

STATE OF TEXAS	§	AGREEMENT TO USE
	§	FUNDS OF THE
COUNTY OF BEXAR	§	CITY OF SAN ANTONIO

This Agreement to Use Funds ("AGREEMENT") is hereby made and entered into by and between the CITY OF SAN ANTONIO (hereinafter referred to as "CITY"), a Texas municipal corporation acting by and through its City Manager or designee pursuant to Ordinance No. XXXXXXXX dated September 1, 2016 and the LIFTFUND INC., formerly Accion Texas Inc., (hereinafter referred to as "LIFTFUND"), a Texas non-profit corporation, by and through its President and CEO, both of which may be referred to herein collectively as the "Parties".

**WHEREAS**, in November 2013, City Council approved a professional services agreement with ACCION Texas, now LiftFund, for the operation and management of Café Commerce, which includes both a virtual and physical location where entrepreneurs and small businesses gather, collaborate, and learn more about entrepreneurship and small business resources; and

**WHEREAS**, in 2015, LiftFund, in partnership with the City of San Antonio, began a rebranding initiative of Café Commerce as the name currently does not convey and emphasize the benefits of the resource center to entrepreneurs and small businesses; and

**WHEREAS**, Many residents have confused Café Commerce as Café College and have even thought of it as a coffee shop and not a resource center for entrepreneurs and small business owners; and

**WHEREAS**, During the exploration of the rebrand initiative process, entrepreneurs and small business owners, even youth, were unaware of the services provided by Café Commerce and commented it was one of the best kept secrets in San Antonio and should have a name that reflects its commitment to being a resource and leader in the entrepreneur space; and

**WHEREAS**, LiftFund and Café Commerce partnered with MarketVision, a reputable marketing firm, who developed over 300 branding concepts that were vetted by multiple focus groups that consisted of Café Commerce clients, non-Café Commerce clients, and other start-up resource providers such as Geekdom, the University of Texas at San Antonio, and Trinity University; and

**WHEREAS**, the final branding concepts were presented to the Café Commerce Advisory Board, that is made up of five successful entrepreneurs, and a final branding concept was approved and is expected to be unveiled on November 18, 2016; and

**WHEREAS**, in support of the rebranding initiative, City Council has allocated and agrees to pay \$100,000.00 to LiftFund to undergo an extensive and comprehensive rebrand initiative, which will include the creation and installation of signage, redevelopment of the Café Commerce website and social media presence, and creation and marketing of the new brand through various marketing material;

**WHEREAS**, the rebranding initiative will be executed pursuant to the Scope of Services and Funding Section II; and

**WHEREAS**, CITY designates its Economic Development Department (hereafter referred to as "EDD") and its Director, (the "Director") to act for the City Manager in the evaluation and monitoring of this AGREEMENT, and work with the Department of Finance and other City departments, as appropriate; **NOW THEREFORE**:

The Parties hereto severally and collectively agree, and by the execution of this Agreement are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks described hereafter.

## **I. GENERAL PROVISIONS**

1. LIFTFUND agrees by the execution of this AGREEMENT to comply with any and all provisions of this AGREEMENT and accept administrative responsibility for the use and documentation of expenditures of funds provided by CITY.
2. LIFTFUND represents, warrants, assures and guarantees that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this AGREEMENT and to perform the responsibilities herein required.
3. The party signing this AGREEMENT for LIFTFUND represents, warrants, assures and guarantees that he or she has full legal authority to execute this AGREEMENT on behalf of LIFTFUND and to bind LIFTFUND to all terms, performances and provisions herein contained.
4. In the event that a dispute arises as to the legal authority of either LIFTFUND, or the person signing on behalf of LIFTFUND, to enter into this AGREEMENT, CITY shall have the right, at its option, to either temporarily suspend or permanently terminate this AGREEMENT. Should CITY suspend or permanently terminate this AGREEMENT pursuant to this paragraph, however, LIFTFUND shall be liable to CITY for any money it has received from CITY for performance of any of the provisions herein.
5. LIFTFUND understands that the funds provided pursuant to this AGREEMENT are funds which have been made available by CITY's General Fund and LIFTFUND will therefore comply with all rules, regulations, policies and procedures applicable to these funds as directed by CITY.
6. LIFTFUND and CITY agree that LIFTFUND is an independent contractor, that LIFTFUND shall be responsible to all parties for its respective acts and omissions, and that CITY shall in no way be responsible therefore, and that neither has authority to bind the other, or hold out to third parties that it has the authority to bind the other.

