

AN ORDINANCE 2017-04-13-0243

**APPROVING A FUNDING AGREEMENT WITH PORT SAN ANTONIO
IN THE AMOUNT OF \$1,539,960.00 FUNDED THROUGH THE FY 2017-
2022 CAPITAL IMPROVEMENT PROGRAM BUDGET FOR A SITE
DEVELOPMENT PROJECT.**

* * * * *

WHEREAS, Port San Antonio (the “Port”) is home to the U.S. Air Force Cyber Command and private sector cyber security contractors employing approximately 1,000 individuals; and

WHEREAS, the cybersecurity and information technology industries are targeted industries of the City; and

WHEREAS, given the exponential growth in the cybersecurity field, the Port is seeking to meet the increasing demand for facilities to accommodate local cybersecurity operations by constructing a 90,000 square foot building as a site development project (the “Project”) at Port San Antonio; and

WHEREAS, the Port has requested, and staff is recommending that the City allocate capital improvement funds in the amount of \$1,539,960.00 for the design and construction of site development items necessary for the Project, including: (1) the extension of major utility lines; (2) site preparation; and (3) the location of on-site utilities, including domestic water, fire water, sanitary sewer, and storm drainage; and

WHEREAS, the Project is anticipated to contribute to the creation of 400 new high-wage and high-skilled jobs at Port San Antonio; **NOW THEREFORE**:

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

SECTION 1. The City Council authorizes the negotiation and execution of a Funding Agreement between the City and Port San Antonio in the amount of \$1,539,960.00 for a site development project to include the construction of a 90,000 square foot facility at Port San Antonio. The City Manager, or her designee, is authorized to execute the Funding Agreement in accordance with this Ordinance. A copy of the Funding Agreement, in substantial final form, is attached to this Ordinance as **Attachment I**.

SECTION 2. A Payment in an amount not to exceed \$1,539,960.00 in SAP Fund 40099000, Other Capital Projects, SAP Project Definition 16-00014, Port SA Site Development, is authorized to be encumber and make payable to Port Authority of San Antonio (Port SA), for the design and construction of site development items necessary for the office building project. Payments for services are contingent upon the availability of funds and the sale of future City of San Antonio, Certificate of Obligation Bonds in accordance with the adopted capital budget. Payment is limited to the amounts budgeted in the Operating and/or Capital Budget funding

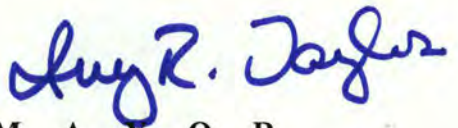
RR
4/13/17
Item No. 11

sources identified. All expenditures will comply with approved operating and/or capital budgets for current and future fiscal years.

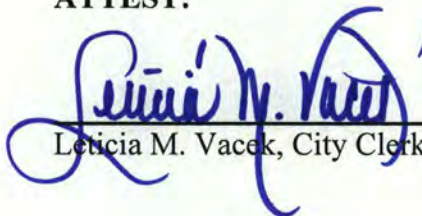
SECTION 3. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, 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 4. This Ordinance shall become effective immediately upon its passage by eight (8) votes or more and upon ten (10) days following its passage if approved by fewer than eight (8) votes.

PASSED AND APPROVED this 13th day of April, 2017.

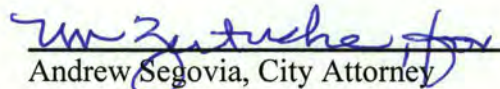

M A Y O R
Ivy R. Taylor

ATTEST:



Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:



Andrew Segovia, City Attorney

Agenda Item:	11 (in consent vote: 4, 5, 6, 7, 8, 9, 10, 11, 12)						
Date:	04/13/2017						
Time:	10:15:06 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing a funding agreement in an amount not to exceed \$1,539,960.00 for a site development project with the Port Authority of San Antonio, located in Council District 4, funding approved in the FY 2016 Budget and included in the FY 2017-2022 Capital Improvement Program Budget. [Carlos Contreras, Assistant City Manager; Rene Dominguez, Director, Economic Development]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ivy R. Taylor	Mayor		x				
Roberto C. Treviño	District 1		x			x	
Alan Warrick	District 2		x				x
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5	x					
Ray Lopez	District 6		x				
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				
Joe Krier	District 9		x				
Michael Gallagher	District 10		x				

