

FUNDING AGREEMENT

This AGREEMENT is entered into by and between the City of San Antonio, a Texas Municipal Corporation (“CITY”), acting by and through its City Manager, pursuant to Ordinance No. 2019-01-10-____, passed and approved on the 10th day of January 2019, and the San Antonio Missions Baseball Club, Inc. (“RECIPIENT”), by and through its president; WITNESSETH:

WHEREAS, Ordinance No. 2006-11-16-1300, dated November 16, 2006, authorized the First Amended and Restated Baseball Stadium Facility Lease Agreement (“Lease”) with RECIPIENT for the use of Nelson W. Wolff Municipal Stadium, located at 5757 New Highway 90 West in San Antonio, Bexar County, Texas (“Stadium”); and

WHEREAS, the Lease establishes the Wolff Stadium Building Fund to be used for capital expenditures and improvements to the Stadium, all of which require the approval of CITY; and

WHEREAS, beginning in 2019, RECIPIENT will be competing in AAA Baseball and improvements at the Stadium are necessary to comply with League standards; and

WHEREAS, the current Stadium Clubhouse must be improved for the coming season and the estimated costs for such work total \$520,000.00 (“Project”); and

WHEREAS, CITY and RECIPIENT agreed to share the costs of such improvements in this First Amendment and Extension to First Amended and Restated Baseball Stadium Facility Lease Agreement, with CITY paying for 70% and RECIPIENT paying for 30%;
NOW THEREFORE

For and in consideration of the following mutual promises and obligations, and for the benefit of the citizens of the City of San Antonio, CITY and RECIPIENT agree as follows:

1. CITY will pay an amount not to exceed \$364,000.00 to RECIPIENT toward the cost of capital improvements to the Stadium Clubhouse, including home and visitor dug out improvements and batting cage improvements, reflecting 70% of the Project costs. RECIPIENT shall be responsible for contracting for such improvements. RECIPIENT shall submit invoices for payment upon the completion of the Project. CITY will reimburse RECIPIENT \$239,000.00 from the Wolff Stadium Building Fund and an amount not to exceed \$125,000.00 from the Hotel Occupancy Tax Renewal and Improvement Fund (“HOT R&I Fund”), within 30 days of the submission of valid receipts. Once facility rental and ticket fee revenue generated from the 2019 baseball season is received by the City, \$100,000.00 will be reimbursed to the HOT R&I Fund from the Wolff Stadium Building Fund.

2. All CITY funds provided under this Agreement shall be limited to the funding sources set forth in Section 1.
3. RECIPIENT will maintain accounting records for all expenditures made from funds provided for under this Agreement. RECIPIENT will maintain these records in accordance with generally accepted accounting practices and shall make these records available to CITY for audit by CITY or its contracted auditor. These records will contain sufficient documentation to provide full support and justification for each expenditure. RECIPIENT will maintain these records for four (4) years from the termination date of this Agreement.
4. This Agreement is not assignable and funds received shall only be used by RECIPIENT for the Project.
5. In the event all of the above described funds are not used for the purpose set out in this Agreement and in accordance with all its terms and provisions, RECIPIENT will refund any such amounts to CITY within sixty (60) calendar days of request.
6. RECIPIENT represents, warrants, assures, and guarantees that it possesses the legal authority to enter into this Agreement and to perform the responsibilities required. The signer of this Agreement for RECIPIENT represents, warrants, assures, and guarantees that he or she has full legal authority to execute this Agreement on behalf of RECIPIENT and to bind RECIPIENT to all of its terms, performances and provisions.
7. CITY and RECIPIENT agree that CITY shall not be obligated or liable under this Agreement to any party, other than RECIPIENT, for payment of any monies or provision of any goods or services.
8. RECIPIENT agrees that CITY may carry out monitoring and evaluation activities to ensure RECIPIENT'S compliance with this Agreement.
- 9. RECIPIENT covenants and agrees to FULLY INDEMNIFY, DEFEND and HOLD HARMLESS, CITY and the elected officials, employees, officers, directors, volunteers, and representatives of CITY, individually or 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 CITY directly or indirectly arising out of, resulting from or related to RECIPIENT's activities under this Agreement, including any acts or omissions of RECIPIENT, any agent, officer, director, representative, employee, consultant or subcontractor of RECIPIENT, and their respective officers, agents, employees, directors, and representatives while in the exercise of performance of the rights or duties under this Agreement, all without, however, waiving any governmental immunity available to CITY under Texas Law and without waiving any defenses of the parties under Texas Law. IT IS FURTHER COVENANTED AND AGREED THAT SUCH INDEMNITY SHALL APPLY EVEN WHERE SUCH COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES,**

FINES, PENALTIES, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY AND/OR SUITS ARISE IN ANY PART FROM THE NEGLIGENCE OF CITY, THE ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND REPRESENTATIVES OF CITY, UNDER THIS AGREEMENT. The provisions of this INDEMNITY are solely for the benefit of the Parties and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. RECIPIENT shall promptly advise CITY in writing of any claim or demand against CITY or RECIPIENT known to RECIPIENT, related to or arising out of RECIPIENT's activities under this Agreement and shall see to the investigation and defense of such claim or demand at RECIPIENT's cost. CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving RECIPIENT of any of its obligations under this Section. Notwithstanding any condition imposed by a policy of insurance to which RECIPIENT and CITY are named, CITY shall retain the right, at its option and at its own expense, to participate in any such defense provided by RECIPIENT or RECIPIENT's agent under this Section.