7. LIFTFUND understands and agrees that this AGREEMENT is subject to mutual termination. Therefore, either Party shall have the option of terminating this AGREEMENT by giving the other Party no less than thirty (30) days written notice. Such notice shall specify the effective date of termination, which date shall not be sooner than the end of thirty (30) days following the day on which such notice is sent.
8. LIFTFUND understands and agrees that this AGREEMENT may be revised and updated by and at the discretion of the City Council. LIFTFUND therefore agrees that, at such time as any revisions are so made during the Term hereof, this AGREEMENT will be amended to include such revisions. In the event that LIFTFUND does not agree to any changes, LIFTFUND shall have the option of terminating this AGREEMENT by giving thirty (30) days written notice to CITY. LIFTFUND shall have the right to exercise such option within thirty (30) days of receipt of notice of any such revisions.
9. LIFTFUND understands and agrees that this AGREEMENT is subject to a general reduction in funding. If and when CITY implements a reduction in General Fund and/or expenditures, agreements funded by CITY's General Fund, including this AGREEMENT may, at CITY's option, be reduced in a like manner. CITY will attempt to provide LIFTFUND with as much advance notice of a potential funding reduction as is possible to allow LIFTFUND to make budget adjustments.
10. In no event shall CITY be liable for any expense of LIFTFUND not eligible or allowable under this AGREEMENT.
11. Should LIFTFUND fail to fulfill in a timely and proper manner the obligations under this AGREEMENT, as determined solely by the Director, or if LIFTFUND should violate any of the covenants, conditions or stipulations of this AGREEMENT, CITY shall have the right to terminate this AGREEMENT by sending written notice to LIFTFUND of such termination and specifying the effective date thereof, which date shall not be sooner than the end of thirty (30) days following the day on which such notice is sent.
  - a. Previous breach of any of the terms or conditions herein shall not be construed as a waiver of same, nor preclude CITY's termination right for successive breach of the same condition.
  - b. Notwithstanding the above, LIFTFUND shall not be relieved of liability to CITY for damages sustained by CITY by virtue of any breach of this AGREEMENT and CITY may withhold funds otherwise due as damages.
  - c. In addition to the above provisions, the City Council shall have the right to terminate this AGREEMENT at any time upon a finding by ordinance that LIFTFUND's activities, programs or operations no longer

are in the best interest of the City of San Antonio or its citizens. Adequate provisions shall be made for LIFTFUND to be heard by the City Council prior to voting on such an ordinance. The effective date of the termination shall be set in the ordinance.

12. Should this AGREEMENT be terminated by any Party for any reason and the program objectives not fully completed as stated in Section II of this AGREEMENT, as determined solely by CITY after consultation with LIFTFUND, LIFTFUND shall refund any and all unused funds either allocated and in possession of LIFTFUND or unallocated and in the possession of CITY shall be the sole property of CITY and CITY shall have the right to: (1) reclaim any and all funds unused but distributed to LIFTFUND under the terms of this AGREEMENT; or (2) retain any and all funds allocated but not distributed to LIFTFUND.
13. Except as otherwise provided for pursuant to the provisions hereof, this AGREEMENT shall begin on September 1, 2016 and shall terminate on November 30, 2016 (the "Term"). This agreement may be extended at the option of CITY and LIFTFUND for additional terms, contingent upon appropriation of funds and approval of the City Council.
14. LIFTFUND shall establish and use internal accounting and administrative controls to preclude theft, embezzlement, improper inducement, obstruction of investigation or other criminal action, and to prevent frauds and program abuse. CITY shall review, and LIFTFUND shall allow review of, LIFTFUND's system of internal administrative and accounting controls, as it deems necessary to ensure financial responsibility.
15. LIFTFUND warrants that no person or selling agency has been employed or retained to solicit or secure this AGREEMENT upon any other agreement or understanding for a commission, percentage, brokerage or contingent fee and further, that no such understanding or agreement exists, or has existed, with any employee of LIFTFUND or CITY.
16. LIFTFUND is authorized to publicly acknowledge that the City of San Antonio is supportive of the objectives as described in this AGREEMENT and has contributed to the cause of realizing such objectives.
17. LIFTFUND acknowledges that this AGREEMENT cannot be assigned without the express written consent of the Director.

## **II. SCOPE OF SERVICES AND FUNDING**

1. LIFTFUND shall utilize up to One Hundred Thousand Dollars and No cents (\$100,000.00) provided by CITY for the funding of the Café Commerce rebranding initiative.
2. Funds shall only be used for the purposes of the Café Commerce rebrand

initiative, which may include, but is not limited to:

