those expenses.

5.04 City shall assist Grantee with right-of-way acquisitions with the use of eminent domain authority if Grantee is not successful in negotiating the purchase of needed right-of-way. The parties shall coordinate with one another on a regular basis, regarding the acquisition of right-of-way and whether eminent domain is required to acquire the needed right-of-way.

5.05 Grantee understands that all funds provided to Grantee pursuant to this Funding Agreement, must be expended to achieve the stated public purpose of creating permanent public improvements to streets, bridges and sidewalks for South New Braunfels (Lyster Road to Aviation Landing), Stinson Corridor (Research Plaza to South Presa Street), and Inner Circle Road (Louis Bauer Drive to Research Plaza) for public use. Grantee understands that the funding provided through this Funding Agreement cannot be expended on private administrative/office space. Grantee is responsible for tracking the use of funds accordingly.

5.06 City shall not be obligated nor liable under this Agreement to any party, other than Grantee for payment of any monies or provision of any goods or services.

5.07 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 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 on a monthly basis upon receipt and approval of an invoice through the City's Project Reporting Information Management Exchange Link (COSA PRIME*link*) within thirty (30) days after receipt of an approved invoice.

6.04 All requests for reimbursement shall be submitted through the COSA PRIME*link*. Grantee shall sign a Business Level Agreement and ensure that all of its employees or representatives utilizing PRIME*link* sign and comply with an Individual User Agreement. Such requests for reimbursement shall be completed on PRIME*link* and/or utilizing forms and instructions approved by TCI. Prior to the initial request for reimbursement, Grantee



must submit a schedule of values for payment to be approved by TCI, 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, Grantee must provide City with a complete set of Construction Documents and environmental studies and permits that have been fully approved and accepted by City and are in a form City deems acceptable to bid out the construction of the Project. City shall have the right to review and approve the completed Construction Documents and environmental reports to ensure conformance with City requirements. 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 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. Costs shall be considered allowable only if so approved in Grantee's design 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 for the public purpose/ public use stated herein and with all applicable city, state and federal laws; regulations and ordinances affecting Grantee's operations hereunder. No City funds provided through this Funding Agreement may be used for Grantee's internal office space or other non-public aspects of the Project.

All funds paid by City shall be for related to the design and construction of permanent public improvements. Only the following categories of costs shall be considered allowable:

- Right of way acquisition
- Architectural/Engineering Design Contract and
- Environmental Studies, Permits & Remediation

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:

- Personnel costs, salaries or wages paid directly by Grantee or an affiliated organization of Grantee
- Travel and travel-related expenses
- 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/Engineer)
- Costs or fees associated with attendance of Grantee at meetings, seminars, or conferences
- Costs or fees associated with regular maintenance and operation of Grantee
- Fundraising
- Equipment and Furnishings.
- Advertising

7.03 Written requests for prior approval shall be Grantee's responsibility and shall be made thirty (30) days from date necessary 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, shall be, and shall remain complete and accurate in all material respects as of the date shown on the information, data, or report, and that since said date shown, shall not have undergone any significant change without written notice to City.

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

(C) No litigation or proceedings are presently pending or to Grantee's knowledge, threatened against Grantee.

(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. TERMINATION**

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

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

## **XII. INDEMNITY**

12.01 Grantee and the CITY acknowledge that they are political subdivisions of the State of Texas and 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, § 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.

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

## **XIII. INSURANCE & BONDS**

13.01 Prior to the commencement of any work under this Agreement, Grantee shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to the City's Transportation & Capital Improvements (TCI) Department, which shall be clearly labeled "South New Braunfels (Lyster Road to Aviation Landing), Research Plaza to South Presa, and Inner Circle Road (Louis Bauer Drive to Research Plaza) "in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The City shall not accept a Memorandum of Insurance or Binder as proof of insurance. The Certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the City. The City shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the City's TCI Department. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

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

13.03 Grantee's financial integrity is of interest to the City; therefore, subject to Grantee's right to maintain reasonable deductibles in such amounts as are approved by



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. Property Insurance: For physical damage to the property of City, including improvements and betterment to the Leased Premises	Coverage for replacement value with a minimum co-insurance factor of eighty percent (80%) of the cost of the Contractor's property
*if applicable	

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

13.05 As they apply to the limits required by the City, the City shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Grantee shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City at the address provided below within 10 days of the requested change. Grantee shall pay any costs incurred resulting from said changes.

