

STATE OF TEXAS       §  
                                  §       **DEVELOPER PARTICIPATION CONTRACT**  
COUNTY OF BEXAR   §       **BULVERDE ROAD PROJECT**

This Developer Participation Contract 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 ~~2013-05-02-0293~~ May 2, 2013, and BMP 1604 Developers, Ltd., a Texas limited partnership acting through its general partner, its successors and permitted assigns (hereinafter referred to as "Developer"), acting by and through its officers, hereto duly authorized. The City and Developer are sometimes collectively referred to herein as the "Parties."

**WHEREAS**, City held a Bond Election on May 12, 2007 and received approval from the voters to fund a variety of Infrastructure Improvements; and

**WHEREAS**, all of the 2007 Bond Election Infrastructure Improvement Projects have been completed or due provision made for their completion; and

**WHEREAS**, the City held a referendum in May 10, 2012, which authorized \$2.0 million for improvements to Bulverde and Classen Roads; and

**WHEREAS**, the Bulverde Road Project and the Oversizing (defined below) qualify as a road projects for which excess bond proceeds may be used; and

**WHEREAS**, the City has identified the Developer as the appropriate party to contract with for the fulfillment of the public purpose of infrastructure construction in accordance with all applicable laws of public funding and the authorizing instruments for the public funding; and

**WHEREAS**, the Developer is the fee simple owner of the property referenced in the proposed location of the Project; and

**WHEREAS**, the public benefit to be gained from the Project is the provision of street access for use by the citizens of San Antonio; and

**WHEREAS**, Texas Local Government Code, Sections 212.071 – 212.074 (the "Authorizing Statutes") allow the municipality to contract with a Developer for the construction of public improvements in Developer Participation Contracts; and

**WHEREAS**, the Authorizing Statutes limit the participation of the municipality to a level not to exceed 30 percent (30%) of the total contract price; and

**WHEREAS**, the Authorizing Statutes also allow participation by the municipality at a level not to exceed 100 percent (100%) of the total cost for any oversizing of improvements required by the municipality; and

**WHEREAS**, City requires Developer to oversize and construct a bridge instead of constructing a cul-de-sac and City shall pay an amount not to exceed \$321,670.00 for the increased costs to build the bridge; and

**WHEREAS**, the total estimated costs of oversizing is \$321,670.00; and

**WHEREAS**, the contract oversight and management services provided by Capital Improvement Management Services Department (CIMS) will require funding in the amount of \$64,000.00; and

**WHEREAS**, this Contract with the Developer for the Bulverde Road Project limits the City of San Antonio participation to a level not to exceed 30 percent (30%) of the total Contract Price for the Bulverde Road Project, plus the entire cost of the Oversizing in an amount not to exceed \$321,669.80; and

**WHEREAS**, the total estimated contract price is \$9,594,434.00; and

**WHEREAS**, the City allowed participation in the Project is estimated to be an amount not to exceed \$3,200,000.00; and

**WHEREAS**, the amount previously appropriated by City Council for the Project was \$1,200,000.00; and

**WHEREAS**, the Developer will complete the design and construction of the Project not later than December 31, 2016;

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

## **I. DEFINITIONS**

1.01 "Appropriation" shall mean the amount appropriated by the City Council for the Project, or exactly \$3,200,000.00.

1.02 "Bulverde Road Project" means the phased public infrastructure improvements to widen and realign Bulverde Road and Classen Road south of Loop 1604 (as depicted in Exhibit A attached hereto. The scope of the Bulverde Road Project is described in Exhibit A-1 attached hereto.

1.03 "City" means the City of San Antonio, Texas, a Texas municipal corporation.

1.04 "City's Representative" means the Director of Capital Improvement Management Services ("CIMS") or such other person as the City Manager may designate from time to time.

1.05 "City Share" means, for the purposes of determining reimbursements due to the Developer pursuant to this Contract, an amount not to exceed the lesser of THIRTY PERCENT (30%) of total estimated Contract Price of the Bulverde Road Project (including \$64,000.00 paid to

CIMS for contract management and oversight) or an amount not to exceed \$2,878,330.20 as authorized by the Authorizing Statutes, plus One Hundred Percent (100%) of certain costs which pertain to the Oversizing in an amount not to exceed \$321,669.80 requested by the City in a cumulative amount not to exceed the amount of the Appropriation.

1.06 "Contract" means this Developer Participation Contract between the City of San Antonio, Texas and Developer.

1.07 "Contract Documents" means this Contract and Exhibit A through Exhibit E attached hereto and made a part hereof for all purposes.

1.08 "Contract Price" means exactly \$9,594,434 and no cents.

1.09 "Construction Documents" means the plans, specifications and estimates for the Project which shall be provided by the Developer pursuant to the terms of this Contract. The Construction Documents shall illustrate the dimensions, Project materials, methods of construction, methods of excavation, and other details of the Project.

1.010 "Developer Property" means the real property described in **Exhibit B** attached hereto, comprised of 104.026 acres.

1.10 "Developer's Representative" means the person executing this Contract for the Developer, or such other person as Developer may designate from time to time.

1.11 "Developer's Share" means all costs of the Project in excess of City Share.

1.12 "Director" means the Director, Capital Improvements Management Services, City of San Antonio.

1.13 "Oversizing" means, collectively, those public improvements more fully described in Exhibit A-1 that are related to the Bulverde Road Project which were oversized at the request of the City, beyond requirements set forth in the City UDC. The City shall pay 100% of the increased cost for Oversizing in an amount not to exceed \$321,669.80.

1.14 "Project" means, collectively, the Bulverde Road Project and Oversizing.

1.15 "Project Costs" means all Eligible Expenses (as defined in Section 10.01 of this Contract) incurred by Developer with respect to the completion of the Project in accordance with this Contract, including without limitation all costs to (i) prepare the Construction Documents, including but not limited to: (a) all engineering fees and expenses for all studies, estimates of probable costs and other work performed by the Project Engineer; (b) all required utility removal, replacement, and relocation cost along with all required environmental reports and permits; (c) all title work; (d) all legal fees; and (e) all other fees and expenses relating to the Project; and (ii) all costs and expenses to construct the Project.

1.16 "Project Engineer" means the individual working for Developer that prepares signs and seals the Construction Documents.

1.17 "ROW" shall mean all rights of way dedicated by Developer for the Project.

1.18 "Work" means the installation and construction of the Project by Developer in accordance with the Construction Documents and as provided herein.

## II. CONTRACT PROVISIONS

2.01 Background. This Contract qualifies as a "Developer Participation Contract" pursuant to Sections 212.071-212.074 of the TEXAS LOCAL GOVERNMENT CODE. In this regard, Developer shall construct the Project on property dedicated as right of way to the City. City shall pay the City Share and Developer shall pay the Developer's Share.

2.01.01 Purpose. The Bulverde Road Project provides for the realignment and construction of Bulverde Road to match the alignment and street design specified in the City's Major Thoroughfare Plan. This Project will also involve modifications to existing areas of Bulverde Road that intersects Redland Road. The Project will include the construction of traffic lanes, a median and bridge structure, in accordance with the Construction Documents. The construction of these roadway modifications will resolve long-standing public safety and access issues associated with flooding and low water crossing on Bulverde Road as well as provide regional connectivity.

2.01.02 Temporary Construction Easement and Other Easements. Within 10 business days following dedication of the ROW by Developer (pursuant to Section 2.03.01), City's Representative shall grant the Temporary Construction Easement to Developer pursuant to and in the form included as **Exhibit C**. The Temporary Construction Easement Document shall be executed by City, as Grantor, and delivered to Developer simultaneously with Developer's dedication of the ROW.

2.01.03 Performance of Obligations by Developer's Contractor. Notwithstanding anything herein to the contrary, the City acknowledges and agrees that all or a portion of the Developer's performance obligations herein may be satisfied by Developer's contractor(s) hired to construct the Project, including without limitation, those requirements for delivery of surety, insurance, provision of plans and Construction Documents to Director, prevailing wage payments, SBEDA reporting, construction of the project, and compliance with other federal, state and local laws. The Developer agrees that performance of such obligations by Developer's contractor does not modify the terms and conditions of this Contract.

2.02 Road Design Standards. Developer shall design and construct the Project as a Secondary Arterial in accordance with the requirements of the City Unified Development Code (the "UDC") Table 506-3 Conventional Street Design Standards.

2.03 Additional Road Requirements. Developer shall design and construct the Project in accordance with the requirements of the Traffic Impact Analysis (“TIA”) prepared and approved by the City for the Project. No changes to the TIA shall be made without prior written City approval

2.03.01 ROW Dedication Required. Prior to commencement of construction of the Project, Developer shall dedicate the ROW, pursuant to the requirements of the UDC and the TIA (the “ROW Dedication”). The ROW Dedication shall be done by plat and shall be accepted by the City, provided that the dedication is in conformance with the customary requirements of the City. The City agrees that the obligation of Developer (or its contractor on behalf of Developer) under this Contract to provide a performance bond (in accordance with the requirements of the City’s standard surety form, attached hereto as “**Exhibit D.**”) for the construction of the Project shall fully satisfy the requirements set forth in Section 35-437 of the UDC which requires provision of surety in connection with the approval and recordation of the plat to dedicate the ROW.

2.04 Progress Payments to Developer. As the Project is designed and constructed, Developer shall submit requests to City for payment of portions of the City Share as may be attributable to the completed engineering and construction of the Project. Any such requests for the payment of the City Share of construction expenses shall be accompanied by a certificate from the Project Engineer certifying the amount of the Work performed and confirming that such Work was performed in accordance with the Construction Documents, stating the amount of the City Share attributable thereto and Developer's Share and include a breakdown of labor, names of contractors and materials used. Upon approval of the draw request, City shall pay the City Share within thirty (30) days following City's receipt of such approved reimbursement request, subject to the terms and conditions of this Contract. Developer shall initially pay all costs incurred from time to time with respect to the Work.

2.05 Performance and Payment Bonds Required. Prior to the commencement of construction, Developer shall provide (or cause its contractor to provide) the City with (i) a performance and payment bond in accordance with and in satisfaction of Section 212.073 of the TEXAS LOCAL GOVERNMENT CODE in the estimated amount of the construction costs for the Project, reflecting the City as beneficiary thereunder (the “Provision of Bonds”), and (ii) insurance certificates showing the City as a named insured in types and amounts described herein (the “Provision of Insurance”). The foregoing shall remain in force and effect throughout the course of construction of the Project. The City agrees that bond and insurance expenses incurred by Developer or Developer’s contractors pursuant to this Agreement shall be eligible for reimbursement as a Project Costs, subject to the terms and conditions herein.

2.06 No Third Party Beneficiaries. Each Project construction contract (i) shall prohibit third party beneficiaries other than City which shall be specifically designated as a third party beneficiary, (ii) shall not be assignable by the Developer and (iii) shall provide City access to the Project at all reasonable times for inspection purposes. Each construction contract shall include provisions in which Developer’s contractor acknowledge therein that it has read this Contract and understands that City has certain rights hereunder and pursuant to this Contract.

2.07 Transfer of Title. The Developer warrants that title to all Work covered by a reimbursement request will pass to the City no later than the time of final payment and acceptance by City. The Developer further warrants that upon submittal of a reimbursement request, all Work for which prior reimbursements were received from the City shall, to the best of the Developer's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Developer's contractors, any subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work. **DEVELOPER SHALL INDEMNIFY AND HOLD CITY HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY THE DEVELOPER'S CONTRACTOR, SUBCONTRACTORS, OR ANYONE CLAIMING BY, THROUGH OR UNDER THE DEVELOPER'S CONTRACTOR OR SUBCONTRACTOR FOR ITEMS COVERED BY PAYMENTS MADE BY THE CITY TO DEVELOPER.** Subject to 2.16 below, upon the transfer of title of Work to City, City shall assume all ownership and maintenance responsibilities for the Project, including all water quality ponds that exclusively benefit the City by mitigating storm water pollutants originating solely from City streets to be constructed by Developer pursuant to government regulations and the Construction Documents. It is expressly acknowledged and agreed that City acceptance of the water quality ponds shall be in writing and issued within fifteen (15) business days provided that testing verifies that each water quality pond is functioning as designed.

2.08 Certification of Contractor and Vendor Payments. For each reimbursement request, Developer (or Developer's contractor) shall certify: (a) that there are no known liens or bond claims outstanding at the date of the reimbursement request, (b) that all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current reimbursement request; (c) that except for such bills not paid but so included, there is no known basis for the filing of any liens or bond claims relating to the Work, and (d) that releases from all subcontractors and Developer's contractor's materialmen have been obtained in such form as to constitute an effective release of lien or claim under the laws of the State of Texas covering all Work performed; provided that if any of the foregoing is not true and cannot be certified, Developer will revise the certificate as appropriate and identify all exceptions to the requested certifications.

2.09 Payment of Reimbursement Request. The City will, within thirty (30) days after receipt of the Developer's reimbursement request, either pay the reimbursement request, for such amount as the City determines is properly due, or notify the Developer in writing of the City's reasons for withholding payment in whole or in part as provided in Section 2.11.

2.10 Verification of Work by City for Payment. The payment of each reimbursement request will constitute the City's understanding that based on the City's evaluation of the Work and the data comprising the reimbursement request, that the Work or portion thereof has been completed and that, to the best of the City's knowledge, information and belief, the quality of the work is in accordance with the Construction Documents. The foregoing representations are subject: (a) to an evaluation of the Work for conformance with the Construction Documents, (b) to results of subsequent tests and inspections, (c) to correction of minor deviations from the Construction Documents prior to completion, and (d) to any specific qualifications herein. The payment will further constitute a representation that the Developer is entitled to payment in the amount paid. However, the issuance of a payment will not be a representation that the City has (1) made

exhaustive or continuous on-site inspections to check the quality or quantity of the Work covered by the reimbursement request, (2) reviewed construction means, methods, techniques, sequences or procedures, or (3) reviewed copies of requisitions received from subcontractors and material suppliers and other data requested by the City to substantiate the Developer's right to payment.

2.11 The City may withhold Payment in whole or in part, to the extent reasonably necessary to protect the City if, the City determines that the requirements of Section 2.10 cannot be achieved. If the City is unable to make payment in the amount of the reimbursement request the City will notify the Developer as provided in Section 2.09. If the Developer and City cannot agree on a revised amount, the City will promptly issue Payment for the amount for which the City agrees. The City may also withhold Payment in whole or in part, because of subsequently discovered evidence, may modify the whole or a part of a Payment to such extent as may be necessary, in the City's opinion, to protect the City from loss for which the Developer is responsible, including loss resulting from acts and omissions because of Developer's default:

2.11.01 The City will pay the undisputed portions of such request for reimbursement within the time frames established in Article II.