- a. Café Commerce logos removed and new logos developed and installed.
  - b. Marketing material such as business cards, stationary, envelopes, thank you notes, postcards, brochures, t-shirts, pens, mugs, stickers, and notepads.
  - c. Website and social media redesign and development, new emails, and development of customer relationship management system.
2. The rebrand initiative requires LIFTFUND to submit an invoice to the City monthly for all purchases made during the previous month and are to be submitted September 30, 2016, and November 30, 2016. Reports shall include itemized breakdown of the services and goods purchased, as well as the delivery/completion date or expected delivery/completion date.
  - a. All such records shall continue to be available for inspection and audit for a period of five (5) years after the termination date hereof. However, if an audit or investigation of LIFTFUND begins during the course of this five-year period, then LIFTFUND is required to maintain said records until such time as the audit or investigation is completely finished.
  - b. LIFTFUND agrees that during the Term of this AGREEMENT, any duly authorized representative of the Economic Development Department shall have the right to conduct on-site inspections at reasonable times and to interview personnel and clients for the purposes of evaluating and monitoring the objectives for compliance with this AGREEMENT.
  - c. The submission of falsified information or the failure to timely submit all information by LIFTFUND as requested by CITY is grounds for termination of this AGREEMENT.
3. LIFTFUND agrees to abide by the CITY's current Ethics Code or any amendment or revisions thereto. LIFTFUND will establish safeguards to prohibit anyone whose position is funded or partially funded by this AGREEMENT from using their position for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or those with whom they have family, business or other ties. CITY may, at its option, cancel this AGREEMENT for any violation of this section.
4. LIFTFUND agrees to establish internal procedures that ensure employees funded or partially funded by this AGREEMENT have an established complaint and grievance policy.
  - a. Such grievance policy will include procedures to receive, investigate and

resolve complaints and grievances in an expeditious manner.

- b. In the event no complaint and grievance policy has been established, LIFTFUND will follow the procedures outlined in the San Antonio Municipal Civil Service rules in regard to employees funded or partially funded by this AGREEMENT.

### **III. FISCAL MANAGEMENT**

1. An accounting system using generally accepted accounting principles for governmental entities which accurately reflects all costs chargeable (paid and unpaid) to this AGREEMENT is mandatory.
2. LIFTFUND covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature including, but not limited to, personal or bodily injury, death and property damage made upon the CITY directly or indirectly arising out of, resulting from or related to LIFTFUND'S activities under this Agreement, including any acts or omissions of LIFTFUND, any agent, officer, director, representative, employee, consultant or subcontractor of LIFTFUND, and their respective officers, agents employees, directors and representatives while in the exercise of performance of the rights or duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death or property damage. IN THE EVENT LIFTFUND AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

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

3. Upon completion or termination of the objectives as described in this AGREEMENT, any unused funds, rebates or credits must immediately be returned by LIFTFUND to CITY.

4. LIFTFUND shall not be relieved of liability to CITY for damages sustained by CITY by virtue of any breach of this AGREEMENT and CITY may withhold funds otherwise due as damages.
5. Should any expense or charge that has been paid with funds from this AGREEMENT be subsequently disapproved or disallowed as a result of any site review or audit, LIFTFUND will immediately refund such amount to CITY. LIFTFUND further authorizes CITY, if CITY so elects, to deduct such amount or charge as a claim against future payments, if any. The Director has the express authority to deduct such claims from subsequent reimbursements.
6. Audit Conditions and Requirements:
  - a. CITY, a political entity, unlike a business for profit, is more interested in knowing if agencies have accomplished or achieved the objectives as stipulated in their contracts and/or agreements, as opposed to certifications that the Balance Sheet fairly represents the financial position at a given date. Therefore, it is essential that City is made aware of progress made upon this AGREEMENT. Following thirty (30) days after a written request by City, LIFTFUND shall submit a written report stating what has been accomplished to date and the most current percentage of completion of the total contract that has been performed.
  - b. It is imperative any auditor performing an audit of LIFTFUND read the entire AGREEMENT, including all attachments, between the CITY and LIFTFUND, since the budget and financial compliance of the AGREEMENT is only a portion of the total contractual obligation.
  - c. All City-funded contracts and agreements, including this AGREEMENT, are subject to periodic audits at any reasonable hour of the day by CITY auditors. This includes the auditing of both LIFTFUND and its subcontractors related to this AGREEMENT.
  - d. If LIFTFUND expends fifty thousand dollars and no cents (\$50,000.00) or more in funds provided by CITY during the Term of this AGREEMENT, then LIFTFUND shall furnish the Director and other City departments designated by the Director, with audited financial statements, prepared by an independent auditor (CPA), within one hundred and twenty (120) days of the close of LIFTFUND's fiscal year or within thirty days of the completion of any audit performed. In addition to the audited financial statements, a copy of any internal controls review; audit exceptions and management letter should be submitted. The audited financial statements must include a schedule of receipts and disbursements by budgeting cost category and a certification from LIFTFUND stating whether or not the terms and conditions of the AGREEMENT were met. If the CITY determines, in its sole discretion, that LIFTFUND is in violation of the above requirements, the CITY

shall have the right to dispatch auditors of its choosing to conduct the required audit and to have LIFTFUND pay for such audit. In addition, when LIFTFUND has expended federal or state funds that exceed the single audit threshold amount in effect during the period of this AGREEMENT, the audit shall be conducted in accordance with the Single Audit Act Agreements of 1996 and the U.S. Office of Management and Budget Circular A-133 (latest revision), and/or the State of Texas Single Audit Circular.

7. LIFTFUND understands and agrees to abide by and adhere to applicable federal, state and CITY provisions regarding financial accounting.

#### **IV. INSURANCE REQUIREMENTS**

1. Prior to the commencement of any work under this AGREEMENT, LIFTFUND shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to the EDD, which shall be clearly labeled "LIFTFUND" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this AGREEMENT until such certificate and endorsements have been received and approved by the CITY's Risk Manager. No officer or employee, other than the CITY's Risk Manager, shall have authority to waive this requirement.
2. The CITY reserves the right to review the insurance requirements of this Article during the effective period of this AGREEMENT and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by CITY's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this AGREEMENT. In no instance will CITY allow modification whereby CITY may incur increased risk.
3. LIFTFUND's financial integrity is of interest to the CITY; therefore, subject to LIFTFUND's right to maintain reasonable deductibles in such amounts as are approved by the CITY, LIFTFUND shall obtain and maintain in full force and effect for the duration of this AGREEMENT, and any extension hereof, at LIFTFUND's sole expense, insurance coverage written on an occurrence basis, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:



TYPE	AMOUNTS
1. Broad form Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations *b. Independent Contractors c. Products/Completed Operations d. Personal Injury e. Contractual Liability f. Damage to property rented by you	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
2. Directors and Officers (Claims-made basis) To be maintained and in effect for no less than two years subsequent to the completion of the professional service.	\$1,000,000 per claim, to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error, or omission in professional services.

4. LIFTFUND agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverage required of LIFTFUND herein, and provide a certificate of insurance and endorsement that names the LIFTFUND and the CITY as additional insureds. LIFTFUND shall provide the CITY with said certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by CITY's Risk Manager, without subsequent CITY Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this AGREEMENT. Such modification may be enacted by letter signed by CITY's Risk Manager, which shall become a part of the contract for all purposes.
5. As they apply to the limits required by the CITY, the CITY shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the Parties hereto or the underwriter of any such policies). LIFTFUND shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to CITY at the address provided below within 10 days of the requested change. LIFTFUND shall pay any costs incurred resulting from said changes.

City of San Antonio  
Attn: Economic Development Department  
P.O. Box 839966  
San Antonio, Texas 78283-3966

6. LIFTFUND agrees that with respect to the above-required insurance, such insurance policies are to contain or be endorsed to contain the following provisions:
  - Name the CITY, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY, with the exception of the workers' compensation and professional liability policies.
  - Provide for an endorsement that the "other insurance" clause shall not apply to the CITY of San Antonio where the CITY is an additional insured shown on the policy.
  - Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of the CITY.
  - Provide advance written notice directly to CITY of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance notice for nonpayment of premium.
7. Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, LIFTFUND shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend LIFTFUND's performance should there be a lapse in coverage at any time during this AGREEMENT. Failure to provide and to maintain the required insurance shall constitute a material breach of this AGREEMENT.
8. In addition to any other remedies the CITY may have upon LIFTFUND's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order LIFTFUND to stop work hereunder, and/or withhold any payment(s) which become due to LIFTFUND hereunder until LIFTFUND demonstrates compliance with the requirements hereof.
9. Nothing herein contained shall be construed as limiting in any way the extent to which LIFTFUND may be held responsible for payments of damages to persons or property resulting from LIFTFUND's or its subcontractors' performance of the work covered under this AGREEMENT.
10. It is agreed that woe's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the CITY for liability arising out of operations under this AGREEMENT.
11. It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this AGREEMENT and that no claim or action by or on behalf of the CITY shall be limited to insurance

coverage provided.

12. LIFTFUND and any LIFTFUND subcontractors are responsible for all damage to their own equipment and/or property.

## **V. EQUAL EMPLOYMENT OPPORTUNITY POLICY**

1. LIFTFUND agrees to post in a conspicuous place available to employees, applicants for employment and contractors funded or partially funded under this AGREEMENT, notices to be provided by the contracting officer setting forth the provisions of this Nondiscrimination Clause.
2. LIFTFUND will, in all solicitations or advertisements for employees or contractors placed by or on behalf of LIFTFUND, state that all qualified applicants will receive fair consideration for employment or contract without regard to race, color, national origin, religion, sex, sexual orientation, gender identity, age, disability, veterans status or political belief or affiliation.
3. LIFTFUND agrees to affirmatively abide by and cooperate in the implementation of the policies and practices set forth in this Nondiscrimination Clause and any additional policies as may be required as a result of local, state or federal initiatives. LIFTFUND will furnish all information and reports requested by CITY and will permit access to books, records and accounts for purpose of review and investigation to ascertain compliance with such rules and regulations.
4. LIFTFUND covenants and agrees that LIFTFUND will not discriminate nor permit discrimination against any person or group of persons, with regard to employment and the provision of services at, on, or in the Facility, on the grounds of race, religion, national origin, marital status, sex, age, disability, or in any manner prohibited by the laws of the United States or the State of Texas. In the event of LIFTFUND's failure or refusal to comply with this Nondiscrimination Clause, this AGREEMENT may be canceled, terminated or suspended in whole or in part, and LIFTFUND may be debarred from further contracts with CITY.