Attachment I

STATE OF TEXAS § **FUNDING AGREEMENT**
§ **BETWEEN THE CITY OF ANTONIO**
COUNTY OF BEXAR § **AND PORT SAN ANTONIO**

This Funding Agreement (this "Agreement") is hereby made and entered into by and between the CITY OF SAN ANTONIO (hereinafter referred to as "City"), a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance No. 2017-__-__-____ dated April 13, 2017, and Port Authority San Antonio (hereinafter referred to as "Contractor"), a political subdivision of the State of Texas, acting by and through its officers, hereto duly authorized.

WHEREAS, City adopted its FY2017-2022 Capital Improvement Program Budget on September __, 2017 and approved funding of a project titled "Project Tech" defined as infrastructure improvements to facilitate future development at Port San Antonio; and

WHEREAS, the City has identified Contractor as the appropriate party to contract with for the fulfillment of the public purpose identified in the City's 2017-2022 Capital Improvement Program Budget in accordance with all applicable laws of public funding and the authorizing instruments for the public funding; and

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. TERM

1.01 The term of this Agreement shall commence upon execution of the Agreement by the City Manager or designee and continue for twelve (12) months or until the infrastructure improvements have been completed.

1.02 If the funding for the entire term of this Agreement is not appropriated at the time this Agreement is entered into, City retains the right to terminate this Agreement at the expiration of each of the City's budget periods.

II. GENERAL RESPONSIBILITIES OF CONTRACTOR

2.01 Provided Contractor receives the funding described in this Agreement, Contractor hereby accepts full responsibility for the performance of all services and activities described in this Agreement to complete the construction of the Project by September 30, 2017. The project shall include the site development and building construction as further described in Exhibit A (the "Project").

2.02 Current budget estimates of the Project are \$1,539,960.00. Contractor shall provide all necessary funding for the Project beyond the City's commitment contained herein and provide evidence to City that all Project funds have been secured. In the event the scope of the project is adjusted downward, the City shall have the option of adjusting its commitment downward accordingly.

2.03 Unless written notification by Contractor to the contrary is received and approved by City, Contractor's Vice President of Real Estate Development shall be Contractor designated representative responsible for the management of this Agreement.

2.04 The Director of the Transportation and Capital Improvements Department ("TCI") or his designee shall be responsible for the administration of this Agreement on behalf of City until the completion of the Project on behalf of City. Street and drainage infrastructure will be reviewed by City.

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

2.06 Contractor shall provide to City their plans and specifications for the Project ("Plans") and such Plans shall be subject to the review and approval of City, acting in its capacity under this Agreement. After approval by City, Contractor shall not make any substantial changes to the Plans without the prior written approval of City. The approvals given in this Section do not relieve Contractor of the burden of obtaining all necessary governmental approvals and permits, including those provided by City through its relevant Development Services and Planning departments and relevant boards and commissions including the Historic and Design Review Commission, and the State of Texas Commission on Environmental Quality (Article 9102).

2.07 Contractor shall submit all a project scope, schedule and monthly updates to TCI Director or his designee.

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

2.09 Contractor hereby accepts full responsibility for the performance of all services and activities described in this Agreement to complete the design and construction of the Project not later than two (2) years from the date of execution of this Contract.

III. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS

3.01 Contractor 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 contractors and subcontractors that may work on the Project.

3.02 To the extent applicable, Contractor agrees to abide by Chapters 252, and 271 of the Texas Local Government Code, and Chapters 2254 and 2267 of the Texas Government Code or other competitive contracting processes allowed for as express exceptions to these laws.