It is the EXPRESS INTENT of the Parties, that the INDEMNITY provided for in this Section, is an INDEMNITY extended by RECIPIENT to INDEMNIFY, DEFEND and HOLD HARMLESS, CITY from the consequences of CITY's OWN NEGLIGENCE, provided, however, that the INDEMNITY provided for in this section SHALL APPLY only when the NEGLIGENT ACT of CITY is a CONTRIBUTORY CAUSE of the resultant injury, death or damage, and shall have no application when the negligent act of CITY is the sole cause of the resultant injury, death, or damage. RECIPIENT further AGREES TO DEFEND, AT ITS OWN EXPENSE, and ON BEHALF OF CITY AND IN THE NAME OF CITY, any claim or litigation brought against CITY and its elected officials, employees, officers, directors, volunteers and representatives, in connection with any such injury, death, or damage for which this INDEMNITY shall apply, as set forth above.

RECIPIENT shall advise CITY in writing within 24 hours of any claim or demand against CITY or RECIPIENT known to RECIPIENT related to or arising out of RECIPIENT's activities under this Agreement.

Defense Counsel. CITY shall have the right to select or to approve defense counsel to be retained by RECIPIENT in fulfilling its obligation to defend and indemnify CITY, unless such right is expressly waived by CITY in writing. RECIPIENT shall retain CITY approved defense counsel within seven (7) business days of CITY's written notice that CITY is invoking its right to indemnification under this Agreement. If RECIPIENT fails to retain counsel within such time period, CITY shall have the right to retain defense counsel on its own behalf, and RECIPIENT shall be liable for all costs incurred by CITY. CITY shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

Employee Litigation. In any and all claims against any party indemnified by any employee of RECIPIENT, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for RECIPIENT or any subcontractor under worker's compensation or other employee benefit acts.

10. The insurance provisions of the Lease shall govern this Agreement.

11. RECIPIENT agrees to comply with all applicable local, state and federal ordinances, rules, regulations and laws when using the funds provided by CITY under this Agreement.

12. As a party to this Agreement, RECIPIENT 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 in this Agreement.

13. The Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as city owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

- (i) a City officer or employee;
- (ii) his parent, child or spouse;
- (iii) a business entity in which the officer or employee, or his parent, child or spouse owns (i) 10% or more of the voting stock or shares of the business entity, or (ii) 10% or more of the fair market value of the business entity;
- (iv) a business entity in which any individual or entity above listed is a (i) subcontractor on a City contract, (ii) a partner, or (iii) a parent or subsidiary business entity.

RECIPIENT warrants and certifies as follows:

- (i) RECIPIENT and its officers, employees and agents are neither officers nor employees of CITY.
- (ii) RECIPIENT has tendered to CITY a Contracts Disclosure Statement in compliance with CITY's Ethics Code.

RECIPIENT acknowledges that CITY's reliance on the above warranties and certifications is reasonable.

14. Texas Government Code §2270.002 provides that a governmental entity may not enter into a contract with a company for goods or services, unless the contract contains a written verification from the company that it:

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

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

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

By submitting an offer to or executing contract documents with CITY, RECIPIENT verifies that it does not boycott Israel, and will not boycott Israel during the term of this Agreement. CITY relies on RECIPIENT's verification. If found to be false, CITY may terminate this Agreement for material breach, without providing the opportunity to cure.

15. 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 CITY ordinances, then and in that event it is the intention of the Parties that such invalidity, illegality or unenforceability shall not affect any other clause or provision and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained; it is also the intention of the Parties 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.

16. 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. 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 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 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.

17. No act or omission of CITY shall in any manner impair or prejudice any right, power, privilege, or remedy available to CITY under this Agreement or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved.

18. This Agreement constitutes the final and entire agreement between the Parties 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 unless same be in writing, dated subsequent to the date of this Agreement, and duly executed by the Parties.

19. In the event any disagreement or dispute should arise between the Parties pertaining to the interpretation or meaning of any part of this Agreement or its governing rules, regulations, laws, codes or ordinances, CITY shall have the final authority to render or secure an interpretation.

20. 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:

Patricia Muzquiz Cantor, Director
Convention and Sports Facilities
900 E. Market
San Antonio, Texas 78205

RECIPIENT:

Burl Yarbrough
President
XXXXXXXXXXXXXX
XXXXXXXXXXXXXX

21. Nothing contained in this Agreement shall be deemed or construed by the Parties, 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.

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

EXECUTED this ____ day of _____ 2019.

CITY OF SAN ANTONIO

SAN ANTONIO MISSIONS BASEBALL CLUB, INC.

Sheryl Sculley
City Manager

Burl Yarbrough
President

APPROVED AS TO FORM: _____
City Attorney