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

1. LIFTFUND further represents and warrants that:
  - a. All information, data or reports heretofore or hereafter provided to CITY 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;
  - b. Any supporting financial statements heretofore or hereafter provided to

CITY are, shall be and shall remain complete, accurate and fairly reflective of the financial condition of LIFTFUND on the date shown on said statements and during the period covered thereby, and that since said date shown, except as provided by written notice to CITY, there has been no material change, adverse or otherwise, in the financial condition of LIFTFUND;

- c. No litigation or proceedings are presently pending or threatened against LIFTFUND or, if pending, have been disclosed by LIFTFUND in writing to CITY;
- d. None of the provisions contained herein contravene or in any way conflict with the authority under which LIFTFUND is doing business, or with the provisions of any existing indenture or agreement of LIFTFUND;
- e. LIFTFUND has the legal authority to enter into this AGREEMENT and accept payments hereunder, and has taken all necessary measures to authorize such execution of AGREEMENT and acceptance of payments pursuant to the terms and conditions hereof; and
- f. None of the assets of LIFTFUND are subject to any lien or encumbrance of any character, except as shown in the financial statements provided by LIFTFUND to CITY.

## **VII. LEGAL/LITIGATION EXPENSES**

- 1. Under no circumstances shall the funds received under this AGREEMENT or any other funds received from CITY be used, either directly or indirectly, to pay costs or attorney fees incurred in any adversarial proceeding against the CITY. LIFTFUND must obtain the written approval of the City Attorney's Office before any funds received under this AGREEMENT may be used in any adversarial proceeding against any other governmental entity or any other public entity.
- 2. During the term of this AGREEMENT, if LIFTFUND files and/or pursues an adversarial proceeding against the CITY then, at the CITY's option, this AGREEMENT and all access to the funding provided for hereunder may terminate if it is found that LIFTFUND has violated this Article.
- 3. LIFTFUND, at the CITY's option, could be ineligible for consideration to receive any future funding while any adversarial proceedings against the CITY remain unresolved.
- 4. For purposes of this Article, "adversarial proceedings" include any cause of action filed by LIFTFUND in any state or federal court, as well as any state or federal administrative hearing, but does not include Alternative Dispute

## **VIII. CHANGES AND AGREEMENTS**

1. Except when the terms of this AGREEMENT expressly provide otherwise, any alterations, additions, or deletions to the terms hereof shall be by agreement in writing executed by both CITY and LIFTFUND, as authorized by City Council and the Board of the LIFTFUND. Notwithstanding the foregoing, the Director may execute amendments that do not relate to the City's funding under this AGREEMENT.
2. It is understood and agreed by the Parties that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this AGREEMENT and that any such changes shall be automatically incorporated into this AGREEMENT without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

## **IX. SEVERABILITY OF PROVISIONS**

If any clause or provision of this AGREEMENT is held invalid, illegal or unenforceable under present or future federal, state or local laws including, but not limited to, the CITY Charter, CITY Code or ordinances of the CITY of San Antonio, Texas, then and in that event it is the intention of the Parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this AGREEMENT shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the Parties hereto that in lieu of each clause or provision of this AGREEMENT that is invalid, illegal or unenforceable, there be added as a part of this AGREEMENT a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

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

1. No waiver by CITY of a breach of any of the terms, conditions, covenants or guarantees of this AGREEMENT shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of CITY to insist in any one or more cases upon the strict performance of any of the covenants of this AGREEMENT, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by any Party hereto of any provision of this AGREEMENT shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.
2. No act or omission of CITY shall in any manner impair or prejudice any right, power, privilege, or remedy available to CITY hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

3. No representative or agent of CITY may waive the effect of the provisions of this Article.

## **XI. SPECIAL CONDITIONS**

1. All LIFTFUND invoices or reports regarding eligible expenditures pursuant to this AGREEMENT must be submitted by LIFTFUND to the EDD no later than thirty (30) days proceeding the following month after LIFTFUND incurs the expense.
2. LIFTFUND understands and agrees that LIFTFUND is required to refund money, pursuant to 80(R) HB 1196, that LIFTFUND has received from CITY through this AGREEMENT, in the event of LIFTFUND's conviction of knowingly employing an undocumented worker, with repayment required within six months of final conviction. Interest shall accrue at the rate of .5% per month until the time of such repayment from the date of final conviction.

## **XII. ENTIRE AGREEMENT**

This AGREEMENT constitutes the final and entire agreement between the Parties hereto and contains all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this AGREEMENT shall be deemed to exist or to bind the Parties hereto unless same be in writing, dated subsequent to the date hereof, and duly executed by the Parties.