2.12 When the above reasons for withholding payment are removed, payment will be made for amounts previously withheld. The City shall not be deemed in default by reason of withholding payment as provided for in subparagraph 2.11.

2.13 Payment of Contractor, Subcontractors and Vendors. The Developer shall require Developer's contractor to pay all bills for labor and materials performed and furnished by others in connection with the construction, furnishing and equipping of the improvements and the performance of the Work related to the respective reimbursement request, no later than ten (10) business days following receipt of payment from the City, and shall, if requested, provide the City with evidence of such payment. Developer's failure to require such payments within such time shall constitute a material breach of this contract, unless the Developer is able to demonstrate to City bona fide disputes associated with the unpaid subcontractor or supplier and its work. Developer's contractor shall include a provision in each of its subcontracts imposing the same payment obligations on its subcontractors as are applicable to the Developer's contractor hereunder, and if the City so requests, shall provide copies of such subcontractor payments to the City. If the Developer's contractor has failed to make payment promptly to its subcontractors or for materials or labor used in the Work for which the City has made payment to the Developer, the City shall be entitled to withhold subsequent payment to the Developer to the extent necessary to protect the City against claims or liens on the Project.

2.13.01 The City will, on request, furnish to Developer's contractor or subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Developer and action taken thereon by the City on account of portions of the Work done by such contractor or subcontractor.

2.13.02 The City shall not have an obligation to pay or to see to the payment of money to a contractor or subcontractor, except as may otherwise be required by law, if any.

2.13.03 Payments to material suppliers shall be treated in a manner similar to that provided in this Section regarding contractors and subcontractors.

2.13.04 A progress payment, the use or occupancy of the Project or portion thereof by the City shall not constitute acceptance of Work that was not performed or furnished in accordance with the Construction Documents.

2.14 Inspections. The Project shall be accessible at all reasonable times to the City's Representative or his designee for inspection. The Developer acknowledges any inspections performed by City during the course of construction for purposes of this Contract (as opposed to routine building and construction inspections performed by City for permitting and acceptance purposes common to all similar construction projects) are for the benefit of City only and may not be relied upon by others, be claimed by Developer as an approval by City, a permit granted by City, a waiver by City, or used for any purpose by Developer, its contractor or any third party. Developer further acknowledges that Developer and its contractor are required to perform their own inspections, and that inspections conducted by City do not relieve any obligations of Developer or others. Subject to the foregoing, City shall promptly notify Developer of any defects or non-conformances discovered during any City inspection.

2.15 Construction Documents. As-Built Plans. Prior to the commencement of construction of the Project, Developer shall provide City's Development Services Department with a complete set of Construction Documents meeting the requirements of this Contract and in conformance with all applicable local, state and federal codes and regulations and customary engineering practices. The Construction Documents shall be prepared by and bear the seal of the individual engineer working for Developer on the Project (the "Project Engineer"). Construction of any part of the Project shall in no event commence prior to City approval of the Construction Documents for that part of the Project (the "City Plan Approval"). Developer shall cause the Project Engineer to commence preparation of the Construction Documents promptly upon completion of engineering and design and to diligently continue same to completion. Developer shall provide City with copies of the Project Engineer's invoices for the Project as such invoices are received by Developer, and City shall pay the City Share thereof. City shall own the Construction Documents upon payment by City of the City Share of the total Project Engineer charges and Developer shall thereupon obtain and provide Project Engineer's assignment of its interest to City. Developer hereby assigns its interest in the Construction Documents to City, to become effective upon receipt by Developer of the total City Share of the Project Engineer's fees. City shall own the Construction Documents for all purposes and may duplicate them, license them, use them and re-use them for any and all purposes. Notwithstanding the foregoing, Developer shall be authorized to use the Construction Documents and modify the Construction Documents (subject to the requirements under this Contract) to allow Developer's contractor and subcontractors to complete the Project. Record drawings/As-Built Plans of the completed Project shall be provided to CIMS by Developer no later than 60 days after completion of the Project, as jointly certified by the Project Engineer and the City Representative.



2.16 Construction Warranty. If the Work is found to be defective, either wholly or in part, and/or found to be non-conforming with the Construction Documents during the 12 month period following completion and written acceptance of the Project or portion thereof as defined in the Contract, City shall immediately give Developer written notice thereof; specifying the defect and/or non-conforming Work with particularity. (For purposes of this Contract, "completion" shall mean written acceptance of the Project or portion thereof by the City.) Developer shall cause the correction of such defective or nonconforming Work within thirty (30) days of notice thereof given by City, or within such longer time as may be reasonably necessary, provided Developer is working diligently and continuously towards a cure. If Developer fails to correct the specified defective or non-conforming Work, then City may, at its own expense, correct such defective or non-conforming Work by City's own crews or by outside contractor, at City's option, and the reasonable cost of such correction shall be deemed to be sums due City by Developer, and may be offset against any outstanding amounts due by City to Developer under this Contract. The cost of City crews shall be determined by prevailing market rates for correcting such specified defects and/or nonconforming work. At the end of said 12-month period, all available product and workmanship material warranties, including all warranties given by Developer, shall be assigned to City, to the extent assignable. This provision shall survive termination of this Contract.

2.17 Representations and Warranties. Developer and City represent, warrant, certify and agree that neither this Contract, nor the Contract Documents, nor any part of the relationship between the parties hereto shall be construed in any way or operate as creating a joint venture, partnership or other business entity between Developer and City.

### **III. TERM**

3.01 The term of this Contract shall commence upon execution of the Contract by both Parties (the "Effective Date") and continue until the Project is complete and accepted in writing by the City (the "Term"). The Developer must complete the Project not later than December 31, 2016.

### **IV. GENERAL RESPONSIBILITIES OF DEVELOPER**

4.01 Construction Commencement. Notwithstanding anything to the contrary herein, Developer shall be deemed to have commenced construction of the Project upon the occurrence of all of the following, in accordance with the terms and conditions of this Contract (the "Construction Commencement"):

- A. The Provision of Bonds;
- B. The Provision of Insurance;
- C. Developer submission of all required forms or information under this Contract;
- D. Developer submission of the Subcontractor/Supplier Utilization Plan;
- E. Developer provision of the Budget for the Project to City;
- F. City Plan Approval; and
- G. Issuance of all required permits and approvals for the Project.

For a period of eighteen (18) months following the date hereof, Developer shall have the right to terminate this Contract if the reasonably anticipated cost of the performing its obligations hereunder exceeds the Budget by more than ten percent (10%) as a result of unknown circumstances or events not reasonably foreseeable by Developer, in which event the Performance Guarantee shall be returned to Developer and neither party shall have any further obligations hereunder.

4.01.01 Developer Obligation to Construction Project. Following Construction Commencement, Developer hereby accepts full responsibility for the performance of all services and activities described in this Contract to complete the design and construction of the Project by December 31, 2016. Construction of the Project shall be in accordance with the Construction Documents.

4.01.02 Developer Performance Guarantee. The Developer hereby guarantees it shall perform its obligations under this Contract. Developer, upon the Effective Date, shall deposit with CIMS either a bond, irrevocable letter of credit, or cash in an amount equal to five percent (5%) of the estimated cost to design and complete the Bulverde Road Project (the "Performance Guarantee"). Notwithstanding any other term or provision hereof, should Construction Commencement not occur prior to the date reasonably required to complete construction by December 31, 2016, , and such failure continues beyond the applicable notice and cure provided under Section 13.03, City may deem Developer in Default whereupon City, may as its sole and exclusive remedy (i) terminate this Contract and be entitled to retain the Performance Guarantee as liquidated damages arising from such default and (ii) recover from Developer any amounts previously paid to Developer in accordance with Article II within 30 days following said termination. Upon the Provision of Bonds by Developer, City shall immediately release the Performance Guarantee to Developer upon demand, and Developer shall have no further obligation under this Section.

4.02 The estimated cost to complete the Project is \$9, 916,103.80. Developer shall provide (or cause to be provided) all necessary funding for the Project Costs beyond the City Share contained herein and provide evidence to City that Developer's Share of the Project Costs has been secured.

4.03 Unless written notification by Developer to the contrary is received by City, the Developer's Representative shall be responsible for the administration of this Contract on behalf of Developer until the completion of the Project.

4.04 Unless written notification by City to the contrary is received by Developer, the City's Representative shall be responsible for the administration of this Contract on behalf of City until the completion of the Project.

4.05 Communications between City and Developer shall be directed to the designated representatives of each as set forth in paragraphs numbered 4.03 and 4.04 hereinabove.

4.06 Pursuant to Section 2.15, Developer shall provide to City its Construction Documents for the Project. After approval by City, Developer shall not make any substantial changes to the Construction Documents without the prior written approval of City. This Section

does not relieve Developer of the burden of obtaining all necessary governmental approvals and permits, including those provided by City through its relevant development departments and relevant boards and commissions including the Historic and Design Review Commission, and the State of Texas Commission on Environmental Quality (Article 9102).

4.06.01 Developer shall obtain as part of the Project Cost any and all required environmental permits for the Project.

4.06.02 Developer shall coordinate all required environmental permits for the Project with the Director.

4.07 City shall have authority to inspect the Project throughout the construction process to ensure compliance with the Plans. Developer shall cause its design professional to provide periodic certifications of construction certifying that construction has been conducted in compliance with the Plans. Developer shall submit said certification to the CIMS Director or his designee at the completion of the Project construction. City shall have the right to withhold funding until certification is provided.

4.08 Any construction of the Project affecting the floodplain shall comply with the UDC and other applicable State or Federal regulations.

4.09 Developer shall coordinate with all utilities affected by the Project.

4.09.01 Developer shall pay all required costs for utility removal, replacement and relocation in connection with the Project.

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

5.01 Developer 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 Developers and Subcontractors that may work on the Project.

5.02 Developer agrees to abide by the following laws, Ordinances; Rules and regulations in its expenditures of City Funds:

5.02.01 Government Code provisions regarding performance and payment bonds as set forth in Section 2.05 of this Contract

5.02.02 PREVAILING WAGE RATE AND LABOR STANDARD PROVISIONS.

A. The requirements of Chapter 2258 of the Texas Government Code, entitled "Prevailing Wage Rates," shall apply to this Agreement. Developer agrees that its construction contractor will comply with City Ordinance No. 71312 and its successors such as Ordinance No. 2008-11-

20-1045 and will require subcontractors to comply with City Ordinance 71312 and its successors such as Ordinance No. 2008-11-20- 1045.

- B. In accordance with the provisions of Chapter 2258 and Ordinance No. 2008-11-20-1045, Developer's Representative shall request upon advertisement of construction bids, and the City will provide Developer 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 Developer is required, and shall require same of its construction contractor and all subcontractors to comply with each updated schedule of the general prevailing rates in effect at the time the Developer seeks proposals or bids for construction of a given phase. The Developer is further required to cause the latest prevailing wage determination decision to be included in bids and contracts with the Developer's general contractor and all subcontractors for construction of each Phase. Developer is responsible for and shall collect and monitor weekly certified payrolls and perform site visits to ensure the prevailing wage is being paid to all workmen. City will audit certified payroll records as necessary in accordance with this Agreement.
- C. Upon audit of the records and certified payrolls under this section, should the City or its auditors find any violations, the Developer shall cause its Construction Contractor to forfeit as a penalty to the City \$60.00 for each laborer, workman, or mechanic employed, for each calendar day, or portion thereof, that such laborer, workman or mechanic is paid less than the said stipulated rates for any work done under said contract, by the Contractor or any subcontractor. The establishment of prevailing wage rates in accordance with Chapter 2258, Texas Government Code shall not be construed to relieve the Developer from its obligation under any federal or state law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed under this Agreement.

5.02.03. Developer shall comply with the requirements of the City of San Antonio Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531, as amended), as further described in **Exhibit E** hereto (the "SBEDA Requirements").

5.03 Construction Documents 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 Developer.

## VI. PAYMENT BY CITY

6.01 City shall pay the Developer the City Share not to exceed the lesser of an amount not to exceed \$2,873,302.20 or up to THIRTY PERCENT (30%) of the total estimated

contract price of the Bulverde Road Project Costs, pursuant to the terms and conditions of this Contract. (City Share includes the payment to CIMS of \$64,000.00 for contract oversight and management.)

- 6.02 City shall pay the Developer for Oversizing in an amount not to exceed \$321,669.80, pursuant to the terms and conditions of this Contract..

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

7.01 City shall reimburse Developer only for Project Costs incurred hereunder. Notwithstanding any other provisions of this Contract, the total of all payments and other obligations made to Developer hereunder shall not exceed the Appropriation and the City Share.

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

7.03 It is further expressly understood and agreed by City and Developer that the City's payment obligations under this Contract are limited to the City's Share of the Project. Additionally, it is expressly understood and agreed by City and Developer that this Contract in no way obligates payment of City's General Fund monies.

## **VIII. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY DEVELOPER**

8.01 Developer shall maintain readily identifiable records that will provide accurate, current, separate, and complete disclosure of the status of any funds received pursuant to this Contract. Developer further agrees:

8.01.01 That maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Contract and with all generally accepted accounting practices; and

8.01.02 That Developer's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

8.02 In order to be reimbursed for work completed, Developer shall submit to the City a report indicating the amount of funds expended, the payee, the date paid, the purpose of the payment, and provide supporting documentation (i.e. copies of paid itemized invoices) as requested by the City. Prior to reimbursement, City will have the right to inspect work completed to ensure conformance with the approved Construction Documents.

8.03 City agrees to provide Developer written notice regarding any expenditure in a reimbursement request that City cannot confirm is an eligible Project Cost under this Contract or related to the Construction Documents. Said notice will provide Developer thirty (30) days from receipt of said notice to provide additional information. Failure to provide sufficient information may result in City's denial of the reimbursement for the expenditure under review. Within thirty (30) days following written demand by the City, Developer shall refund to the City any sum of

money for the expenditure in question previously paid by City to Developer that has been determined to:

8.03.01 Have not been spent by Developer strictly in accordance with the terms of this Contract; or

8.03.02 Not be supported by adequate documentation to fully justify the expenditure.

8.04 Upon termination of this Contract, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in Section 10 as a result of any auditing or monitoring by City, Developer shall refund such amount to City within thirty (30) working days of City's written request therefore wherein the amount disallowed or disapproved shall be specified.