City of San Antonio  
 Attn: TCI Department  
 Contract Services Division  
 P.O. Box 839966  
 San Antonio, Texas 78283-3966

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

Name the City, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the City, with the exception of the workers' compensation and professional liability policies;

Provide for an endorsement that the "other insurance" clause shall not apply to the City where the City is an additional insured shown on the policy;

Workers' compensation, employers' liability, general liability and automobile liability policies shall provide a waiver of subrogation in favor of the City.

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

13.07 Within five (5) calendar days of a suspension, cancellation 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 contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

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

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

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

13.11 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement and that no claim or action by or on behalf of the City shall be limited to insurance coverage provided.

13.12 Grantee and any Subcontractors are responsible for all damage to their own equipment and/or property.

13.13 Grantee shall ensure that its general contractor complies with Texas Government Code Chapter 2253 provisions regarding performance and payment bonds on certain Public Works contracts (copies of required bonds must be provided to City prior to the start of construction).

#### **XIV. NONDISCRIMINATION**

14.01 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.

#### **XV. CONFLICT OF INTEREST**

15.01 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.

15.02 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.

15.03 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.



## **XVI. POLITICAL ACTIVITY**

16.01 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.

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

## **XVII. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL**

17.01 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).

## **XVIII. CONTRACTING**

18.01 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.

18.02 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.

## **XIX. CHANGES AND AMENDMENTS**

19.01 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.

19.02 It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this

Agreement and that any such changes shall be automatically incorporated into this Agreement without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

## **XX. ASSIGNMENTS**

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

## **XXI. SEVERABILITY OF PROVISIONS**

21.01 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.

## **XXII. NON-WAIVER OF PERFORMANCE**

22.01 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.

22.02 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.

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

### XXIII. ENTIRE AGREEMENT

23.01 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 it is in writing, dated subsequent to the date hereof and duly executed by the Parties.

### XXIV. NOTICES

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

City: Mike Frisbie, P.E., Director, Transportation & Capital  
Improvements Department  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

And

Grantee: Samantha Carneiro  
Brooks City Base  
3201 Sidney Brooks  
San Antonio, Texas 78235

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.

### XXV. PARTIES BOUND

25.01 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.

### XXVI. RELATIONSHIP OF PARTIES

26.01 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.

26.02 **No Joint Enterprise.** There is no intention on the part of BDA or the CITY to create or otherwise form a joint enterprise under or pursuant to this Agreement. BDA

and the CITY are undertaking a governmental function or service. BDA is engaging in redevelopment of base property and areas around the base property pursuant to Local Government Code Chapter 379B. The CITY also is promoting redevelopment of the same area. BDA and the CITY do not have a pecuniary purpose, let alone a common one. The purpose of this Agreement is to further the public good, not gain a profit.

#### **XXVII. TEXAS LAW TO APPLY**

27.01 This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the Parties created hereunder are performable in Bexar County, Texas and venue of any court action brought directly or indirectly by reason of this Funding Agreement shall be in Bexar County, Texas.

#### **XXVIII. GENDER**

28.01 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.

#### **XXIX. CAPTIONS**

29.01 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.

#### **XXX. DEFAULT**

30.01 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.

#### **XXXI. LEGAL AUTHORITY**

31.01 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.

31.02 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.

**XXXII. FORCE MAJEURE**

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

**XXXIII. CONDITIONS TO AGREEMENT**


33.01 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 3<sup>rd</sup> day of December, 2018.

**CITY OF SAN ANTONIO**

By:   
\_\_\_\_\_  
Mike Frisbie, P.E.  
Director, Transportation and Capital Improvements

**Brooks Development Authority**

By:   
\_\_\_\_\_  
Leo Gomez, President & CEO

**APPROVED AS TO FORM:**

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