## **XIII. NOTICE**

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

**CITY:**  
Director  
Economic Development  
Department  
P.O. Box 839966  
San Antonio, TX 78283-3966

City Attorney's Office  
Commerce & Visitor's  
Services Division  
City Hall, 3rd Floor  
San Antonio, Texas 78205

and

**LIFTFUND:**  
Executive Director  
2007 West Martin Street  
San Antonio, Texas 78207

2. Notice of changes of address by any Party must be made in writing and delivered (or mailed, registered or certified mail, postage prepaid) to the other

Party's last known address within five (5) business days of such change.

#### **XIV. PARTIES BOUND**

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

#### **XV. GENDER**

Words of gender used in this AGREEMENT shall be held and construed to include the other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

#### **XVI. RELATIONSHIP OF PARTIES**

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 ventures or any other similar such relationship between the Parties hereto.

#### **XVII. TEXAS LAW TO APPLY**

THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.

#### **XVIII. CAPTIONS**

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

#### **XIX. SBEDA**

Please refer to Exhibit A for SBEDA requirements.

**EXECUTED IN TRIPLICATE ORIGINALS this \_\_\_\_\_ day of \_\_\_\_\_, 2016.**

**CITY OF SAN ANTONIO**

**LIFTFUND**

---

**Carlos Contreras**

---

**Janie Barrera**

**Assistant City Manager**

**President & CEO**

**ATTEST:**

---

**Leticia Vacek**  
**City Clerk**

**APPROVED AS TO FORM:**

---

**Veronica M. Zertuche**  
**Deputy City Attorney**



## **Exhibit A: Café Commerce Rebrand**

### **SBEDA ORDINANCE COMPLIANCE PROVISIONS**

#### **A. Contract Requirements and Commitment**

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

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

#### **B. SBEDA Program**

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

#### **C. Definitions**

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

**Centralized Vendor Registration System (hereafter referred to as "CVR")** – refers to a mandatory electronic system wherein City requires all prospective Consultants, Sub-Consultants,

Contractors and Subcontractors ready, willing and able to sell goods or services to City to register. The CVR system assigns a unique identifier to each registrant that is then required for the purpose of submitting solicitation responses and invoices and for receiving payments from City. The CVR-assigned identifiers also are used by City's Goal Setting Committee for measuring relative availability and tracking utilization of SBE and M/WBE (as defined herein) firms by Industry or commodity codes and for establishing annual aspirational Goals and contract-by-contract Subcontracting Goals.

**Certification or "Certified"** – refers to the process by which City's Small Business Office (hereafter referred to as "SBO") staff determines a firm to be a bona-fide small, minority-, women-owned or emerging small business enterprise. Emerging Small Business Enterprises (hereafter referred to as "ESBEs") automatically are eligible for Certification as SBEs. Any firm may apply for multiple Certifications covering each and every status category (e.g., SBE, ESBE, MBE, or WBE) for which it is able to satisfy eligibility standards. The SBO staff may contract these services to a regional Certification agency or other entity. For purposes of Certification, City accepts any firm that is certified by local government entities and/or other organizations identified herein that have adopted Certification standards and procedures similar to those followed by the SBO, provided the prospective firm satisfies the eligibility requirements set forth in this Ordinance in Section III.E.6 of Attachment A.

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

**Good Faith Efforts** – means the documentation of Grantee’s intent to comply with S/M/WBE Program Goals and procedures including, but are not limited to, the following:

(1) documentation reflecting Grantee’s commitment to comply with SBE or M/WBE Program Goals as established by the GSC for a particular contract; or

(2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., timely advertisements in appropriate trade publications and publications of wide general circulation; timely posting of SBE or M/WBE subcontract opportunities on the City of San Antonio website; solicitations of bids/proposals/qualification statements from all qualified SBE or M/WBE firms listed in the Small Business Office’s directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes, to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Consultant’s posting of a bond covering the work of SBE or M/WBE Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by Grantee and the solicitation; and documentation of consultations with trade associations and Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers representing the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers). The appropriate form and content of Grantee’s Good Faith Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

**HUBZone Firm** – means a business certified by the U.S. Small Business Administration for participation in the federal HUBZone Program, as established under the 1997 Small Business Reauthorization Act. To qualify as a HUBZone firm, a small business must meet all of the following criteria:

(1) The business is owned and Controlled by U.S. citizens;

(2) At least thirty five percent (35%) of the business’s employees must reside in a HUBZone; and

(3) The business’s Principal Place of Business must be located in a HUBZone within the San Antonio Metropolitan Statistical Area. [See 13 C.F.R. 126.200 (1999).]

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

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

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

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

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

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

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

African-Americans: Persons 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 one sixteenth (1/16<sup>th</sup>) percentage origin in any of the Native American Tribes, as recognized by the U.S. Department of the Interior, Bureau of Indian Affairs and as demonstrated by possession of personal tribal role documents.

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

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

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

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

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

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

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

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

**Significant Business Presence** – defined as an established place of business in one or more of the eight (8) counties making up the SAMSA, from which twenty percent (20%) of the entity’s full-time, part-time and contract employees regularly are based, and from which a substantial role in the S/M/WBE's performance of a Commercially Useful Function is conducted. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a significant business presence. To qualify for this Program, a S/M/WBE must be headquartered or have a *significant business presence* for at least one (1) year within the Relevant Marketplace

**Small Business Enterprise (hereafter referred to as “SBE”)** – means a corporation, partnership, sole proprietorship or other recognized legal entity existing for the purpose of making a profit, is independently owned and operated by Individuals legally residing in or are citizens of the United States or its territories, meets the U.S. Small Business Administration (hereafter referred to as “SBA”) size standard for a small business in its particular industry(ies) and meets the Significant Business Presence requirements, as defined herein.

**Small Business Office (hereafter referred to as “SBO”)** – means the office within City’s EDD Department primarily responsible for general oversight and administration of the S/M/WBE Program.

**Small Business Office Manager (hereafter referred to as “SBO Manager”)** – refers to the Assistant Director of EDD responsible for the management of the SBO and ultimately responsible for oversight, tracking, monitoring, administration, implementation and reporting of the S/M/WBE Program. The SBO Manager also is responsible for enforcement of Grantee, Consultant and vendor compliance with contract participation requirements and ensuring that overall SBEDA Program goals and objectives are met.

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

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

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

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

**Women Business Enterprises (hereafter referred to as “WBEs”)** – refers to any legal entity, except a Joint Venture, organized to engage in for-profit transactions, certified, for purposes of the SBEDA Ordinance, as being a Small Business Enterprise, is at least fifty-one percent (51%)

owned, managed and controlled by one or more non-minority women Individuals lawfully residing in or are citizens of the United States or its territories, is ready, willing and able to sell goods or services to be purchased by City and meets the Significant Business Presence requirements, as defined herein. Unless otherwise stated, WBE, as used in this Agreement, is not inclusive of MBEs.

D. SBEDA Program Compliance – General Provisions

Grantee acknowledges and accepts the terms of City's SBEDA Ordinance, as amended, together with all requirements, guidelines and procedures set forth in City's SBEDA Policy & Procedure Manual, are in furtherance of City's efforts at economic inclusion and, moreover, such terms are part of Grantee's Scope of Work, as referenced in City's Funding Agreement, forming the basis for a Funding Agreement award and subsequent execution of this Agreement. These SBEDA Ordinance requirements, guidelines and procedures hereby are incorporated by reference into this Agreement and are considered by the Parties hereto to be material terms. Grantee's agreement fully to comply with these SBEDA program terms is a material condition for being awarded this Funding Agreement by City. Without limitation, Grantee further agrees to the following terms as part of its contract compliance responsibilities under City's SBEDA Program:

1. Grantee fully shall cooperate with the SBO and other City departments in the data collection and monitoring efforts regarding Grantee's utilization and payment of and to Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers, S/M/WBE firms and HUBZone firms, as applicable, for their performance of Commercially Useful Functions pursuant to this Agreement 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, the timely entry of data into monitoring systems and ensuring the timely compliance of its Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers with this term;
2. Grantee fully shall cooperate with any City or SBO investigation (and shall also respond truthfully and promptly to any City or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of Grantee, its Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers;
3. Grantee shall permit the SBO, upon reasonable notice, to undertake inspections as necessary including, but not limited to, contract-related correspondence, records, documents, payroll records, daily logs, invoices, bills, cancelled checks and work product, and to interview Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers and workers to determine whether there has been a violation of the terms of this

Agreement;

4. Grantee immediately shall notify the SBO, in writing, on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to Grantee's Sub-Consultant/Supplier Utilization Plan for this Agreement, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by Grantee to replace the Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Supplier in accordance with the applicable Affirmative Procurement Initiative. All proposed changes by Grantee to its Sub-Consultant/Supplier Utilization Plan including, but not limited to, proposed self-performance of work by Grantee of work previously designated for performance by Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Supplier(s), substitutions of new Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers, terminations of previously designated Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers or reductions in the scope of work and value of work awarded to Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and/or Suppliers, shall be subject to advanced written approval by the Originating Department and the SBO.
5. Grantee immediately shall notify the Originating Department and SBO of any transfer or assignment of its contract with City, as well as any transfer or change in its ownership or business structure.
6. Grantee shall retain all records of its Consultant, Sub-Consultant, Contractor, Subcontractor and/or Supplier payments pursuant to this Agreement for a minimum of four (4) years or as required by state law, following the conclusion of this contract or, in the event of litigation concerning this Agreement, for a minimum of four (4) years or as required by state law following the final determination of litigation, whichever is later.
7. In instances wherein the SBO determines that a Commercially Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in Grantee's Sub-Contractor/Supplier Utilization Plan, Grantee shall not be given credit for the participation of its S/M/WBE or HUBZone Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s), Suppliers and/or joint venture partner(s) toward attainment of S/M/WBE or HUBZone firm utilization goals and Grantee and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties, in accordance with the SBEDA Ordinance.