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

3.04 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 and the City-funded portion of the Project. Contractor 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 and shall not accept affidavits.

B. In accordance with the provisions of Chapter 2258 and Ordinance No. 2008-11-20-1045, Contractor shall request upon advertisement of construction bids, and the City will provide Contractor 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 Contractor is required, and shall require its construction contractor and all subcontractors to comply with each updated schedule of the general prevailing rates in effect at the time the Contractor calls for bids for construction of a given phase. The Contractor is further required to cause the latest prevailing wage determination decision to be included in bids and contracts with the Contractor's general contractor and all subcontractors for construction of each Phase. Contractor is responsible for and shall collect and monitor monthly 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 Contractor 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 Contractor from its obligation under any federal or state law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed under this Agreement.

3.05 ENVIRONMENTAL.

Construction shall be in accordance with the all state and federal environmental requirements including all City applicable construction and development regulations.

3.06 SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY PROGRAM (RESERVED FOR NEGOTIATION).

A. The City, through City Ordinance No. 2010-06-17-0531, and as amended, has adopted and implemented a Small Business Economic Development Advocacy ("SBEDA") Program. Information regarding the SBEDA Ordinance may be found on the City's Economic Development Department (EDD) website and is also available in hard copy form upon request to the City. Contractor understands and agrees that for portions of the Project undertaken by Contractor in the award of contracts, subcontracts and other opportunities for design, construction and operation of the Project, this Funding Agreement shall be subject to the SBEDA Affirmative Procurement Initiative and goal as determined by the applicable SBEDA Goal Setting Committee.

B. The applied SBEDA Ordinance Compliance Provisions, Affirmative Procurement Initiative (API), goal and a Subcontractor/Supplier Utilization Plan is attached and incorporated into this Funding Agreement as Exhibit B SBEDA.

IV. OWNERSHIP, USE OPERATIONS

4.01 Contractor hereby acknowledges that it will construct the Project in a manner consistent with use by the general public or for a public purpose. Contractor shall not employ, nor allow others to employ, discriminatory practices in the use of the Project. Contractor hereby agrees that the programs and use described above will continue for the term of this Agreement.

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

4.03 The Project improvements shall be used for public infrastructure improvements and to facilitate future development at Port San Antonio during the entire term of the Bonds in connection therewith.

V. FUNDING AND ASSISTANCE BY CITY

5.01 City shall reimburse Contractor for all eligible expenses incurred hereunder. Notwithstanding any other provisions of this Agreement, the total of all payments and other obligations made or incurred by City hereunder shall not exceed the sum of \$_____ plus the sum of \$_____ that City shall retain for fiscal and project oversight, for total funding by City of \$1,539,960.00.

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

5.03 Funding shall consist of reimbursements paid to Contractor for allowable costs of the Project, not to exceed \$1,539,960.00.

**VI. RECEIPT, DISBURSEMENT AND ACCOUNT
OF FUNDS BY CONTRACTOR**

6.01 Contractor agrees to maintain readily identifiable records that will provide accurate, current, separate, and complete disclosure of the status of any funds received pursuant to this Agreement. Contractor further agrees:

- (A) That maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Agreement and with all generally accepted accounting practices; and
- (B) That Contractor's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

6.02 Contractor agrees to retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials (hereinafter "records") pertaining to activities pertinent to this Agreement for a minimum of four (4) years from the completion of the Projects. Records will be retained by Contractor in an electronic format and Contractor will forward the records to City at the end of the four year period.

6.03 Contractor shall maintain a numbered interest bearing account in an FDIC insured financial institution for the receipt and disbursement of all funds received pursuant to this Agreement and further agrees that all checks and withdrawals from such account shall have itemized documentation in support thereof pertaining to the use of City funds provided under this Agreement. All interest earned on funds in the account shall be applied to the allowable costs of construction of the Project in accordance with the provisions hereof.