### **IX. RIGHT OF REVIEW AND AUDIT**

9.01 The Developer grants the City or its designees, the right to audit, examine or inspect, at the City's election, Developer's Records (defined below) relating to the performance of the Work under the Contract during the term of the Contract and retention period herein. Such audit, examination or inspection may be performed by a City designee, which may include its internal auditors or an outside representative engaged by the City. The Developer agrees to retain its records in an electronic format for a minimum of four (4) years following termination of the Contract (and forward the electronic records to City at the end of the four year period), unless there is an ongoing dispute under the contract, then, such retention period shall extend until final resolution of the dispute. For purposes of this Contractor, "Developer's Records" means any and all information, materials and data of every kind and character generated as a result of the Work under this Contract. Examples of Developer records include but are not limited to billings, books, records, general ledger, cost ledgers, invoices, production sheets, documents, correspondence, meeting notes, subscriptions, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, written accounting policies, procedures, federal and state filings for issue in question, and any and all other relevant materials, agreements, sources of information and matters that may in the City's judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Contract Documents.

9.02 Notwithstanding the foregoing, the City agrees Developer's retention and authorized audit of the Developer's Records shall not include the retention, disclosure, review or audit of records of the Developer or its affiliates unrelated to the Contract or the Work performed by or for Developer relating to performance of Work under this Contract. It is expressly agreed by the City that Developer shall not be required to disclose or retain the following:

- (a) time sheets, personnel or payroll records of Developer's employees;
- (b) private information about the employees or directors or partners of Developer;
- (c) information pertaining to the revenues, assets, liabilities, securities, or position of Developer;

- (d) contributions or distributions of partner entities of the Developer;
- (e) financial records of the Developer, other than those related to the performance of Work under this Contract,
- (f) financial records of partner entities of Developer, other than those related to performance of Work under this Contract;
- (g) federal or State tax filings of any sort;
- (g) organization formation documents of any sort;
- (h) private plans, engineering drawings or analyses, architectural drawings or analyses, financial projections, marketing materials, real estate agreements of any type, or other documents or records of any kind, without limitation, that pertain to the development, sale, leasing or construction of Developer Property (other than those related to performance of Work under this Contract);
- (i) memoranda or correspondence between Developer and its attorneys;
- (j) memoranda or correspondence of any sort between partner entities of Developer that is unrelated to the Developer's performance of Work under this Contract; or
- (k) information pertaining to insurance coverage of Developer or its partner entities, other than that required for Developer's performance of Work under this Contract.

9.03 The City agrees that it will exercise the right to audit, examine or inspect only during regular business hours and following five (5) days prior written notice to Developer. The Developer agrees to allow the City or its designee access to the Developer's Records deemed necessary by City or its designee(s), to perform such audit, inspection or examination. Developer also agrees to provide adequate and appropriate work space necessary to City or its designees to conduct such audits, inspections or examinations.

9.04 Developer must include this audit clause and right of review in any Subcontractor, supplier or vendor contract. Notwithstanding the foregoing, it is expressly agreed that City's rights to audit apply only to Developer's Records.

## **X. ALLOWABLE EXPENDITURES**

10.01 Prior to the commencement of Project construction, Developer shall submit an estimated construction schedule and budget to complete the Project (the "Budget"), including contingency amounts to City's Representative for prior approval of any costs to be paid from funds received hereunder. Costs shall be considered allowable only if so approved in Developer's construction budget, or otherwise approved in advance by City's Representative in writing, and incurred directly and specifically in the performance of and in compliance with this Contract and with all city, state and federal laws; regulations and ordinances affecting Developer's operations hereunder. Only the following categories of Project Costs shall be considered allowable (the "Eligible Expenses"):

- Construction costs, including bonds and insurance expenses
- Project Management fees/expenses
- Construction contingencies with approved change orders
- Design Plans and specifications
- Advertising and outreach expenses of Developer to comply with contractor solicitation and SBEDA Ordinance, as required by this Contract.

Expenditures of the funds provided under this Contract shall only be allowed if incurred directly and specifically in the performance of and in compliance with this Contract and all applicable city, state and federal laws, regulations and/or ordinances.

10.02 The following shall not be considered allowable Project Costs under this Contract:

- Personnel costs, salaries or wages paid directly by Developer or other similarly affiliated organization
- Travel and travel-related expenses
- Costs or fees for consultant and/or professional services, except for those directly related to the projects
- Costs or fees associated with attendance at meetings, seminars, or conferences
- Costs or fees associated with regular maintenance and operation
- Fundraising
- Equipment and Furnishings, unless provided by Developer's General Developer and shown on the approved Plans
- Advertising, other than those expenses specified above
- Right of Way

## **XI. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS**

11.01 Developer further represents and warrants that:

- 11.01.01 All information, data or reports heretofore or hereafter provided to City is, shall be, and shall remain complete and accurate 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.
- 11.01.02 It is financially stable and capable of fulfilling its obligations under this Contract and that Developer shall provide City immediate written notice of any adverse material change in the financial condition of Developer that may materially and adversely affect its obligations hereunder.
- 11.01.03 No litigation or proceedings are presently pending or to Developer's knowledge, threatened against Developer that would affect its ability to fulfill its obligations specified herein.



- 11.01.04 None of the provisions contained herein contravene or in any way conflict with the authority under which Developer is doing business or with the provisions of any existing indenture or agreement of Developer.

## **XII. ACCESSIBILITY OF RECORDS**

12.01 At any time and as often as City may deem necessary, upon five (5) business days written notice (but in no case more than once monthly), Developer shall make Records available to City or any of its authorized representatives, at no charge to the City, pursuant to Article IX of this Contract, and shall permit City or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

12.02 To the extent required by law, Developer agrees to cooperate with City to satisfy requests for information received by City under the Texas Public Information Act or related laws pertaining to this Contract.

## **XIII. DEFAULT/TERMINATION**

13.01 Default. Each failure of a Party to perform its obligations in accordance with the terms and conditions of this Contract shall be deemed a "Default."

13.02 Other Defaults by Developer. In addition to the foregoing, the following occurrences may be deemed a Default of the Developer:

- 13.02.01 Failure or refusal of the Developer/Developer's contractor to start the Work to meet the Project delivery set forth in this Contract.
- 13.02.02 City's reasonable belief that the progress of the Work being made by the Developer or Developer's contractor is insufficient to complete the Work within the specified time.
- 13.02.03 Failure or refusal of the Developer or Developer's contractor to provide sufficient and proper equipment or construction forces to properly execute the Work in a timely manner, following receipt of written notice by the City of such concerns.
- 13.02.01 City's determination that the Developer or Developer's contractor has abandoned the Work or Project, following written request of Developer to provide documentation to the contrary.
- 13.02.02 City's determination that the Developer or Developer's contractor has become insolvent, bankrupt, or otherwise financially unable to carry on the Work, following a written request of Developer to provide evidence to the contrary.
- 13.02.03 Failure or refusal on the part of the Developer, following receipt of written notice by the City, to observe any material requirements of the Construction Documents.

- 13.02.04 Failure or refusal of the Developer or Developer's contractor to promptly make good any defects in materials or workmanship, or any defects of any nature, the correction of which has been directed in writing by the City.
- 13.02.05 A reasonable belief by the City that collusion exists or has occurred for the purpose of illegally procuring the contract, contractor or a subcontractor, or that a fraud is being perpetrated on the City in connection with the construction of Work under the Contract.
- 13.02.06 Repeated and flagrant violation of safe working conditions by Developer's contractor following receipt of written notice by the City of such violations.
- 13.02.07 The willful and persistent violation of the Developer (or Developer's contractor) to carry out the Work in accordance with the Construction Documents.

13.03 Cure Period, Termination. Upon the occurrence of a Default by either Party in the performance of its obligations hereunder and the failure to cure such Default within thirty (30) days following receipt of written notice of default from the non-defaulting party (or such reasonably longer time as may be necessary, provided that the defaulting party commences the cure within thirty (30) days and continuously and diligently pursues the cure to completion), the non-defaulting party shall have the right to terminate this Contract.

13.03.01 Cure Period for Failure to Achieve SBEDA Requirements. Notwithstanding the foregoing, upon the occurrence of a Default by Developer for failure to perform the SBEDA Requirements (pursuant to Section 5.02.03) and the failure of Developer to cure such Default within fifteen (15) days following receipt of written Notice of Default from the City (or such reasonable time period required to cure such Default), the City may terminate this Contract as its sole remedy for such Default.

13.04 Suspension of Payments to Developer. In the event of an uncured Default by Developer (following Construction Commencement) and written Notice to Developer thereof, the City may withhold payments, in whole or in part, until such Default is cured. The withholding of payments by City may occur to protect the City from loss for which the Developer is responsible, including losses resulting from acts and omission because of:

- A. defective Work not remedied;
- B. third party claims filed or reasonable evidence indicating probable filing of such claims for which Developer is responsible hereunder unless security acceptable to the City is provided by the Developer;
- C. failure of the Developer to make payments properly to Contractors, Subcontractors or for labor, materials or equipment under Section 2.13;

- D. reasonable evidence that the Work cannot be completed in the Contract Term and Developer has failed to provide City adequate assurance of its continued performance; or
- E. damage to City property or City contractor;

When the above reasons for withholding payment are remedied, payment will be made by City for amounts previously withheld. The City shall not be deemed in default by reason of withholding payment as provided for herein.

### 13.05 Completion of Project Following Termination by City.

13.05.01 In the event of that this Contract is terminated by City following Construction Commencement and only if City elects to enforce the performance bond for the Project and/or construct the Project (or portion(s) thereof), the Developer hereby grants to City a twenty-five (25) foot wide construction easement on each side of the ROW to complete the construction of the Project. This Contract shall operate as an agreement by Developer to allow City access to the Property as necessary to complete the Project in accordance with the Construction Documents.

13.05.02 In the event this Contract is terminated by City following Construction Commencement and only if City elects to enforce the performance bond for the Project and/or construct the Project, the Developer shall, as of the date specified by the City, discontinue the Work or portion of the Work as the City shall designate, whereupon the company issuing the Developer's performance bond (the "Surety") shall, within fifteen (15) days after the receipt of written notice of termination has been served upon the Developer and the Surety or its authorized agents, assume the obligations of the Developer for the Work or that portion of the Work which the City has ordered the Developer to discontinue and Surety may:

- A. perform the Work with forces employed by the Surety;
- B. with the written consent of the City, tender a replacement contractor to take over and perform the Work, in which event the Surety shall be responsible for and pay the amount of any costs required to be incurred for the completion of the Work that are in excess of the amount of the City Share remaining under the Contract as of the time of the termination; or
- C. with the written consent of the City, tender and pay to the City in settlement the amount of money necessary to finish the balance of uncompleted Work under the Contract, correct existing defective or nonconforming work, and compensate the City for any other loss sustained as a result of Developer's Default, less the City Share remaining under the Contract at the time of termination.

13.05.03 In the event of termination of this Contract following Construction Commencement, Surety shall assume the Developer's obligations in all respects, and the amount of funds remaining unpaid to the Developer under the Contract shall be paid by the

City to the Surety for all Work performed by the Surety or the replacement contractor in accordance with the terms of the Construction Documents, subject to any rights of the City to deduct any costs, damages, or actual damages that the City may have incurred, including but not limited to additional fees, expenses and attorneys fees, as a result of such termination.

13.05.04 Any balance of the City's Share remaining at the time of the Contract termination shall become due and payable to the Surety as the Work progresses, subject to all of the terms, covenants, and conditions of the Contract Documents. If the Surety does not, within the time specified, exercise its obligation to assume the performance obligations of the Developer under the Contract (or that portion of the Work which the City has ordered the Developer to discontinue) then the City shall have the power to complete the Work in accordance with the Construction Documents, by contract or otherwise, as it may deem necessary. The Developer agrees that the City shall have the right to take possession of or use any or all of the materials, plants, tools, equipment, supplies, and property of every kind provided by the Developer for the purpose of the Work (or to procure other tools, equipment, labor, and materials for the completion of the Work) and to charge to the account of the Developer the expenses of completion and labor, materials, tools, equipment, and incidental expenses, up to an amount not to exceed the Contract Price. The expenses incurred by the City to complete the Work shall be deducted by the City out of any balance of the City Share remaining unpaid to or unearned by the Developer. The Developer and the Surety shall be liable to the City for any costs incurred in excess of the balance of the City's Share available for the completion and correction of the Work, and for any other costs, damages, expenses (including but not limited to additional fees and attorney's fees), and actual damages, as the case may be, incurred as a result of the termination, up to an amount not to exceed the Contract Price.

13.06 The City shall not be required to obtain the lowest bid for the Work of completing the Project in accordance with the Construction Documents, but the expenses to be deducted from the City's Share shall be the actual cost of such Work and the other damages and the City shall use its best efforts to minimize the cost of completing the Work. Notwithstanding the foregoing, the City agrees that it shall not enter into contracts or incur unreasonable charges to complete the Work and agrees to look first to the Surety in all cases to complete the Work prior to engaging in self-help to remedy any default by Developer hereunder. In case the City's costs and damages are less than the City's Share which would have been payable under the Contract if the same had been completed by the Developer, then the City may pay to the Developer or the Surety, as appropriate, the difference, provided that the Developer (or the Surety) shall not be entitled to any claim for damages or for loss of anticipated profits. In the event that the actual cost for completion and damages exceeds the amount which would have been payable to Developer under the Contract if the same had been completed by the Developer, then the Developer or its Surety shall pay the amount of the excess costs to the City following receipt of notice from the City for the excess amount owed, up to an amount equal to the Contract Price, less the City Share. When only a particular portion of the Work is being completed by the City under the provisions of this Section, the Developer shall continue the remainder of the Work in conformity with the terms of the Agreement and in such manner as not to hinder or interfere with the performance of workmen employed and provided by the City.

13.07 Developer's Remedy Following City Default. City acknowledges that the Developer is entering into this Contract to construct the Project relying on the City's performance of its obligations hereunder, including the payment of the City's Share to the Developer. Notwithstanding the provisions under this article, should City fail to make timely payments of the City's Share as required under this Contract and fail to cure such Default in accordance with Section 13.03, Developer may terminate this Contract and shall be entitled to seek all remedies and damages from City permitted under law.

13.08 Limited Remedies of Both Parties. Except for the express remedies set forth above, the Parties agree that no other remedies are available in the event of a Default; and it is expressly agreed that neither Party shall have the right to seek consequential, special or punitive damages against the other for any default under this Contract.

#### **XIV. INDEMNITY**

14.01 Developer covenants and agrees to FULLY INDEMNIFY, and HOLD HARMLESS; City and City's elected officials, agents, employees, officers, directors, officially designated volunteers, and representatives of City individually or collectively, (collectively, the "City Parties") from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury, death and property damage (the "Damages") made upon City, arising out of or resulting from Developer's negligent activities or omissions under this Contract, including any negligent acts or omissions of any agent, officer, director, representative, employee, consultant, volunteer, subconsultant, licensee, sublicensee, contractor or subcontractor of Developer or Subcontractor of Developer, and their respective officers, agents, employees, directors and representatives, volunteers consultant, (collectively "Developer Parties") while in the exercise of the performance of the rights or duties under this Contract. THE INDEMNITY PROVIDED FOR IN THE PARAGRAPH SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF CITY, OR THE CITY PARTIES IN SUCH INSTANCE WHERE SUCH NEGLIGENCE CAUSES PERSONAL INJURY, DEATH OR PROPERTY DAMAGE. IN THE EVENT DEVELOPER AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS; WITHOUT, HOWEVER, CITY WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

14.02 The provisions of this INDEMNITY 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. Developer shall promptly advise City in writing within three (3) business days of any claim or demand against City or Developer known to Developer and related to or arising out of Developer's negligent activities or omissions under this Contract, and shall see to the investigation and defense of such claim or demand at Developer's cost. Notwithstanding any condition imposed by a policy of insurance to which Developer and City are named, City shall retain the right, at its option and at its own expense, to participate in such defense provided by any insurance or self-insurance of

Developer under this section without relieving Developer of any of its obligations under this section.

## XV. INSURANCE

15.01 Prior to the commencement of any work under this Contract, Developer shall furnish (or cause to be furnished) copies of all required endorsements and an original completed Certificate(s) of Insurance (the "Certificate") to the City's Capital Improvements Management Services (CIMS) Department, which shall be clearly labeled "Developer Participation Contract Bulverde Road Project" in the Description of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The City will not accept Memorandum of Insurance or Binders as proof of insurance. The original Certificate (s) or form must have the agent's original signature, if agent is authorized to bind the insurance company, including the signer's company affiliation, title 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 Contract until such Certificate and endorsements have been received and approved by the City's CIMS Department. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

15.02 The City reserves the right to review the insurance requirements of this Article during the effective period of this Contract 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 Contract. In no instance will City allow modification whereupon City may incur increased risk.

15.03 Developer's financial integrity is of interest to the City. Therefore, subject to Developer's right to maintain reasonable deductibles in such amounts as are approved by the City, Developer shall obtain and maintain in full force and effect for the duration of this Contract, and any extension hereof, at Developer'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 on the following table:

*[Remainder of page intentionally left blank]*

INSURANCE	
TYPE	AMOUNTS
1. Workers' Compensation	Statutory
2. Employers' Liability	\$1,000,000/\$1,000,000/\$1,000,000
3. Commercial General Liability Insurance to include coverage for the following: a. Premises operations *b. Independent Developers c. Products/completed operations d. Personal Injury e. Contractual Liability	For Bodily Injury and Property Damage of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage
4. Business Automobile Liability a. Owned leased vehicles b. Non-owned vehicles c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence
* if applicable	

15.04 Developer agrees to obtain (or cause to be obtained) all insurance coverages with minimum limits of not less than those limits delineated in Section 15.03 (Insurance Table) from each contractor and provide a Certificate of Insurance and Endorsement that names the Developer and the City as an additional insured.

15.05 The City shall be entitled, upon request and without expense, to receive copies of the policies, declaration page and all endorsements thereto as they apply to the limits required by the City, 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). Consultant 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 business days of the requested change. Developer shall pay any costs incurred resulting from said changes.

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

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

- 15.06.01 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;
- 15.06.02 Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the City is an additional insured shown on the policy;
- 15.06.03 Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the City.
- 15.06.04 Provide thirty (30) calendar days 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.

15.07 Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, Developer shall provide a replacement Certificate of Insurance and applicable endorsements to City. City shall have the option to stop construction of the Project 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 Contract.

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

15.09 It is agreed that Developer's insurance shall be deemed primary and noncontributory with respect to any insurance or self-insurance carried by the City of San Antonio for liability arising out of operations under this Contract.

15.10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Contract.

## **XVI. WARRANTIES**

16.01 Developer guarantees that design and construction of the road and bridge shall meet the requirements of the City's Unified Development Code (including plat variances permitted by the City's Planning Commission) and be constructed in strict compliance with the Construction Documents, subject to change orders and modifications permitted by the Director.

16.02 Representations and Warranties. Developer and City represent, warrant, certify and agree that neither this Contract, nor the Contract Documents, nor any part of the relationship



between the parties hereto shall be construed in any way or operate as creating a joint venture, partnership or other business entity between Developer and City.

#### **XVII. NONDISCRIMINATION**

17.01 Developer covenants that it, or agents, employees or anyone under its control, will not discriminate against any individual or group on account of race, color, sex, age, religion, national origin, handicap or familial status, in employment practices or in the *use* of or admission to the premises, which said discrimination Developer acknowledges is prohibited.

#### **XVIII. CONFLICT OF INTEREST**

18.01 Developer 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 Contract. Developer further covenants that in the performance of this Contract, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

18.02 City 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.

18.03 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 Contract shall:

18.03.01 Participate in any decision relating to this Contract 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;

18.03.02 Have any direct or indirect interest in this Contract or the proceeds thereof.

#### **XIX. POLITICAL ACTIVITY**

19.01 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.

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

20.01 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 Developer pertaining to the Project (but excluding information marked as proprietary

or confidential information of Developer, to the extent permitted by law), shall, upon receipt, become the property of City.

## **XXI. CONTRACTING**

21.01 Any work or services subcontracted hereunder shall be subcontracted 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 Contract. Compliance by contractors with this Contract shall be the responsibility of Developer. Developer is responsible to ensure that all local, state and federal permits and approvals required for the activities under this Contract are obtained.

21.02 City shall in no event be obligated to any third party, including any contractor, subcontractor or vendor of Developer, for performance of or payment for work or services.

## **XXII. CHANGES AND AMENDMENTS**

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

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

## **XXIII. ASSIGNMENTS**

23.01 Developer shall not transfer, pledge or otherwise assign this Contract, 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. Any such assignment, whether voluntary or involuntary, by operation of law, under legal process or proceedings, by receivership, in bankruptcy or otherwise, without the prior written consent of City shall, at City's option, be of no force and effect whatsoever. Any consent to any such assignment or transfer shall not constitute a waiver of any of the restrictions of this Section and the provisions of this Section shall apply to each successive assignment or other transfer hereunder, if any.

## **XXIV. SEVERABILITY OF PROVISIONS**

24.01 If *any* clause or provision of this Contract 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 Contract 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 Contract that is invalid, illegal, or unenforceable, there be added as a part of the Contract 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.

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

25.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Contract 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 anyone or more cases upon the strict performance of any of the covenants of this Contract, 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 Contract shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

25.02 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.

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

## **XXVI. ENTIRE AGREEMENT**

26.01 This Contract 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 Contract 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.

26.02 The terms of this Contract are intended to be a final expression of the Parties agreement and may not be contradicted by evidence of any prior or contemporaneous statements, representations, agreements or understandings, whether written or oral. The Parties expressly agree that no such statements, representations, agreements or understandings exist. The Parties further intend that this Contract constitutes the complete and exclusive statement of the Parties' intent and that no extrinsic evidence may be introduced in any proceeding involving the Contract Documents. No addition to, deletion from, or modification of any term or provision of this Contract shall be effective unless it is made in a writing signed by the Parties hereto.

## **XXVII. NOTICES**

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

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

With Copies to: Office of the City Clerk  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

DEVELOPER: BMP 1604 Developers, Ltd.  
10003 NW Military Hwy., Suite 2205  
San Antonio, TX 78231

With copies to: Steve Golden  
Golden Steves Cohen & Gordon LLP  
300 Convent, Suite 2600  
San Antonio, Texas 78205

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

Any communication so addressed and mailed shall be deemed to be given on the earliest of: (a) when actually received or delivered; (b) when proof of return of certified mail is received; or (c) on the first business day after deposit with an overnight air courier service, if proof to the address of the intended addressee is provided. A change of address may be given by written notice: as provided herein

## XXVIII. MISCELLANEOUS

28.01 Conflicts Between Documents. In the event of any conflict between the Exhibits hereto and the terms and provisions of this Contract, the terms and provisions of this Contract shall control.

28.02 Waiver. It is understood and acknowledged that City exercises no control over the means of accomplishing the Work. No approval by City shall impose any liability on City for any risk or damage to persons or property or the City Property or shall imply or guarantee any drainage implications or the operation of the drainage facilities to the parties, any other party or otherwise.

28.03 Third Party Beneficiaries. There shall be no third party beneficiaries to this Contract.

28.06 Counterparts. The Contract Documents may be executed in counterparts, each of which shall be deemed an original and together shall constitute a single instrument.

28.07. Force Majeure. In the event Developer or City is unable in whole or in part by force majeure to carry out any covenant, agreement, obligation or undertaking to be kept or performed under this Contract, the time for the performance of such covenant, agreement, obligation or undertaking so delayed shall be extended for the period of such delay, and such default shall be remedied with all reasonable dispatch. The term "force majeure" as employed in this section shall include acts of God, (i.e. Fire, flood, natural disasters ) and permit and government-caused delays, by Endangered Species Act, or Army Corps of Engineers review, acts of terrorism, strikes, lockouts, or other industrial disturbances, acts of a public enemy, war, blockades, riots, epidemics, earthquakes, explosions, accidents, or repairs to machinery or pipes, the delays of carriers, or inability by reason of governmental regulation to obtain materials, acts of public authorities, or other causes, whether or not of the same kind as specifically enumerated, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome. If the Developer suffers any event of "force majeure", such event shall likewise constitute force majeure with respect to Developer.

#### **XXIX PARTIES BOUND**

29.01 This Contract shall be binding on and inure to the benefit of the Parties hereto and their respective successors and assigns, except as otherwise expressly provided herein.

#### **XXX. RELATIONSHIP OF PARTIES**

30.01 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.

#### **XXXI. TEXAS LAW TO APPLY**

31.01 This Contract 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. Exclusive venue shall lie in Bexar County, Texas.

#### **XXXII. GENDER**

32.01 Words of any gender used in this Contract 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.

#### **XXXIII. CAPTIONS**

33.01 The captions contained in this Contract are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Contract.

#### **XXXIV. LEGAL AUTHORITY**

34.01 The person executing this Contract for the City represents, warrants, assures, and guarantees that they possess the legal authority, pursuant to *any* proper, appropriate and official

motion, resolution or action passed or taken, to enter into this Contract and to perform the responsibilities herein required.

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

*[Signatures on Following Page]*

21  
MAY  
**EXECUTED IN DUPLICATE ORIGINALS**, each of which shall have the full force and effect of an original this the ~~23~~ day of ~~April~~, 2013.

**CITY OF SAN ANTONIO**

**DEVELOPER**  
BMP 1604 Developers, Ltd.

By: BMP 1604 GP, LLC, General Partner

By: [Signature]  
Per Sheryl Sculley  
City Manager

By: [Signature]  
Printed Name: Jacques R. Brana  
Title: Member

ATTEST: [Signature]  
CITYCLERK



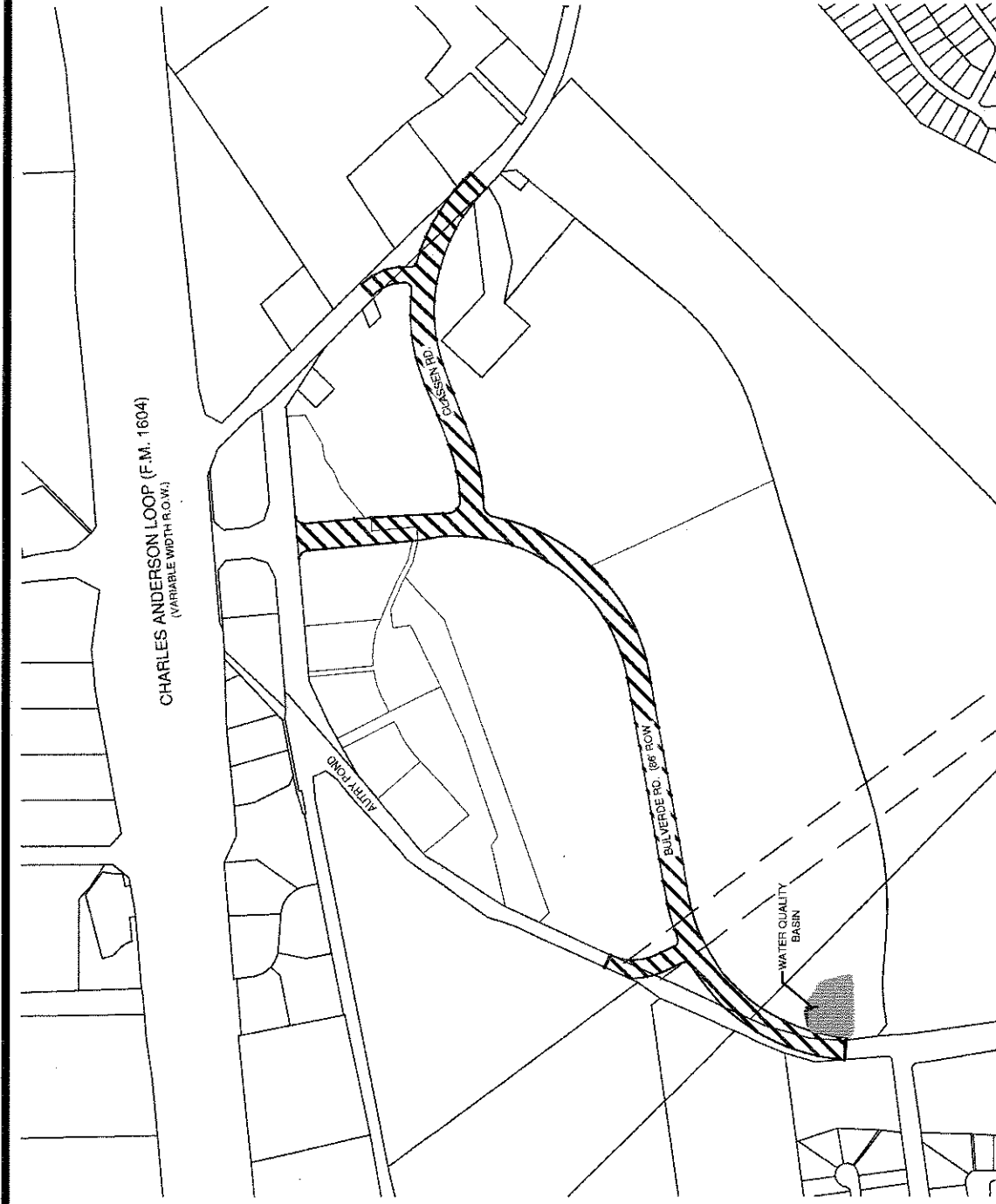
**APPROVED AS TO FORM:**

[Signature]  
CITY ATTORNEY

- Exhibits to Contract:**
- Exhibit A: Depiction of Project
  - Exhibit A-1: Description of Project Scope
  - Exhibit B: Developer's Property
  - Exhibit C: Temporary Construction Easement
  - Exhibit D: City Standard Surety Form
  - Exhibit E: SBEDA Requirements
  - Exhibit E-1: SBE and M/WBE Commitment Form (to be attached upon execution)

**EXHIBIT A:**  
**Depiction of Project**





SCALE: 1" = 600'



JOB NO. 8207-00  
 DATE MARCH 2013  
 DESIGNER \_\_\_\_\_  
 CHECKED \_\_\_\_\_ DRAWN \_\_\_\_\_  
 SHEET 1 of 1

**BULVERDE / 1604**  
**SAN ANTONIO, TEXAS**  
**EXHIBIT A**



555 EAST RAMSEY | SAN ANTONIO, TEXAS 78216 | PHONE: 210.375.9000  
 TEXAS BOARD OF PROFESSIONAL ENGINEERS, FIRM REGISTRATION # 470  
 FAX: 210.375.5010

THIS DOCUMENT HAS BEEN PREPARED FROM MATERIAL THAT WAS STORED AND/OR TRANSMITTED ELECTRONICALLY AND MAY HAVE BEEN INADEQUATELY ALIQUOTED. REPLY ONLY ON ORIGINAL HARD COPY MATERIALS BEARING THE CONSULTANT'S ORIGINAL SIGNATURE AND SEAL.

**EXHIBIT A-1:**  
**Scope of Project**

**EXHIBIT A-1**  
**PROJECT SCOPE**

**BULVERDE RD, CLASSEN RD, & AUTRY POND TIE-IN AT BULVERDE MARKETPLACE**  
**("Bulverde Road Project" per Agreement)**

MARCH 26, 2013

<b>CONSTRUCTION PROJECT COSTS</b>			<b>COSA</b>	<b>BMP 1604</b>
<b>DESCRIPTION</b>	<b>UNIT</b>	<b>QTY</b>	<b>%</b>	<b>%</b>
<b>GENERAL</b>				
Mobilization	LS	1	30%	70%
Insurance & Bond	LS	1	30%	70%
Preparation of ROW	LS	1	30%	70%
Demolition	LS	1	30%	70%
Temporary Pavement - Single Course	SY	1,000	30%	70%
Temporary Pavement - Flex Base (8")	SY	1,000	30%	70%
Traffic Control Plan - Signage	LS	1	30%	70%
Traffic Control Plan - Implementation & Barricades	LS	1	30%	70%
TPDES - Silt Fence	LF	7,000	30%	70%
TPDES - Construction Entrance	EA	3	30%	70%
TPDES - Rock Berm (Type 2)	EA	2	30%	70%
TPDES - Inlet Protection	EA	12	30%	70%
TPDES - Concrete Washout	EA	2	30%	70%
Tree Protection Fencing (Allowance)	LF	2,000	30%	70%
Street Trees 1.5"	EA	184	30%	70%
Street Trees Irrigation	LS	1	30%	70%
<b>STREETS</b>				
2" HMAC Type D	SY	27700	30%	70%
2.5" HMAC Type C	SY	27700	30%	70%
24" Flex Base	SY	27700	30%	70%
Lime Stabilized Subgrade	SY	27700	30%	70%
Intersection Pavement & Curb	LS	1	30%	70%
7" Curb	LF	18000	30%	70%
Autry Pond Median Improvements	LS	1	30%	70%
6' Sidewalk	LF	6700	30%	70%
10' Multiuse Path	LF	3100	30%	70%
Excavation	CY	45000	30%	70%
Embankment	CY	25000	30%	70%
Embankment of Excess Material On-Site	CY	5000	30%	70%
Haul-Off Excess Material	CY	15000	30%	70%
Concrete Driveways (4)	SY	200	30%	70%
Retaining Wall	SF	3200	30%	70%

<b>CONSTRUCTION PROJECT COSTS</b>		<b>UNIT</b>	<b>QTY</b>	<b>COSA</b>	<b>BMP 1604</b>
<b>DESCRIPTION</b>				<b>%</b>	<b>%</b>
Traffic Signal - Bulverde Intersection		LS	1	30%	70%
Traffic Signal		ARMS	11	30%	70%
Striping		LF	9000	30%	70%
Signage		LS	1	30%	70%
<b>DRAINAGE</b>					
6" Concrete Rip Rap (U-Channel)		SY	400	30%	70%
6'x6' Inlet (4-Way)		EA	1	30%	70%
8'x8' Inlet (4-Way)		EA	1	30%	70%
8'x8' Junction Box		EA	1	30%	70%
7'x7' Junction Box		EA	2	30%	70%
6'x6' Junction Box		EA	2	30%	70%
5'x5' Junction Box		EA	1	30%	70%
4'x4' Junction Box		EA	2	30%	70%
Class A Concrete (9'x7' & 9'x6' MBC + Headwall + Wingwall)		CY	1380	30%	70%
6'x4' SBC		LF	40	30%	70%
6'x3' SBC		LF	40	30%	70%
5'x4' SBC		LF	170	30%	70%
4'x4' SBC		LF	750	30%	70%
4'x3' SBC		LF	60	30%	70%
48" RCP		LF	40	30%	70%
36" RCP		LF	100	30%	70%
30" RCP		LF	200	30%	70%
24" RCP		LF	250	30%	70%
20' Curb Inlet		EA	5	30%	70%
15' Curb Inlet		EA	1	30%	70%
10' Curb Inlet		EA	4	30%	70%
COSA Handrails - Standard Pipe Rail		LF	700	30%	70%
Earth Channel Excavation		CY	4000	30%	70%
Haul-Off Excess Material		CY	4000	30%	70%
<i>Note: Drainage quantities are based on the original alignment of Bulverde Rd as depicted on plats 080263 and 080265</i>					
<b>STORM WATER QUALITY STRUCTURES</b>					
<b>Basin A</b>					
Water Quality Basin		LS	1	30%	70%
<b>Basin B</b>					
Structural Wall		CY	160	30%	70%
Excavation		CY	1000	30%	70%
Haul-Off Excess Material		CY	1000	30%	70%
Concrete Rip Rap (Pond Bottom)		SY	470	30%	70%

<b>CONSTRUCTION PROJECT COSTS DESCRIPTION</b>	<b>UNIT</b>	<b>QTY</b>	<b>COSA %</b>	<b>BMP 1604 %</b>
Silica Sand	SY	470	30%	70%
Washed Gravel	SY	470	30%	70%
Filter Fabric	SY	470	30%	70%
4" SCH 40 Perf. PVC	LF	550	30%	70%
Chain Link Fence	LF	320	30%	70%
<b>Basin C</b>				
Structural Wall	CY	400	30%	70%
Excavation	CY	6000	30%	70%
Haul-Off Excess Material	CY	6000	30%	70%
Concrete Rip Rap (Pond Bottom)	SY	1300	30%	70%
Silica Sand	SY	1300	30%	70%
Washed Gravel	SY	1300	30%	70%
Filter Fabric	SY	1300	30%	70%
4" SCH 40 Perf. PVC	LF	1200	30%	70%
Wet Well - ALLOWANCE	LS	1	30%	70%
Chain Link Fence	LF	710	30%	70%
<b>DRY UTILITIES &amp; CONDUIT</b>				
4" Sch 40 Conduits (Street Tree Irrigation)	LF	4300	30%	70%
6" Sch 80 Conduits (Electrical-Street Lights)	LF	3500	30%	70%
3-Phase Electrical Conduit to Traffic Signal	LF	800	30%	70%
Street Light Foundations (Wire Cage provided by CPS)	EA	32	30%	70%
<b>OVERSIZING ("Oversizing" per Agreement)</b>				
<b>ADD ALTERNATE #1 - PEDESTRIAN BRIDGE</b>				
Replace Multiple Box Culvert Structure with Alternate Span Structure to support public access	LS	1	100%	0%

<b>CONSTRUCTION PROJECT COSTS</b>	<b>UNIT</b>	<b>QTY</b>	<b>COSA</b>	<b>BMP 1604</b>
<b>DESCRIPTION</b>			<b>%</b>	<b>%</b>
<b>OTHER PROJECT COSTS</b>				
<b>DESCRIPTION</b>	<b>UNIT</b>	<b>QTY</b>	<b>COSA</b>	<b>BMP 1604</b>
			<b>%</b>	<b>%</b>
<b>COSA FEES - DEVELOPMENT SERVICES</b>				
Platting	LS	1	30%	70%
Tree Affidavit	LS	1	30%	70%
Stormwater Management (FILO)	AC	8	30%	70%
COSA Street Light Contract	EA	32	30%	70%
<b>CPS ENERGY FEES</b>				
CPS Contract - OHE Demo and Realignment	LS	1	30%	70%
CPS Contract - UGE Service to Traffic Signal	LS	1	30%	70%
<b>PROFESSIONAL FEES</b>				
Civil/Environmental Engineering & Surveying - Phase 1	LS	1	30%	70%
Civil/Environmental Engineering & Surveying - Remaining	LS	1	30%	70%
Geotechnical Engineering Design	LS	1	30%	70%
Geotechnical Engineering Material Testing	LS	1	30%	70%
Endangered Species Habitat Assessment	LS	1	30%	70%
Corps Permitting - Bridge	LS	1	30%	70%
Landscape & Irrigation	LS	1	30%	70%
Title Company	LS	1	0%	100%
Legal Fees	LS	1	30%	70%
<b>ADMINISTRATIVE FEES</b>				
Fulcrum Property Group Administration	LS	1	30%	70%
CIMS Project Management	LS	1	30%	70%

**EXHIBIT B:**  
**Developer's Property**

**EXHIBIT "B"**

**LEGAL DESCRIPTION OF THE PROPERTY**

FIELD NOTES  
FOR

A 104.026 acre, or 4,531,357 square feet more or less, tract of land comprised of 13.198 acres being Lots 5 through 10, and Lot 902, Block 29, Lot 4, Block 30 Bulverde Market 2 recorded in Volume 9630, Page 76 of the Deed and Plat Records of Bexar County, Texas and 90.828 acres out of that 108.5 acre tract, conveyed to Bulverde Marketplace Partners in deed recorded in Volume 14542, Pages 1467-1480 and Volume 14542, Pages 1481-1493 of the Official Public Records of Bexar County, Texas, out of the Jacob Goll Survey No. 395, Abstract No. 297, County Block 4967, the George Voss Survey No. 340 1/2, Abstract 788, County Block 4955, and out of the M. M. Seay Survey No. 340, Abstract 911, County Block 4966, now all in New City Block (N.C.B.) 17365 of the City of San Antonio of Bexar County Texas. Said 104.026 acre tract being more fully described as follows, with bearings based on the North American Datum of 1983 (CORS 1996), from the Texas Coordinate System established for the South Central Zone:

- BEGINNING:** At a set ½" iron rod with yellow cap stamped "Pape-Dawson" on the south right-of-way line of Autry Pond Road, a 90-foot right-of-way, the northwest corner of Lot 4, Block 29 of said Bulverde Market 2, a northeast corner of said Lot 5;
- THENCE:** S 05°04'34" E, departing the south right-of-way line of said Autry Pond Road, along and with the west line of said Lot 4, the east line of said Lot 5, a distance of 249.89 feet to a found MAG nail for the southwest corner of said Lot 4;
- THENCE:** Southeasterly, along and with the south line of said Lot 4, the north line of said Lot 5, along a non-tangent curve to the right, said curve having a radial bearing of S 05°58'25" E, a radius of 365.00 feet, a central angle of 19°26'57", a chord bearing and distance of S 86°14'57" E, 123.31 feet, for an arc length of 123.90 feet to a set Mag nail with washer stamped "Pape Dawson";
- THENCE:** Southeasterly, continuing along and with the south line of said Lot 4, the north line of said Lot 5, along a compound curve to the right, said curve having a radius of 200.00 feet, a central angle of 09°05'37", a chord bearing and distance of S 71°58'40" E, 31.71 feet, for an arc length of 31.74 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";
- THENCE:** S 67°25'51" E, continuing along and with the south line of said Lot 4, the north line of said Lot 5, at a distance of 26.41 feet passing a found "X" in concrete for the southeast corner of said Lot 4, the southwest corner of Lot 3, Block 29 of said Bulverde Market 2 and continuing for a total distance of 175.69 feet to a found ½" iron rod with cap stamped "MBC";



THENCE: S 62°10'07" E, along and with the south line of said Lot 3, the north line of said Lot 5, a distance of 95.80 feet to a found ½" iron rod with cap stamped "MBC";

THENCE: S 76°21'51" E, continuing along and with the south line of said Lot 3, the north line of said Lot 5, a distance of 77.91 feet to a found ½" iron rod with cap stamped "MBC" for the southeast corner of said Lot 3, on the west right-of-way line of Bulverde Road, a variable width right-of-way and a northeast corner of said Lot 5;

THENCE: S 05°04'09" E, along and with the west right-of-way line of said Bulverde Road, the east line of said Lot 5, a distance of 21.12 feet to a found ½" iron rod with cap stamped "MBC" for a southeast corner of said Lot 5, the southwest corner of said Bulverde Road right-of-way;

THENCE: N 84°55'51" E, along and with the south line of said Bulverde Road right-of-way, a distance of 51.50 feet to a set ½" iron rod with a yellow cap marked "Pape Dawson" of a southeast corner of said Bulverde Road right-of-way;

THENCE: N 05°04'09" W, along and with the east right-of-way line of said Bulverde Road, a distance of 173.70 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

THENCE: N 88°11'50" E, along and with a south line of said Bulverde Road right-of-way, a distance of 51.58 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson" for a southeast corner of said Bulverde Road right-of-way;

THENCE: N 05°04'09" W, along and with the east right-of-way line of said Bulverde Road, at a distance of 24.15 feet passing the southwest corner of said Lot 4, Block 30 and continuing for a total distance of 255.12 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson" at a point of curvature;

THENCE: Northeasterly, along and with the east right-of-way line of said Bulverde Road, the west line of said Lot 4, along a tangent curve to the right, said curve having a radius of 35.00 feet, a central angle of 89°59'58", a chord bearing and distance of N 39°55'50" E, 49.50 feet, for an arc length of 54.98 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson" on the south right-of-way line of Classen Road, a variable width right-of-way;

THENCE: N 84°55'49" E, along and with the south right-of-way line of said Classen Road, the north line of said Lot 4, at a distance of 377.62 feet passing a found ½" iron rod for the northeast corner of said Lot 4 and continuing for a total distance of 414.60 feet to a found TXDOT monument (TYPE II);

THENCE: Along and with the southeast right-of-way line of said Classen Road, the northeast line of said 108.5 acre tract the following bearings and distances:  
S 56°42'50" E, a distance of 275.00 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";  
S 44°50'41" E, a distance of 203.20 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson" the north corner of a 0.0956 acre Lease recorded in

Volume 8721, Pages 564-568 of the Official Public Records of Real Property of Bexar County, Texas;

Thence: Departing the west right-of-way line of said Classen Road, the east line of said 108.5 acre tract, along and with the 0.0956 of an acre Lease the following bearings and distances;

S 67°25'45" W, a distance of 75.00 feet to a set ½" iron rod with a yellow cap marked "Pape Dawson";

S 44°50'41" E, a distance of 60.00 feet to a set ½" iron rod with a yellow cap marked "Pape Dawson";

N 67°25'45" E, a distance of 75.00 feet to a set ½" iron rod with a yellow cap marked "Pape Dawson", on the west right-of-way line of said Classen Road, the east line of said 108.5 acre tract, the east corner of said 0.0956 of an acre Lease;

THENCE: Along and with the southeast right-of-way line of said Classen Road, the northeast line of said 108.5 acre tract the following bearings and distances:

S 44°50'41" E, a distance of 347.01 feet to a set ½" iron rod with a yellow cap marked "Pape Dawson";

S 45°00'41" E, a distance of 175.11 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson" for the northeast corner of a 3.728 acre tract recorded in Volume 15347, Pages 383-387 of the Official Public records of Real Property of Bexar County, Texas;

THENCE: Departing the southwest right-of-way line of said 3.728 acre tract, along and with the perimeter of said 3.728 the following bearings and distances:

S 83°17'47" W, a distance of 357.99 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

N 47°39'19" W, a distance of 241.44 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

S 42°20'41" W, a distance of 207.80 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

S 47°39'19" E, a distance of 265.20 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

N 42°20'41" E, a distance of 129.80 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

S 50°43'28" E, a distance of 418.69 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson" for the south corner of said 3.728 acre tract, the southeast corner of said 108.5 acre tract;

THENCE: Along and with the south line of said 108.5 acre tract the following bearings and distances:

S 39°15'27" W, a distance of 498.54 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

Southwesterly, along a tangent curve to the right, said curve having a radius of 957.00 feet, a central angle of 33°42'25", a chord bearing and distance of S 56°06'40" W, 554.92 feet, for an arc length of 563.00 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

S 72°57'52" W, a distance of 1500.00 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

Southwesterly, along a tangent curve to the right, said curve having a radius of 1457.00 feet, a central angle of 21°44'54", a chord bearing and distance of S 83°50'19" W, 549.74 feet, for an arc length of 553.05 feet to a found ½" iron rod;

N 85°17'14" W, a distance of 100.00 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

Southwesterly, along a tangent curve to the left, said curve having a radius of 743.00 feet, a central angle of 12°18'05", a chord bearing and distance of S 88°33'44" W, 159.21 feet, for an arc length of 159.52 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

S 82°24'42" W, a distance of 59.94 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

N 52°34'02" W, a distance of 56.55 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson" on the east right-of-way line of said Autry Pond Road;

THENCE:

Along and with the east right-of-way line of said Autry Pond Road, the west line of said 108.5 acre tract the following bearings and distances:

N 07°32'46" W, a distance of 127.46 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

N 03°59'04" E, a distance of 129.93 feet to a found fence post;

N 15°27'23" E, a distance of 167.91 feet to a found ½" iron rod;

N 24°16'30" E, a distance of 231.67 feet to a found ½" iron rod;

N 24°38'34" E, a distance of 264.29 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

N 24°24'34" E, a distance of 287.00 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

N 25°10'34" E, a distance of 135.85 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

N 25°20'34" E, at a distance of 39.04 feet passing a found ½" iron rod with cap stamped "MBC" for the southwest corner of said Lot 902, at a distance of 143.04 feet passing the northwest corner of said Lot 902, the southwest corner of said Lot 10 and continuing for a total distance of 188.50 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

THENCE: N 33°16'34" E, along and with the southeast right-of-way line of said Autry Pond Road, the northwest line of said Lot 10, a distance of 228.16 feet to a found ½" iron rod;

THENCE: N 33°39'34" E, continuing along and with the southeast right-of-way line of said Autry Pond Road, the northwest line of said Lot 10, a distance of 120.70 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

THENCE: N 50°05'34" E, continuing along and with the southeast right-of-way line of said Autry Pond Road, the northwest line of said Lot 10, at a distance of 10.97 feet passing the west corner of said Lot 9, at a distance of 269.74 feet passing the north corner of said Lot 9, the west corner of said Lot 8 and continuing for a total distance of 298.29 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

THENCE: N 49°06'47" E, along and with the southeast line of said Autry Pond Road, the northwest line of said Lot 8, a distance of 100.90 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

THENCE: N 60°26'25" E, along and with the southeast line of said Autry Pond Road, the northwest line of said Lot 8, at a distance of 1193.15 feet passing the northeast corner of said Lot 8, a northwest corner of said Lot 7, at a distance of 42.05 feet passing a northeast corner of said Lot 7, the northwest corner of said Lot 6 and continuing for a total distance of 225.00 feet to a set ½" iron rod with yellow cap stamped "Pape-Dawson";

THENCE: N 65°29'25" E, along and with the southeast line of said Autry Pond Road, the northwest line of said Lot 6, a distance of 180.28 feet to a found ½" iron rod with yellow cap stamped "Pape-Dawson";

THENCE: N 84°55'49" E, along and with the southeast line of said Autry Pond Road, the northwest line of said Lot 6, at a distance of 16.48 feet passing the northeast corner of said Lot 6, a northwest corner of said Lot 5 and continuing for a total distance of 36.48 feet to the POINT OF BEGINNING, and containing 104.026 acres in the City of San Antonio, Bexar County, Texas. Said tract being described in accordance with a survey made on the ground and a survey description and map prepared under job number 9018-13 by Pape-Dawson Engineers, Inc.

**EXHIBIT C:**  
**Temporary Construction Easement**

**Notice of Confidentiality Rights: If You Are a Natural Person, You May Remove or Strike Any or All the Following Information from Any Instrument That Transfers an Interest in Real Property Before it Is Filed for Record in the Public Records: Your Social Security Number or Your Driver's License Number.**

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State of Texas     §  
                              §     **Know All By These Presents:**  
County of Bexar   §

**Temporary Construction Easement**

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**Authorizing Ordinance:**

    SP No.:

**Grantor:** City of San Antonio

**Grantor's Address:** P.O. Box 839966, San Antonio, Texas 78283-3966

**Grantee** BMP 1604 Developers, Ltd.

**Grantee's Address:** 10003 NW Military Hwy., Suite 2205  
    San Antonio, TX 78231

**Purpose of Easement:** Easement for the construction of the following improvements, and associated ingress and egress:

**Description of Servient Estate:** \_\_\_\_\_ acres, more or less, out of \_\_\_\_\_, an addition to the City of San Antonio, Bexar County, Texas according to plat thereof filed of record in Volume \_\_\_\_, Pages \_\_\_\_\_ of the Deed and Plat Records of Bexar County, Texas, said land being more particularly described on **Exhibit A**, which is incorporated herein by reference for all purposes as if it were fully set forth.

**Expiration:** This easement expires \_\_\_\_\_.

Grantor grants, dedicates, and conveys to Grantee, for and in consideration of the benefits accruing to Grantors a temporary construction easement over, across, under and upon the Servient Estate. The easement may be used only for the Purpose of Easement stated above.

**To Have and To Hold** the above described easement and rights unto Grantee, its successors and assigns, until this easement expires.

Witness my hand, this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

**City of San Antonio,**  
a Texas municipal corporation

By: \_\_\_\_\_

Printed  
Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Approved As To Form:**

\_\_\_\_\_  
City Attorney

State of Texas        §

County of Bexar     §

This instrument was acknowledged before me this date by \_\_\_\_\_,  
of the City of San Antonio, a Texas municipal corporation, in the capacity therein  
stated and on behalf of that entity.

Date: \_\_\_\_\_

\_\_\_\_\_  
Notary Public, State of Texas

My Commission expires: \_\_\_\_\_

**EXHIBIT D:**  
**City Standard Surety Form**



Bond No. \_\_\_\_\_

**PERFORMANCE BOND**

STATE OF TEXAS §  
COUNTY OF BEXAR §  
CITY OF SAN ANTONIO §

Know all men by these presents:

Subdivider/Developer:	
Surety:	
Surety's Texas Address for Demand:	
Surety's Phone Number	
Bond Amount:	
Subdivision Plat (No. and Name):	
Date of Planning Commission Approval:	
Site Improvements:	

1. THAT WE, [NAME OF COMPANY], \_\_\_\_\_, ACTING BY AND THROUGH [NAME, TITLE], as Principal, and [Name of Surety Company], as Sureties, do hereby acknowledge ourselves to be held and firmly bound unto the City of San Antonio, a municipal corporation of the County of Bexar and State of Texas in the sum of \$ \_\_\_\_\_ for payment of which sum well and truly to be made in and unto said City of San Antonio, we do hereby bind and obligate ourselves, our heirs executors, administrators, assigns, and successors, jointly and severally.

2. THE CONDITIONS OF THIS BOND, HOWEVER, ARE SUCH THAT WHEREAS, the said

Name of Company: \_\_\_\_\_

hereinafter called Developer, Subdivider, Contractor, or Principal, has made and does this day make and enter into a certain contract in writing with said City of San Antonio for the construction and completion for said City of certain structure, work and improvements generally described as

\_\_\_\_\_

and for the performance and observance of diverse other matters and things in connection with said work; all as more fully described in said contract and its included instruments which are expressly made a part of the obligation.

3. NOW THEREFORE, if Contractor, the principal party to this obligation shall faithfully construct and complete said structures, work and improvements, and shall observe perform and comply with all the terms, conditions stipulations, undertakings and provisions of said contract and all included instruments, according to their intent and purpose insofar as the same relate to or are incident to the construction and completion of said structures, work and improvements then and thereupon the is obligation shall be and become and void, but otherwise to remain in full force and effect; and it is hereby further understood and agreed that this bond shall be a continuous obligation against the principal and each member of said principal party hereto, and each and all sureties heron, and that successive recoveries may be had hereon for each and every breach of this bond until the full amount thereof shall have been exhausted; and the liability of the sureties on this bond shall not be in any manner released or diminished by any changes in the work which may be authorized or directed by the City, nor by the exercise or failure to exercise by or on behalf of the City any right or remedy provided by the contract or specifications or by any law or ordinance.
  
4. It is further understood that this obligation is incurred pursuant to Chapter 2253 of the Texas Government Code, and that this obligation is for the benefit and sole protection of City. This Performance Bond is also given to the City of San Antonio in satisfaction of the guarantee of performance requirements of Article 4 of the Unified Development Code of the City of San Antonio. The rights and obligations of Subdivider, Surety, and the City of San Antonio are governed by the terms and conditions set forth on Exhibit A, which is incorporated into this bond for all purposes as if fully set forth.
  
5. IN TESTIMONY WHEREOF, witness our hands and the seal of any incorporated surety hereon this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 20\_\_\_\_\_.

DEVELOPER COMPANY NAME

\_\_\_\_\_

BY: \_\_\_\_\_

NAME, TITLE \_\_\_\_\_

Surety Company Name: \_\_\_\_\_

\_\_\_\_\_

BY: \_\_\_\_\_

NAME, attorney in fact

Address of Surety \_\_\_\_\_

(ATTACHMENT: Power of Attorney)

Developer/Subdivider \_\_\_\_\_

By: \_\_\_\_\_

Printed  
Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Approved and accepted this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

City of San Antonio,  
a Texas Municipal Corporation

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
City Attorney's Office

#### **Exhibit A: Performance Bond Terms and Conditions**

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**Whereas**, the Subdivider petitioned the Planning Commission of the City of San Antonio for permission to develop a subdivision within the jurisdiction of the City;

**Whereas**, the Subdivision Plat, which shows the subdivision, was approved by the Planning Commission on the Date of Planning Commission Approval;

**Whereas**, the City's Unified Development Code ("UDC") requires that the site improvements ("Site Improvements") set out below be completed by Subdivider in conformance with the UDC within three years from the Date of Planning Commission Approval;

**Whereas**, the UDC requires that an approved subdivision plat may not be filed for record in the office of the county clerk until such Site Improvements have been completed and have been accepted by the City of San Antonio, or until there is provided to the City of San Antonio a guarantee of performance that such Site Improvements will have been completed and will have been accepted by the city within three years of the date on which the plat was approved; and

**Whereas**, the Subdivider has elected to provide to the City of San Antonio such a guarantee of performance in lieu of waiting to record the Subdivision Plat until all Site Improvements have been completed.

**Now therefore**, the Subdivider, as principal, and Surety, as surety, jointly and severally guarantee to the City of San Antonio, a municipal corporation of the County of Bexar and State of Texas ("City"), full payment of the Bond Amount if the required Site Improvements are not completed and accepted by City within three years of the Date of Planning Commission Approval or such extended deadline for performance as Subdivider may obtain in conformity with the UDC. Subdivider and Surety bind themselves and their respective heirs, administrators, executors, and assigns, jointly and severally, firmly to this bond.

If the Site Improvements are not timely completed, the City of San Antonio need only make written demand on the Surety at the Surety's Address for Demand for City's estimate of the cost of completing the Site Improvements. The Demand cannot exceed the Bond Amount. If the City demands less than the full Bond Amount but is unable to complete the Site Improvements, it may make multiple draws until the Site Improvements are completed or until it has drawn the full Bond Amount. If upon completion of the Site Improvements City still has unspent Surety funds, City must refund the unspent funds to Surety.

Changes in the nature or extent of Site Improvements do not impair Surety's obligations, but nothing increases the Bond Amount without Surety's written consent.

If, within three years of the Date of Planning Commission Approval or such extended deadline for performance as Subdivider may obtain in conformity with the UDC, Subdivider constructs or causes to be constructed the Site Improvements according to the requirements of the UDC, then this obligation terminates. Otherwise the obligation under this bond remains in full force and effect.

PAYMENT BOND

STATE OF TEXAS )  
COUNTY OF BEXAR )  
CITY OF SAN ANTONIO )

Know all men by these presents:

1. THAT WE, \_\_\_\_\_ (Company Name), ACTING BY AND THROUGH \_\_\_\_\_  
(Company Representative, Title) as Principal, and \_\_\_\_\_ (Surety)

as Sureties, do hereby acknowledge ourselves to be held and firmly bound unto the City of San Antonio, a municipal corporation of the County of Bexar and State of Texas in the sum of \$ \_\_\_\_\_ for payment of which sum well and truly to be made in and unto said City of San Antonio, we do hereby bind and obligate ourselves, our heirs, executors, administrators, assigns, and successors, jointly and severally:

2. THE CONDITIONS OF THIS BOND, HOWEVER, ARE SUCH THAT WHEREAS, the said

\_\_\_\_\_ (Company Name)  
hereinafter called Contractor or Principal, has made and does this day make and enter into a certain contract in writing with said City of San Antonio, for the construction and completion for said City of certain structures, work and improvements generally described as

Bulverde Road (Loop 1604 to Redland & Classen Roads) (Project Name)

Project Number: 40-258 & 40-301

and for the performance and observance of diverse other matters and things in connection with said work, and interalia, therein entered into covenants and agreements to promptly pay all persons supplying labor, materials and services in the prosecution of the work provided for in said contract; all as more fully described in said contract and its included instruments which are expressly made a part of this obligation;

3. NOW THEREFORE, if Contractor, the Principal party to this obligation shall promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation shall be and become null and void, but otherwise to remain in full force and effect: and it is hereby further understood and agreed that this bond shall be a continuous obligation against the principal and each member of said principal party hereto, and each and all sureties hereon, and that successive recoveries may be had thereon for each and every breach of this bond until the full amount thereof shall have been exhausted; and the liability of the sureties on this bond shall not be in any manner released or diminished by any changes in the work which may be authorized or directed by the City, nor by the exercise or failure to exercise by or on behalf of the City any right or remedy provided by the contract or specifications or by any law or ordinances.

4. It is further understood that this obligation is incurred pursuant to Chapter 2253 of the Texas Government Code, and that this obligation is for the benefit and protection of the City and all persons supplying labor and materials in the prosecution of said contract.

5. IN TESTIMONY WHEREOF, witness our hands and the seal of any incorporated surety hereon this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 20 \_\_\_\_\_.

\_\_\_\_\_  
(Company Name)

BY: \_\_\_\_\_  
(Company Representative, Title)

\_\_\_\_\_  
(Surety)

BY: \_\_\_\_\_  
(Surety Representative)

\_\_\_\_\_  
(Address of Surety for Service Purposes)

**EXHIBIT E:**  
**SBEDA TERMS & CONDITIONS**  
**SBE SUBCONTRACTING GOAL**

## Exhibit E: SBEDA Requirements

### **I. SBEDA Ordinance Compliance Provisions**

#### **A. SBEDA Program**

The CITY has adopted a Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531 and as amended, also referred to as “SBEDA Ordinance” or “the SBEDA Program”), which is posted on the City’s Economic Development (EDD) website page and is also available in hard copy form upon request to the CITY. The SBEDA Ordinance compliance provisions contained in this section of the Contract are governed by the terms of the SBEDA Ordinance, as well as by the terms of the SBEDA Ordinance Policy & Procedure Manual established by the CITY pursuant to the SBEDA Ordinance, and any subsequent amendments to the SBEDA Ordinance and SBEDA Policy & Procedure Manual that are effective as of the date of the execution of this Contract. Unless defined in a contrary manner herein, terms used in this section of the Contract 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. Definitions**

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

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

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

satisfies the eligibility requirements set forth in this Ordinance in Section III.E.6 of Attachment A.

**Commercially Useful Function** – an S/M/WBE firm performs a Commercially Useful Function when it is responsible for execution of a distinct element of the work of the contract and is carrying out its responsibilities by actually performing, staffing, managing and supervising the work involved. To perform a Commercially Useful Function, the S/M/WBE firm must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quantity and quality, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether an S/M/WBE firm is performing a Commercially Useful Function, an evaluation must be performed of the amount of work subcontracted, normal industry practices, whether the amount the S/M/WBE firm is to be paid under the contract is commensurate with the work it is actually performing and the S/M/WBE credit claimed for its performance of the work, and other relevant factors. Specifically, an S/M/WBE firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of meaningful and useful S/M/WBE participation, when in similar transactions in which S/M/WBE firms do not participate, there is no such role performed. The use of S/M/WBE firms by DEVELOPER to perform such “pass-through” or “conduit” functions that are not commercially useful shall be viewed by the CITY as fraudulent if DEVELOPER 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, the DEVELOPER shall not be given credit for the participation of its S/M/WBE subcontractor or joint venture partner towards attainment of S/M/WBE utilization goals, and the DEVELOPER and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

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

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

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

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

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

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

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

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

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

African-Americans: Persons having origins in any of the black racial groups of Africa as well as those identified as Jamaican, Trinidadian, or West Indian.



Hispanic-Americans: Persons of Mexican, Puerto Rican, Cuban, Spanish or Central and South American origin.

Asian-Americans: Persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

Native Americans: Persons having no less than 1/16<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** – the CITY department or authorized representative of the CITY which issues solicitations or for which a solicitation is issued.

**Payment** – dollars actually paid to DEVELOPER and/or DEVELOPER's Subcontractors and vendors for CITY contracted goods and/or services.

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

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

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

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

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

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

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

**SBE Subcontracting Program** – an API in which Prime Contractors or vendors are required to make Good Faith Efforts to subcontract a specified percentage of the value of prime contract dollars to certified SBE firms. Such subcontracting goals may be set and applied by the GSC on

a contract-by-contract basis to those types of contracts that provide subcontract opportunities for performing Commercially Useful Functions wherein there have been ongoing disparities in the utilization of available SBE Subcontractors.

When specified by the GSC, the SBE Subcontracting Plan or Good Faith Efforts plan submitted by DEVELOPER may also be required to reflect Good Faith Efforts that a DEVELOPER or vendor has taken (or commits to taking in the case of solicitations that do not include a detailed scope of work or those in which price cannot be considered a factor in evaluation), toward attainment of subcontracting goals for SBE firms.

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

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

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

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

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

**Subcontractor** – any vendor or contractor that is providing goods or services to a Prime Contractor or DEVELOPER in furtherance of the Prime Contractor's performance under a contract or purchase order with the City. A copy of each binding agreement between the DEVELOPER and its subcontractors shall be submitted to the CITY prior to execution of this contract Contract and any contract modification Agreement.

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

**Subcontractor/Supplier Utilization Plan** – a binding part of this Contract which shall be submitted pursuant to and consistent with DEVELOPER’s “Subcontractor/Supplier Utilization Commitment Form” (attached hereto as “**Exhibit E-1**”) that states the DEVELOPER’s written commitment for the use of Joint Venture Partners and / or Subcontractors/Suppliers in the performance of this Contract, and that states the name, scope of work, and dollar value of work to be performed by each of DEVELOPER’s Joint Venture partners and Subcontractors/Suppliers in the course of the performance of this contract, specifying the S/M/WBE Certification category for each Joint Venture partner and Subcontractor/Supplier, as approved by the SBO Manager, and which when submitted, shall be attached hereto and incorporated herein for all purposes. Following submittal of the Plan described herein, any additions, deletions or modifications of the Joint Venture partner or Subcontractor/Supplier names, scopes of work, of dollar values of work to be performed requires an amendment to this Contract to be approved by the IEDD Director or designee.

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

#### C. SBEDA Program Compliance – General Provisions

DEVELOPER acknowledges that the terms of the CITY’s SBEDA Ordinance, as amended, together with all requirements, guidelines, and procedures set forth in the CITY’s SBEDA Policy & Procedure Manual are in furtherance of the CITY’s efforts at economic inclusion and, moreover, that such terms are part of DEVELOPER’s scope of work that formed the basis for funding and execution of this Contract, these SBEDA Ordinance requirements, guidelines and procedures are hereby incorporated by reference into this Contract, and are considered by the Parties to this Contract to be material terms. DEVELOPER agrees to fully comply with these SBEDA program terms as a condition for the funding provided under this contract by the CITY. Without limitation, DEVELOPER further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. DEVELOPER shall cooperate fully with the Small Business Office and other CITY departments in their data collection and monitoring efforts regarding DEVELOPER’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. DEVELOPER shall cooperate fully with any formal 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 DEVELOPER or its Subcontractors or suppliers, under this Contract;
3. DEVELOPER 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 Contract;
4. DEVELOPER shall notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to DEVELOPER'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 DEVELOPER 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 DEVELOPER 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.

DEVELOPER 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.

DEVELOPER shall retain all records of its Subcontractor payments for this contract for a minimum of four years, or as

required by state law, following the conclusion of this contract or, in the event of litigation concerning this contract, for a minimum of four years, or as required by state law, following the final determination of litigation, whichever is later

5. 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 DEVELOPER's Subcontractor / Supplier Utilization Plan, the DEVELOPER 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 DEVELOPER and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.
6. DEVELOPER acknowledges that compliance with this Contract requires that DEVELOPER and each of its Subcontractors for this project have registered and/or maintained active status in the CITY's Centralized Vendor Registration System. As part of the registration process DEVELOPER and Subcontractor(s) shall document the primary commodity codes each registered Subcontractor will be performing under for this contract.

D. SBEDA Program Compliance – Affirmative Procurement Initiatives

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

**SBE Subcontracting Program.** In accordance with SBEDA Ordinance Section III. D. 1. (c), this contract is being entered into pursuant to the SBE Subcontracting Program. DEVELOPER agrees to subcontract at least **twenty-two percent (22%)** of the Payment value of CITY's Appropriation for the Project to certified SBE firms headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). Prior to the commencement of the Project construction, DEVELOPER shall submit to the CITY the names of the certified SBE Subcontractors to be used by DEVELOPER for the Project, the respective percentages of the total Payment to be awarded and performed by each SBE Subcontractor, and a description of each SBE Subcontractor's scope of work on the Subcontractor/Supplier Utilization Plan, as well as documentation including each SBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount. The Subcontractor/Supplier Utilization Plan shall be attached hereto and incorporated herein by reference into the material terms of this Contract.

**M/WBE Subcontracting Program.** In accordance with SBEDA Ordinance Section III. D. 2. (b), this contract is being entered into pursuant to the M/WBE Subcontracting Program. DEVELOPER agrees to subcontract at least **fifteen percent (15%)** of the Payment value of the CITY's Appropriation for the Project to certified M/WBE firms headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). Prior to the commencement of the Project construction, DEVELOPER shall submit to CITY the names of the certified M/WBE Subcontractors to be used by DEVELOPER for the Project, the respective percentages of the total Payment to be awarded and performed by each M/WBE Subcontractor, and a description of each M/WBE Subcontractor's scope of work on the Subcontractor/Supplier Utilization Plan, as well as documentation including each M/WBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount. The Subcontractor/Supplier Utilization Plan shall be attached hereto and incorporated herein by reference into the material terms of this Contract.

In the absence of a waiver granted by the SBO, the failure of DEVELOPER to attain these subcontracting goals for SBE or M/WBE 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 subject to the terms and conditions therein. Further, a material breach of these requirements may result in debarment from performing future CITY contracts, withholding of payment for retainage equal to the dollar amount of the underutilization below the agreed upon SBE or M/WBE subcontracting goals, and/or shall be subject to any other remedies available under the terms of this Agreement for violations of the SBEDA Ordinance, or under any other applicable law.

#### F. Commercial Nondiscrimination Policy Compliance

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

#### G. Prompt Payment

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

#### H. Violations, Sanctions and Penalties

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

1. Fraudulently obtain, retain, or attempt to obtain, or aid another in fraudulently obtaining, retaining, or attempting to obtain or retain Certification status as an SBE, MBE, WBE, M/WBE, HUBZone firm, Emerging M/WBE, or ESBE for purposes of benefitting from the SBEDA Ordinance;
2. Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of the SBEDA Ordinance;
3. Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;
4. Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of the SBEDA Ordinance; and
5. Make false statements to any entity that any other entity is, or is not, certified as an S/M/WBE for purposes of the SBEDA Ordinance.

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

1. Suspension of contract;
2. Withholding of funds;

3. Rescission of contract based upon a material breach of contract pertaining to S/M/WBE Program compliance;
4. Refusal to accept a response or proposal; and
5. Disqualification of DEVELOPER 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).

Any Default caused by Developer's failure to meet the requirements of Exhibit E shall be subject to the requirements of Article XIII of the Contract.



**EXHIBIT E-1:**  
**SBEDA COMMITMENT FORM**



City of San Antonio  
 Subcontractor/Supplier Utilization Commitment Form

Solicitation Name: **Bulverde Road- Developer Participation Agreement**

Respondent Name: BMP 1604 Developers, LLC

Initial each statement and sign below.

- I understand that by executing the proposed contract with City of San Antonio ("CITY"), I hereby affirm my firm's commitment to meet the subcontracting requirements indicated in this Commitment Form and the contract.
- I understand a Small Business Enterprise (SBE) subcontracting goal of twenty-two percent (22%) of the CITY's appropriation for the Project applies to this contract.
- I understand a Minority/Women-Owned Business Enterprise (M/WBE) subcontracting goal of fifteen percent (15%) of the CITY's appropriation for the Project applies to this contract.
- I understand and affirm that I am required to submit the Subcontractor / Supplier Utilization Plan to the Small Business Office once comprehensive scope of work has been established.
- I understand and affirm that absent a waiver approved by the Small Business Office, I will not commence any construction work until the Small Business Office has approved the Subcontractor/ Supplier Utilization Plan.
- I understand that self-performance by S/M/WBE Developer(s), serving as Prime Contractor, does not count toward these subcontracting goals.
- I understand that absent a waiver approved by the Small Business Office, failure to include a completed, signed copy of this Commitment Form to satisfy the subcontracting goals for this contract may render the contract voidable.

[Signature]  
 Signature

04/23/2013  
 Date

Jacques R. Brana, Member of General Partner  
 Printed Name & Title

\* = Required fields



# City of San Antonio Discretionary Contracts Disclosure Update

Office of the  
City Clerk

Please fill out this form online, print completed form and submit with proposal to originating department. All questions must be answered.

For details on use of this form, see Section 2-59 through 2-61 of the City's Ethics Code.

\*This is a  New Submission or  Correction or  Update to previous submission.

Name of person submitting the disclosure (Last, First, Middle Initial)

First: Jacques M.I. R Last: Braha Suffix: \_\_\_\_\_

Contract or project name: Bulverde Road Project

Originating department: Capital Improvements Management Services

Name of individual(s) or entity(ies) to which a contract will be awarded (or to be awarded)

BMP 1604 Developers, LTD.

Does any business entity(ies) that is not a contractor, subcontractor, lobbyist, or consultant have a partner, parent, or subsidiary business entity(ies)?

Not applicable. Contracting party(ies) does not have partner, parent, or subsidiary business entities.

Names of partner, parent, or subsidiary business entities:

BMP 1604 GP, LLC  
P & G Acquisitions, LLC

Will any individual, organization, or entity that will be retained for this contract be a subcontractor?

Not applicable. No subcontractors will be retained for this contract.

Subcontractors may be retained, but have not been selected at the time of this submission.

List of subcontractors:

Will any attorney, lobbyist, or consultant be retained by any individual listed in questions 4 or 5 to assist in seeking this contract?

Not applicable. No attorneys, lobbyists, or consultants have been retained to assist in seeking this contract.

List of attorneys, lobbyists, or consultants retained to assist in seeking this contract:

\* = Required fields



# City of San Antonio Discretionary Contracts Disclosure Update

Office of the  
City Clerk

See attached list

### 7. Disclosure of Political Contributions

List any campaign or officeholder contributions made by the following individuals in the past 24 months totaling more than \$100 to any current member of City Council, former member of City Council, any candidate for City Council, or to any political action committee that contributes to City Council elections:

- a) any individual seeking contract with the city (Question 3)
- b) any owner or officer of entity seeking contract with the city (Question 3)
- c) any individual or owner or officer of an entity listed above as a partner, parent, or subsidiary business (Question 4)
- d) any subcontractor or owner/officer of subcontracting entity retained for the contract (Question 5)
- e) the spouse of any individual listed in response to (a) through (d) above
- f) any attorney, lobbyist, or consultant retained to assist in seeking contract (Question 6)

Not applicable. No campaign or officeholder contributions have been made in preceding 24 months by these individuals.

List of contributions:

Name of Contributor	Address	City/City Council District	Amount	Date
See attached list				

### Update on Contribution Rules

Information regarding contributions must be updated by submission of a revised form from the date of the submission of this form, up through the time City Council takes action on the contract identified in response to Question 2 and continuing for 30 calendar days after the contract has been awarded.

### Notice Regarding Contribution Prohibition for High-Profile Contracts

Under Section 2-309 of the Municipal Campaign Finance Code, the following listed individuals are prohibited from making a campaign or officeholder contribution to any member of City Council, candidate for City Council or political action committee that contributes to City Council elections from the 10th business day after a contract solicitation has been released until 30 calendar days after the contract has been awarded:

- a) Legal signatory of a high-profile contract
- b) Any individual seeking a high-profile contract
- c) Any owner or officer of an entity seeking a high-profile contract
- d) The spouse of any of individual listed in response to (a) through (c) above
- e) Any attorney, lobbyist, or consultant retained to assist in seeking a high-profile contract

**Penalty.** A high-profile contract cannot be awarded to the individual or entity if a prohibited contribution has been made by any of these individuals during the contribution "black-out" period, which is the 10th business day after a solicitation has been released until 30 calendar days after the contract has been awarded.

### 8. Disclosure of Conflicts of Interest

Are you aware of any fact(s) with regard to this contract that would raise a "conflict of interest" issue under Sections 2-43 or 2-44 of the City Ethics Code for any City Council member or board/commission member that has not or will not be raised by these city officials?

\* = Required fields



## City of San Antonio Discretionary Contracts Disclosure Update

Office of the  
City Clerk

- I am not aware of any conflict(s) of interest issues under Section 2-43 or 2-44 of the City Ethics Code for members of City Council or a city board/commission.
- I am aware of the following conflict(s) of interest:

### \*Acknowledgements

**Updates Required**

I understand that this form must be updated by submission of a revised form if there is any change in the information before the discretionary contract is the subject of action by the City Council, and no later than 5 business days after any change has occurred, whichever comes first. This includes information about political contributions made after the initial submission and up until 30 calendar days after contract has been awarded.

**No Contact with City Officials or Staff during Contract Evaluation**

I understand that a person or entity who seeks or applies for a city contract or any other person acting on behalf of that person or entity is prohibited from contacting city officials and employees regarding the contract after a Request for Proposal (RFP), Request for Qualification (RFQ), or other solicitation has been released.

This no-contact provision shall conclude when the contract is posted as a City Council agenda item. If contact is required with city officials or employees, the contact will take place in accordance with procedures incorporated into the solicitation documents. Violation of this prohibited contacts provision set out in Section 2-61 of the City Ethics Code by respondents or their agents may lead to disqualification of their offer from consideration.

### \*Contribution Prohibitions for "High-Profile" Contracts

- This is not a high-profile contract.
- This is a high-profile contract.

### \*Conflict of Interest Questionnaire (CIQ)

Chapter 176 of the Local Government Code requires contractors and vendors to submit a Conflict of Interest Form (CIQ) to the Office of the City Clerk.

- I acknowledge that I have been advised of the requirement to file a CIQ form under Chapter 176 of the Local Government Code.

(9.11)

- I swear or affirm that the statements contained in this Discretionary Contracts Disclosure Form, including any attachments, to the best of my knowledge and belief are true, correct, and complete.

Your Name: Jacques Braha Title: Manager

Company Name or DBA: BMP 1604 Developers, LTD. Date: 05/02/2013

Please fill this form out online, print completed form and submit with proposal to originating department. All questions must be answered.

If necessary to mail, send to:  
Purchasing  
P.O. Box 839966  
San Antonio, Texas 78283-3966

***Political Contributions - 2011***  
**Rob Killen, Kaufman & Killen, Inc.**

Date	Name	Check Number	Amount
October 13, 2011	Jose Menendez Campaign	3121	\$500.00
November 8, 2011	Kevin Wolff Campaign	3131	\$500.00

***Political Contributions - 2012***  
**Rob Killen, Kaufman & Killen, Inc.**

Date	Name	Check Number	Amount
February 7, 2012	John Clamp for Tax Assessor	3157	\$250.00
June 15, 2012	Philip Cortez Campaign		\$500.00
July 15, 2012	Philip Cortez Campaign		\$500.00
September 15, 2012	Nelson Wolff		\$1000.00
October 1, 2012	Justin Rodriguez Campaign		\$250.00

***Political Contributions - 2011***  
**William T. Kaufman, Kaufman & Killen, Inc.**

Date	Name	Check Number	Amount
5/18/11	Kevin Wolff Campaign	5260	\$2,500.00
8/31/11	Philip Cortez Campaign	5379	\$1,000.00
9/13/11	Justin Rodriguez Campaign	5161	\$1,000.00
10/3/11	Jose Menendez Campaign	5409	\$1,000.00
12/5/11	Kevin Wolff Campaign	5171	\$2,500.00

***Political Contributions - 2012***  
**William T. Kaufman, Kaufman & Killen, Inc.**

Date	Name	Check Number	Amount
1/12/12	John Clamp Campaign	5588	\$500.00
9/13/12	Justin Rodriguez Campaign	5761	\$250.00
9/18/12	Philip Cortez Campaign	5768	\$1000.00

***Political Contributions - 5-1-11 to 5-1-13***  
**Michele Haussmann, Kaufman & Killen, Inc.**

Date	Name	Amount
2/10/12	John Clamp for Tax Assessor	\$100

***Political Contributions - 5-1-11 to 5-1-13***  
**Pape-Dawson Engineers**

Date	Name	Amount
5-1-11 to 5-1-13	NA	\$0

***Political Contributions - 5-1-11 to 5-1-13***  
**Jacques Braha, BMP 1604 Developers, LTD and BMP 1604 GP, LLC**

Date	Name	Amount
2/7/12	John Clamp for Tax Assessor	\$100
2/10/12	John Clamp for Tax Assessor	\$200

***Political Contributions - 5-1-11 to 5-1-13***  
**Steve Braha, BMP 1604 Developers, LTD and BMP 1604 GP, LLC**

Date	Name	Amount
2/7/12	John Clamp for Tax Assessor	\$200
11/14/12	Chris Medina Campaign	\$500

***Political Contributions - 5-1-11 to 5-1-13***  
**Trey Jacobson, Golden Steves Cohen & Gordon, LLP**

Date	Name	Amount
5-1-11 to 5-1-13	NA	\$0

***Political Contributions - 5-1-11 to 5-1-13***  
**Andrew Cohen, Golden Steves Cohen & Gordon, LLP**

Date	Name	Amount
5-1-11 to 5-1-13	NA	\$0

***Political Contributions - 5-1-11 to 5-1-13***  
**Steve Golden, P & G Acquisitions, LLC**

<b>Date</b>	<b>Name</b>	<b>Amount</b>
April 29, 2011	Julian Castro Campaign	\$1,000
January 23, 2013	Julian Castro Campaign	\$1,000



AN ORDINANCE

2013-05-02-0292

**AUTHORIZING THE NEGOTIATION AND EXECUTION OF A DEVELOPER PARTICIPATION AGREEMENT WITH BMP 1604 DEVELOPERS, LTD. IN THE AMOUNT NOT TO EXCEED \$3,200,000.00 FOR THE BULVERDE ROAD (LOOP 1604 TO REDLAND ROAD AND CLASSEN ROAD) PROJECT, A 2007 BOND SAVINGS AND 2012 – 2017 BOND FUNDED PROJECT, LOCATED IN COUNCIL DISTRICT 10.**

\* \* \* \* \*

**WHEREAS**, on May 29, 2011, City Council approved the reallocation of \$47 million in savings from the 2007-2012 Bond Program for over 20 new Capital Improvement Projects; and

**WHEREAS**, the Bulverde Road Project provides for the construction of Bulverde Road from Loop 1604 to Redland Road and Classen Road; and

**WHEREAS**, the City and Developer desire to realign Bulverde Road and Classen Road to match the alignment and street design specified in the City's Major Thoroughfare Plan; and

**WHEREAS**, this Project involves modifications to existing areas of Bulverde Road to connect Classen Road to a segment of Bulverde Road that intersects Redland Road and will include the construction of traffic lanes, a median and bridge structure over Elm Waterhole Creek that will resolve long-standing public safety and access issues associated with flooding and low-water crossing on Bulverde and Classen Roads, as well as, provide regional connectivity; and

**WHEREAS**, Texas Local Government Code Sections 212.071 – 212.074 allow the municipality to participate in a Developer Participation Contracts; and

**WHEREAS**, the statutes limit the participation of the municipality to a level not to exceed 30 percent of the total contract price; and

**WHEREAS**, the statutes also allow participation by the municipality at a level not to exceed 100 percent of the total cost for any oversizing of improvements required by the municipality; and

**WHEREAS**, the Contract with **BMP 1604 Developers, Ltd.** for the Bulverde Road Project limits the City of San Antonio participation to the amount appropriated by the City Council, an amount not to exceed the lesser of 30 percent of the total contract price or an amount not to exceed \$2,878,330.20 and 100% of certain costs that pertain to oversizing in an amount not to exceed \$321,699.80; and

**WHEREAS**, the City's total contribution toward the City Share in the Bulverde Road Project is an amount not to exceed \$3,200,000.00; and

**WHEREAS**, the Developer will complete the design and construction of the Project not later than December 31, 2016; and

**WHEREAS**, this Ordinance authorizes the negotiation and execution of a Developer Participation Contract with **BMP 1604 Developers, Ltd.** in the amount not to exceed \$3,200,000.00 for the Bulverde Road (Loop 1604 To Redland Road And Classen Road) Project located in Council District 10; **NOW THEREFORE**,

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

**SECTION 1.** The City Manager, or her designee, is authorized to negotiate and execute a Developer Participation Agreement with **BMP 1604 Developers, Ltd.** in the amount not to exceed the lesser of 30 percent of the total contract price or an amount not to exceed \$2,878,330.20 and 100% of certain costs that pertain to oversizing in an amount not to exceed \$321,669.80 or a total amount not to exceed \$3,200,000.00 as the City's contribution for the Bulverde Road Project. The Contract must be executed within 45 days of signing of this Ordinance; if the parties are not able to finalize within 45 days, the amendments must be considered through a subsequent ordinance. Should a Contract be negotiated which substantially varies from the terms of the attached Contract, the Contract must be considered through a subsequent Ordinance.

**SECTION 2.** Payment in the amount not to exceed \$1,200,000.00 in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 40-00258, Bulverde Rd (Loop 1604 to Redland Rd), is authorized to be encumbered and made payable to **BMP 1604 Developers, Ltd.** for construction services.

**SECTION 3.** Payment in the amount not to exceed \$2,000,000.00 in SAP Fund 45099000, General Obligation Capital Projects, SAP Project Definition 40-00301, Bulverde Rd & Classen Rd Realignment, is authorized to be encumbered and made payable to **BMP 1604 Developers, Ltd.** for construction services.

**SECTION 4.** The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

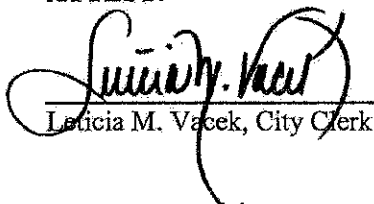
**SECTION 5.** This Ordinance shall be effective immediately upon passage by eight or more affirmative votes; otherwise, it shall be effective on the tenth day after passage.

**PASSED AND APPROVED** this 2nd day of May, 2013.



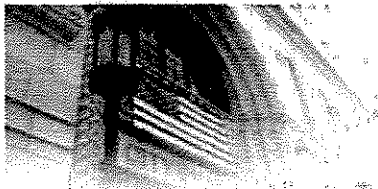
M A Y O R  
Julián Castro

ATTEST:

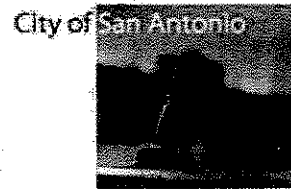
  
\_\_\_\_\_  
Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Michael D. Bernard, City Attorney



Request for  
**COUNCIL  
ACTION**



### Agenda Voting Results - 8

<b>Name:</b>	6, 7, 8, 10, 12, 13, 15, 16, 17						
<b>Date:</b>	05/02/2013						
<b>Time:</b>	10:53:34 AM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance authorizing the negotiation and execution of a Developer Participation Agreement with BMP 1604 Developers, Ltd. in the amount not to exceed \$3,200,000.00 for the Bulverde Road (Loop 1604 to Redland Road and Classen Road) project, a 2012-2017 Bond and 2007 Bond savings funded project that totals an estimated \$9,916,103.80 with developer's financial participation located in Council District 10. [Peter Zanoni, Deputy City Manager; Mike Frisbie, Director, Capital Improvements Management Services]						
<b>Result:</b>	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x				
Ivy R. Taylor	District 2		x				
Leticia Ozuna	District 3		x				
Rey Saldaña	District 4		x				
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7		x			x	
W. Reed Williams	District 8		x				x
Elisa Chan	District 9		x				
Carlton Soules	District 10		x				