8. Grantee acknowledges that the CITY will not execute a contract or issue a Notice to Proceed for this project until the Grantee and each of its Subcontractors for this project have registered and/or maintained active status in the CITY's Centralized Vendor Registration System, and Grantee has represented to CITY which primary commodity codes each registered Subcontractor will be performing under for this contract.

E. SBEDA Program Compliance – Affirmative Procurement Initiatives

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

**M/WBE Subcontracting Program.** In accordance with SBEDA Ordinance Section III. D.6. (b), this contract is being awarded pursuant to the M/WBE Subcontracting Program. Grantee agrees to subcontract at least **thirty percent (30%)** of the contract value to certified M/WBE firms headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA);

The Subcontractor / Supplier Utilization Plan that Grantee submitted to CITY for this contract (or, as appropriate, that it agrees to submit during the price proposal negotiation phase of this contract), and that contains the names of the certified M/WBE Subcontractors to be used by Grantee on this contract, the respective percentages of the total prime contract dollar value to be awarded and performed by each M/WBE Subcontractor, and documentation including a description of each M/WBE Subcontractor's scope of work and confirmation of each M/WBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount is hereby attached and incorporated by reference into the material terms of this Agreement. In the absence of a waiver granted by the SBO, the failure of Grantee to attain this subcontracting goal for M/WBE firm participation in the performance of a Commercially Useful Function under the terms of its contract shall be a material breach and grounds for termination of the contract with the CITY, and may result in debarment from performing future CITY contracts, withholding of payment for retainage equal to the dollar amount of the underutilization below the agreed upon M/WBE subcontracting goal, and/or shall be subject to any other remedies available under the terms of this Agreement for violations of the SBEDA Ordinance, or under any other law.

F. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, Grantee represents and warrants it has complied with, throughout the course of this solicitation and contract award process and will continue to comply with, City's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, Grantee shall not discriminate on the

basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation or, on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring or commercial treatment of Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s), Suppliers vendors or commercial customers, nor shall Grantee retaliate against any person for reporting instances of such discrimination. Grantee shall provide equal opportunity for Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s), Suppliers and vendors to participate in all of Grantee's public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this **clause** shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in City's Relevant Marketplace. Grantee understands and agrees a material violation of this **clause** shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification of Grantee from participating in City contracts or other sanctions. This **clause** is not enforceable by or for the benefit of, and creates no obligation to, any third party. Grantee's certification of its compliance with this Commercial Nondiscrimination Policy, as submitted to City pursuant to the solicitation for this Agreement, hereby is incorporated into the material terms of this Agreement. Grantee shall incorporate this Commercial Nondiscrimination Policy clause into each of its Consultant(s), Sub-Consultant(s), Contractor(s) Subcontractor(s) and Supplier agreements entered into pursuant to City contracts.

G. Prompt Payment

Upon execution of this Agreement, Grantee shall be required to submit to City accurate progress payment information with each invoice, with regard to each of its Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and Suppliers, including HUBZone Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and Suppliers, to ensure Grantee's reported subcontract participation is accurate. Grantee shall pay its Consultant(s), Sub-Consultant(s), Contractor(s), Subcontractor(s) and Suppliers in compliance with Chapter 2251, Texas Government Code (known as the "Prompt Payment Act") within ten (10) days of receipt of payment from City. In the event of Grantee's noncompliance with these prompt payment provisions, no new City contracts shall be issued to Grantee until City's audit of previous subcontract payments is complete and payments are verified to be in accordance with the specifications of the Agreement.

H. Violations, Sanctions and Penalties

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

1. fraudulently obtains, retains, attempt to obtain, or aids another in fraudulently obtaining, retaining, or attempting to obtain or retain Certification status as an SBE, MBE, WBE, M/WBE, HUBZone firm, Emerging M/WBE, or ESBE for purposes of benefitting from the SBEDA Ordinance;

2. willfully falsifies, conceals or covers up by a trick, scheme or device, a material fact or makes any false, fictitious or fraudulent statements or representations, or makes use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statements or entries pursuant to the terms of the SBEDA Ordinance;
3. willfully obstructs, impedes or attempts to obstruct or impede any authorized official or employee investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;
4. fraudulently obtains, attempts to obtain or aids another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of the SBEDA Ordinance; and
5. makes false statements to any entity that any other entity is or is not certified as an S/M/WBE for purposes of the SBEDA Ordinance.

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

1. Suspension of contract;
2. Withholding of funds;
3. Rescission of contract based upon a material breach of contract pertaining to S/M/WBE Program compliance;
4. Refusal to accept a response or proposal; and
5. Disqualification of Grantee or other business firm from eligibility for providing goods or services to City for a period not to exceed two years (upon approval by the San Antonio City Council).