6.04 City shall reimburse Contractor on a monthly basis upon receipt and approval of an invoice through the City's Project Reporting Information Management Exchange Link (COSA *PRIMELink*)

6.05 All requests for reimbursement shall be submitted through the COSA *PRIMELink*. Contractor shall sign a Business Level Agreement and ensure that all of its employees or representatives utilizing *PRIMELink* sign and comply with an Individual User Agreement. Such requests for reimbursement shall be completed on *PRIMELink* and/or utilizing forms and instructions approved by TCI. Prior to the initial request for reimbursement, Contractor must submit a schedule of values for payment to be approved by TCI, which approval shall not be unreasonably withheld, conditioned, or delayed. Any changes to the schedule of values once approved will be processed and approved as task orders through the portal.

6.06 Prior to reimbursement, City will have the right to inspect work completed to ensure conformance with the approved Plans. Invoices should include all supporting documentation that costs have been incurred, as required by City.

6.07 City agrees to provide Contractor written notice regarding any expenditure the City reasonably determines to be outside the permissible parameters of this Agreement. Said notice will provide Contractor thirty (30) days from receipt of said notice to cure the deficiency or refund to the City any sum of money paid by City to Contractor determined to:

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

6.08 Upon termination of this Agreement, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in Section 6 as a result of any auditing or monitoring by City, Contractor 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.

VII. ALLOWABLE EXPENDITURES

7.01 Upon preparation of a construction plan and budget by Contractor, Contractor shall submit said budget to City for approval of any costs to be paid from funds received hereunder. Costs shall be considered allowable only if so approved in Contractor's construction budget, or otherwise approved in advance by City in writing, and incurred directly and specifically in the performance of and in compliance with this Agreement and with all city, state and federal laws; regulations and ordinances affecting Contractor's operations hereunder. Only the following categories of costs shall be considered allowable:

- **Major utility lines (i.e., water mains, sanitary sewer mains, electrical primary lines, etc.) that will be extended from their existing locations to the project boundaries.**
- **Site preparation including clearing and stripping, grading, building pad excavation and soil preparation, select fill, pavement base and spoil haul-off.**
- **On-site utilities including domestic water, fire water, sanitary sewer, storm drainage**

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

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

- Personnel costs, salaries or wages paid directly by Contractor 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, except for items of a capital nature which are being provided by Contractor's General Contractor and shown on the approved Plans and specifically approved by City.
- Advertising except related to procurement of the contracts for the project or outreach related to the Small Business Development Advocacy Program requirements.

7.03 Written requests for prior approval shall be Contractor's responsibility and shall be made thirty (30) days from date necessary to permit a thorough review by City. Procurements and/or purchases which must be approved pursuant to the terms of this Agreement shall be conducted entirely in accordance with all applicable terms, provisions and requirements hereof.

VIII. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

8.01 Contractor further represents and warrants that:

- (A) 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.
- (B) It is financially stable and capable of fulfilling its obligations under this Agreement and that Contractor shall provide City immediate written notice of any adverse material change in the financial condition of Contractor that may materially and adversely effect its obligations hereunder.
- (C) No litigation or proceedings are presently pending or to Contractor's knowledge, threatened against Contractor.
- (D) None of the provisions contained herein contravene or in any way conflict with the authority under which Contractor is doing business or with the provisions of any existing indenture or agreement of Contractor.

IX. ACCESSIBILITY OF RECORDS

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

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

X. MONITORING AND EVALUATION

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

XI. INDEMNITY

11.01 THE CITY AND CONTRACTOR ACKNOWLEDGE THEY ARE POLITICAL SUBDIVISIONS OF THE STATE OF TEXAS AND THAT EACH ARE SUBJECT TO AND SHALL COMPLY WITH THE APPLICABLE PROVISIONS OF THE TEXAS TORT CLAIMS ACT, AS SET OUT IN CIVIL PRACTICES AND REMEDIES CODE, SECTION 101.001 et seq., INCLUDING BUT NOT LIMITED TO THE REMEDIES AUTHORIZED THEREIN REGARDING CLAIMS OR CAUSES OF ACTION THAT MAY BE ASSERTED BY THIRD PARTIES FOR ACIDENT, INJURY OR DEATH.

XI. INSURANCE & BONDS (RESERVED FOR NEGOTIATION)

11.01 Prior to the commencement of any work under this Agreement, Contractor shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the City's Transportation and Capital Improvements (TCI) Department, which shall be clearly labeled, "Port - Tech Facility" 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, 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 Agreement until such certificate and endorsements have been received and approved by the City's TCI Department. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

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

11.03 CONTRACTOR's financial integrity is of interest to the City; therefore, subject to CONTRACTOR's right to maintain reasonable deductibles in such amounts as are approved by the City, CONTRACTOR shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at CONTRACTOR'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:

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

11.04 Contractor agrees to obtain all insurance coverages with minimum limits of not less than those limits delineated in Section 11.03 (Insurance table) from each vendor subcontracted by Contractor and provide a Certificate of Insurance and Endorsement that names the Contractor and the CITY as an additional insured.

11.05 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). Contractor 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. CONTRACTOR shall pay any costs incurred resulting from said changes.

City of San Antonio
Attn: TCI Department
Contract Services Division

P.O. Box 839966
San Antonio, Texas 78283-3966

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

- Name the City, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the City, with the exception of the workers' compensation and professional liability policies;
- Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the City is an additional insured shown on the policy;
- Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the City.
- 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.

11.07 Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, CONTRACTOR shall provide a replacement Certificate of Insurance and applicable endorsements to City. City shall have the option to suspend CONTRACTOR's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

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

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

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

11.11 Contractor shall comply with Texas Government Code Chapter 2253 provisions regarding performance and payment bonds on certain Public Works contracts (copies of required bonds must be provided to City prior to the start of construction).

XII. NONDISCRIMINATION

12.01 As a party to this contract, Contractor understands and agrees to comply with the *Non-Discrimination Policy* of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein.

XIII. CONFLICT OF INTEREST

13.01 Contractor covenants that neither it nor any member of its governing body or of its staff presently has any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. Contractor further covenants that in the performance of this Agreement, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

13.02 Contractor 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.

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

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

XIV. POLITICAL ACTIVITY

14.01 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.

XV. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL

15.01 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 Contractor, shall, upon receipt, become the property of City.

XVI. CONTRACTING

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

16.02 City shall in no event be obligated to any third party, including any sub-contractor of Contractor, for performance of or payment for work or services.

XVII. CHANGES AND AMENDMENTS

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

17.02 It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this Agreement and that any such changes shall be automatically incorporated into this Agreement without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

XVIII. ASSIGNMENTS

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

XIX. SEVERABILITY OF PROVISIONS

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

clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

XX. NON-WAIVER OF PERFORMANCE

20.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either Party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

20.02 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.

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

XXI. ENTIRE AGREEMENT

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

XXII. NOTICES

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

CITY:

Director Transportation & Capital Improvements
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966
San Antonio, Texas 78283-3966

CONTRACTOR:

Port San Antonio
Attn: Ray Flores
907 Billy Mitchell Blvd.
San Antonio, TX 78226-1802

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.

XXIII. PARTIES BOUND

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

XXIV. RELATIONSHIP OF PARTIES

24.01 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.

XXV. TEXAS LAW TO APPLY

25.01 This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the Parties created hereunder are performable in Bexar County, Texas.

XXVI. GENDER

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

XVII. CAPTIONS

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

XXIII. LEGAL AUTHORITY

28.01 Contractor 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.

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

EXECUTED IN DUPLICATE ORIGINALS, each of which shall have the full force and effect of an original this the ___ day of _____, 2017.

CITY OF SAN ANTONIO
a municipal corporation

PORT SAN ANTONIO
a political subdivision of the State of Texas

By: _____
Sheryl Sculley
City Manager

By: _____
Roland Mower
President & CEO

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY