

**THIS IS A DRAFT AND WILL BE REPLACED BY THE FINAL, SIGNED  
ORDINANCE OR RESOLUTION ADOPTED BY CITY COUNCIL.**

**AN ORDINANCE**

**AUTHORIZING THE NEGOTIATION AND EXECUTION OF A  
DEVELOPER PARTICIPATION AGREEMENT WITH SECURITY  
SERVICE FEDERAL CREDIT UNION AND AUTHORIZING \$817,000.00,  
PAYABLE TO SSFCU, FOR THE REGIONAL DRAINAGE AND WATER  
QUALITY PUBLIC INFRASTRUCTURE IMPROVEMENTS  
ASSOCIATED WITH THE DEVELOPMENT OF THE SSFCU  
HEADQUARTERS.**

\* \* \* \* \*

**WHEREAS, Security Service Federal Credit Union (SSFCU)** had acquired property in March 2014 to consolidate its San Antonio locations and construct a new headquarters facility at 14880 West IH-10 in San Antonio; and

**WHEREAS,** as part of the construction of its new headquarters facility, **SSFCU** will provide public infrastructure improvements to the area, which include Regional Drainage and Water Quality Public Infrastructure Improvements; and

**WHEREAS,** the drainage improvements at UTSA Boulevard and UTEX Boulevard will provide for improvements to the current drainage structures and enhanced drainage flow of the surrounding areas and will eliminate the low water crossing at UTSA Boulevard; and

**WHEREAS,** UTSA Boulevard is currently functioning with four 6 foot by 4 foot box culverts and this project will add four 8 foot by 4 foot box culverts to, for a total of eight box culverts; and

**WHEREAS,** the drainage improvements at UTEX Boulevard include replacing four 30 inch pipe culverts with eight 8 feet by 4 feet box culverts; and

**WHEREAS,** on July 21, 2015, the Bexar County Commissioner's Court approved an Interlocal Agreement with the City of San Antonio in order to commit \$817,000.00 from Storm Water Quality Funds in support of this Project and will help accomplish the County's objective of improving storm water quality management; and

**WHEREAS,** this Ordinance authorizes payment of \$817,000.00 to **Security Service Federal Credit Union** for the Public Infrastructure and Water Quality Improvements for engineering and construction-related costs in relation to the Regional Drainage and Water Quality Public Infrastructure Improvements associated with the development of the SSFCU Headquarters; and

**WHEREAS,** if this Developer Participation Agreement with **SSFCU** is not approved, the Interlocal Agreement would be voided as funds are only available from Bexar County for the improvements to be constructed by **SSFCU** for the Regional Drainage and Water Quality Public Infrastructure Improvements associated with the development of the SSFCU Headquarters;  
**NOW THEREFORE,**

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

**SECTION 1.** The City Manager, or her designee, is authorized to execute a Developer Participation Contract, **ATTACHMENT A**, with **Security Service Federal Credit Union** for the Regional Drainage and Water Quality Public Infrastructure Improvements associated with the development of the SSFCU Headquarters.

**SECTION 2.** Payment in amount not to exceed \$20,776,776.00 in SAP Fund 40099000, Other Capital Projects, SAP Project Definition 23-01504, UTEX Boulevard Improvements, is authorized to be encumbered and made payable to **Security Service Federal Credit Union** (SSFCU), for execution of a Developer Participation Agreement.

**SECTION 3.** The financial allocations in this Ordinance are subject to approval by the Chief Financial Officer, City of San Antonio. The Chief Financial Officer may, subject to concurrence by the City Manager, or the City Manager's designee, correct allocation 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 be effective immediately upon passage by eight or more affirmative votes; otherwise, it shall be effective on the tenth day after passage.

**PASSED AND APPROVED** this \_\_\_\_ day of \_\_\_\_\_, **2015.**

**M A Y O R**  
Ivy R. Taylor

**ATTEST:**

**APPROVED AS TO FORM:**

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

\_\_\_\_\_  
Martha G. Sepeda, Acting City Attorney

STATE OF TEXAS           §  
  §  
COUNTY OF BEXAR       §           **DEVELOPER PARTICIPATION CONTRACT  
FOR SECURITY SERVICE FEDERAL CREDIT  
UNION HEADQUARTERS**

This Developer Participation Contract is hereby made and entered into by and between the City of San Antonio (hereafter referred to as "*City*"), a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance No. \_\_\_\_\_ dated \_\_\_\_\_ and Security Service Federal Credit Union (hereafter referred to as "*SSFCU*" or sometimes as "*Developer*" or "*Contractor*"), acting by and through its officers, hereto duly authorized (City and SSFCU hereafter referred to singularly as "Party" and collectively referred to as "the Parties").

**WHEREAS**, SSFCU plans to develop, construct and consolidate its current headquarters with its other San Antonio locations into a new headquarters facility (the "*SSFCU Headquarters*") located at 14880 W IH 10 in San Antonio; and

**WHEREAS**, the SSFCU Headquarters investment includes Regional Drainage and Water Quality Public Infrastructure Improvements described on the attached Exhibit "D" (hereinafter the "*PROJECT*");

**WHEREAS**, the Project qualifies for a Developer Participation Contract for public infrastructure improvements for which City funds may be used; and

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

**WHEREAS**, SSFCU will design and construct the Project, and

**WHEREAS**, the public benefit to be gained from the Project is the provision of improving public drainage, water quality and public infrastructure improvements for City of San Antonio; and

**WHEREAS**, Texas Local Government Code, Sections 212.071 – 212.074 allows a municipality to enter into agreements with a developer of a subdivision or land in the municipality pursuant to which a municipality may participate in the cost of public infrastructure improvements related to the development at a level not to exceed thirty percent (30%) of the total contract price required for public infrastructure improvements in a development or subdivision of land in the municipality; and

**WHEREAS**, this Developer Participation Contract with SSFCU for the Project limits City's participation to a level not to exceed 30% of the total Project infrastructure design and construction contract price not to exceed **EIGHT HUNDRED SEVENTEEN THOUSAND DOLLARS AND NO/100** (\$817,000.00) or less for the Project; and

**WHEREAS**, the total estimated infrastructure design and construction contract price (the "**Total Contract Price**") is TEN MILLION EIGHT HUNDRED FORTY-SIX THOUSAND TWO HUNDRED SIXTY-THREE DOLLARS AND NO/100 (\$10,846,263.00); and

**WHEREAS**, City's agreed participation in the Project is the lesser of an amount not to exceed **EIGHT HUNDRED SEVENTEEN THOUSAND DOLLARS AND NO/100** (\$817,000.00) and to a level not to exceed thirty percent (30%) of the Total Contract Price; and

**WHEREAS**, the amount appropriated by the San Antonio City Council to the Project is in an amount not to exceed **EIGHT HUNDRED SEVENTEEN THOUSAND DOLLARS AND NO/100** (\$817,000.00); and

**WHEREAS**, the Developer shall complete the design and construction of the Project not later than three (3) years from the date of execution of this Contract; 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. DEFINITIONS**

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

1.02 "**City's Representative**" means the Director of Transportation & Capital Improvements (hereafter referred to as "**TCI**") or such other person as the City Manager may designate.

1.03 "**Amount appropriated by City Council**" is an amount not to exceed **EIGHT HUNDRED SEVENTEEN THOUSAND DOLLARS AND NO/100 (\$817,000.00)**.

1.04 "**City Share**" means the lesser of 30% of the total contract price for the Project up to a maximum of **EIGHT HUNDRED SEVENTEEN THOUSAND DOLLARS AND NO/100 (\$817,000.00)**.

1.05 "**Contract**" means this Developer Participation Contract between City of San Antonio, Texas and SSFCU.

1.06 "**Contract Documents**" means this Contract and Exhibit A through Exhibit D attached hereto, incorporated herein by reference and made a part hereof for all purposes.

1.07 "**Construction Documents**" means the plans, specifications and estimates for the Project which shall be provided by the Developer pursuant to the terms of this Contract. The Construction Documents shall illustrate the dimensions, materials, methods of construction, methods of excavation, and other pertinent and customary details of the Project. A description of the Construction Documents is provided in Exhibit A attached hereto.

1.08 "**Developer**" means SSFCU.

1.09 "**Developer Property**" means the approximately 64 acre property described in Exhibit B attached hereto that is owned by Developer.

1.10 "**Developer's Representative**" means Developer's Project Manager or such other person as Developer may designate.

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

1.12 "**Development**" means the SSFCU Headquarters described in **Exhibit C** attached hereto.

1.13 "**Director**" means the Director of Transportation & Capital Improvements Department, City of San Antonio.

1.14 "**Project**" means the Regional Drainage and Water Quality Public Infrastructure Improvements more fully described in Exhibit D attached hereto and made a part hereof for all purposes.

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

1.16 "**Project Manager**" means Jack Dysart.

1.17 "**Subcontractor(s)**" means persons or business entities providing construction services or supplies for the Construction Contractor.

1.18 "Total Contract Price" is **TEN MILLION EIGHT HUNDRED FORTY SIX THOUSAND TWO HUNDRED SIXTY-THREE DOLLARS AND NO/100 (\$10,846,263.00)**

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

## II. CONTRACT PROVISIONS

2.01 Background. This Contract qualifies as a “Developer Participation Contract” pursuant to Sections 212.071-212.074 of the Texas Local Government Code. In this regard, Developer shall construct the Project and City shall pay the City Share of the Project Costs, and Developer shall pay the Developer’s Share of the Project Costs.

2.02 Developer shall design and construct the Project in accordance with the requirements of the City of San Antonio Unified Development Code (hereafter referred to as “UDC”) Conventional Drainage Design Standards.

2.03 After the Project is constructed and accepted by City, Developer shall submit a Request for Reimbursement to City for City’s Share as may be attributable to the completed engineering and construction of the Project. Any such request shall be accompanied by a certificate from the Project Manager certifying the amount of the Work performed and confirming that such Work was performed in accordance with the Construction Documents, stating the amount of City Share attributable thereto and Developer's Share and include a breakdown of labor, names of Contractors and materials used. Upon approval of the Request for Reimbursement, City shall pay City’s Share within thirty (30) days following City's receipt of such approved Request for Reimbursement. Developer shall initially pay all costs incurred from time to time with respect to the Work.

2.04 Prior to the commencement of construction on the Project, Developer’s Contractor (the “*Construction Contractor*”) shall provide City with (a) payment and performance bonds in accordance with and in satisfaction of Section 212.073 of the Texas Local Government Code and Chapter 2253 of the Government Code, reflecting City as beneficiary there under, and (b) insurance certificates showing City and Bexar County, Texas as a named insured in types and amounts reasonably required by City's Risk Manager. The foregoing shall remain in force and effect throughout the course of construction of the Project.

2.05 The Construction Contract shall prohibit third party beneficiaries other than City, which shall be specifically designated as a third party beneficiary, shall not be assignable by the Developer and shall provide City access to the Project at all reasonable times for inspection purposes. Developer shall acknowledge therein that it has read this Contract and understands that City has certain rights hereunder and pursuant to the Construction Contract. "As Built" Plans shall be provided to City no later than 60 days after completion of the Project, as jointly certified by the Project Manager and the Director.

2.06 Developer warrants that title to all Work covered by any Request for Reimbursement will pass to City no later than the time of payment. Developer further warrants that upon submittal of a Request for Reimbursement, all Work for which the Request for Reimbursement is issued shall, to the best of Developer’s knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of Developer, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work. **DEVELOPER SHALL INDEMNIFY AND HOLD CITY**

**HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY THE CONSTRUCTION CONTRACTOR, SUBCONTRACTORS, OR ANYONE CLAIMING BY, THROUGH OR UNDER THE CONSTRUCTION CONTRACTOR OR SUBCONTRACTOR FOR ITEMS COVERED BY PAYMENTS MADE BY CITY TO DEVELOPER.**

2.07 In the Request for Reimbursement, Developer shall certify that there are no known liens or bond claims outstanding at the date of the Request for Reimbursement, that all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current Request for Reimbursement and that except for such bills not paid but so included, there is no known basis for the filing of any liens or bond claims relating to the Work, and that releases from all Subcontractors and Developer's Construction Contractor's materialmen have been obtained in such form as to constitute an effective release of lien or claim under the laws of the State of Texas covering all Work performed; provided that if any of the foregoing is not true and cannot be certified, Developer shall revise the Request for Reimbursement as appropriate and identify all exceptions to the requested certifications.

2.08 City shall, within thirty (30) days after receipt of Developer's Request for Reimbursement, either pay the Request for Reimbursement, for such amount as City determines is properly due, or notify Developer in writing of City's reasons for withholding payment in whole or in part as provided in Section 2.10.

2.09 The payment of the Request for Reimbursement shall constitute City's understanding based on City's evaluation of the Work and the data comprising the Request for Reimbursement, that the Work has been completed and that, to the best of City's knowledge, information and belief, the quality of the work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion, and to any specific qualifications. The Payment will further constitute a representation that the Developer is entitled to payment in the amount paid. However, the issuance of a Payment shall not be a representation that City has: (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, or (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by City to substantiate Developer's right to payment.

2.10 City may withhold Payment in whole or in part, to the extent reasonably necessary to protect City if, in City's opinion, the requirements of this Section 2.10 cannot be made. If City is unable to make payment in the amount of the Request for Reimbursement, City shall notify Developer as provided in **Section 2.08** herein. If Developer and City cannot agree on a revised amount, City promptly will issue Payment for the amount for which City agrees. City also may withhold Payment, in whole or in part, because of subsequently discovered evidence, may modify the whole or a part of a Payment to such extent as may be necessary, in City's opinion, to protect City from loss for

which the Developer is responsible, including loss resulting from acts and omissions because of:

- 2.10.01 defective Work not remedied;
- 2.10.02 third party claims filed or reasonable evidence indicating probable filing of such claims for which Developer is responsible hereunder unless security acceptable to City is provided by Developer;
- 2.10.03 failure of Developer to make payments properly to the Construction Contractor, Subcontractors or for labor, materials or equipment;
- 2.10.04 reasonable evidence that the Work cannot be completed for the unpaid balance of City's Share and Developer has failed to provide City adequate assurance of its continued performance within a reasonable time after demand;
- 2.10.05 damage to City or to another Contractor;
- 2.10.06 reasonable evidence that the Work will not be completed within the Contract period, and that the unpaid balance would not be adequate to cover actual costs for the anticipated delay; or
- 2.10.07 persistent failure by the Developer to carry out the Work in accordance with the Contract Documents.

City shall pay the undisputed portions of such Request for Reimbursement within the time frames established in Article II.

2.11 When the above reasons for withholding payment are removed, payment shall be made for amounts previously withheld. City shall not be deemed in default by reason of withholding payment as provided for in subparagraph 2.10.

2.12 After City has reviewed the Request for Reimbursement, City shall make payment in the manner and within the time provided in the Contract Documents.

- 2.12.01 Developer shall, within ten (10) days following receipt of payment from City, require its Construction Contractor to pay all bills for labor and materials performed and furnished by others in connection with the construction, furnishing and equipping of the improvements and the performance of the work, and shall, if requested, provide City with evidence of such payment. Developer's failure to require such payments within such time shall constitute a material breach of this contract, unless Developer is able to demonstrate to City bona fide disputes associated with the unpaid Subcontractor or supplier and its work. The Construction



Contractor shall include a provision in each of its subcontracts imposing the same payment obligations on its Subcontractors as are applicable to the Construction Contractor hereunder, and if City so requests, shall provide copies of such Subcontractor payments to City. If Developer has failed to make payment promptly to its Subcontractors or for materials or labor used in the Work for which City has made payment to Developer, City shall be entitled to withhold payment to Developer to the extent necessary to protect City.

- 2.12.02 City shall, on request, furnish to the Construction Contractor or a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by Developer and action taken thereon by City on account of portions of the Work done by such Construction Contractor or Subcontractor.
- 2.12.03 City shall not have an obligation to pay or to see to the payment of money to the Construction Contractor or a Subcontractor, except as may otherwise be required by law, if any.
- 2.12.04 Payments to material suppliers shall be treated in a manner similar to that provided in this Section regarding the Construction Contractor and Subcontractors.
- 2.12.05 A reimbursement payment, or partial or entire use or occupancy of the Project by City shall not constitute acceptance of Work that was not performed or furnished in accordance with the Contract Documents.
- 2.12.06 Developer or its Construction Contractor acting on behalf of Developer, shall, as a condition precedent to any obligation of City under this Contract, provide to City payment and performance bonds in the full penal amount of the Contract in accordance with Texas Government Code Chapter 2253.

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

2.14 Construction Documents. Developer shall provide City with a complete set of Construction Documents meeting the requirements of this Contract and in conformance with all applicable local, state and federal codes and regulations and customary engineering practices. The Construction Documents shall be prepared by and bear the seal of the individual engineer working on behalf of the Project Manager. Construction of any part of the Project shall in no event commence prior to Director's approval of the Construction Documents for that part of the Project. Developer shall cause the preparation of the Construction Documents promptly upon completion of engineering and design and to diligently continue same to completion. Developer shall provide City with copies of the Project invoices for the Project as such invoices are received by Developer, and City shall pay City Share thereof. City shall own the Construction Documents upon payment by City of City Share of the total Project design/engineering charges and Developer shall thereupon obtain and provide Project Manager's assignment of its interest to City, subject to any limitations under law. Developer hereby assigns its interest in the Construction Documents to City, to become effective upon receipt by Developer of the total City Share. City shall own the Construction Documents for all purposes and may duplicate them, license them, use them and re-use them for any and all purposes.

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

2.16 Default. Upon the occurrence of a default by Developer in the performance of its obligations hereunder (a "Default") and the failure of Developer to cure such Default within thirty (30) days following receipt of written notice of Default from City (or such reasonably longer time as may be necessary provided the Developer commences the cure within thirty (30) days and continuously and diligently pursues the cure to completion), City shall have the right to terminate this Contract.

2.16.01 The failure or refusal of Developer/Developer's Contractor to start the Work.

- 2.16.02 A reasonable belief that the progress of the Work being made by Developer/Developer's Contractor is insufficient to complete the Work within the specified time.
- 2.16.03 The failure or refusal of Developer/Developer's Contractor to provide sufficient and/or proper equipment or construction forces to properly execute the Work in a timely manner.
- 2.16.04 The failure or refusal on the part of Developer to observe any material requirements of the Contract Documents
- 2.16.05 The failure or refusal of Developer/Developer's Contractor to promptly make good any defects in materials or workmanship, or any defects of any nature, the correction of which has been directed in writing by City.
- 2.16.06 In the event of an uncured Default by Developer of Work to be performed under this Article II and only in the event that City decides to construct or correct deficiencies of the Project pursuant to Section 2.15, the Developer shall grant to City a twenty-five (25) foot construction easement on each side of the Project for City to complete the construction of the Project. In this event, Developer agrees to reimburse City for any reasonable costs in excess of City Share. This Contract shall operate as an agreement by Developer to allow City access to the Property as necessary to complete the Project in accordance with the Contract Documents. These remedies are in addition to any money damages and/or legal, equitable and/or other contract rights City may have in the event of Developer's Default; provided that it is expressly agreed that neither party shall have the right to seek consequential, special or punitive damages against the other for any default under this Contract.

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

### **III. TERM**

The term (hereafter referred to as the "**Term**") of this Contract shall commence upon execution of the Contract by both Parties, and continue until the Project is complete and accepted by City and all payments received by Developer pursuant to this Contract. Notwithstanding the foregoing, certain provisions of this Contract, including Section 2.15, shall survive the Term.

**IV. GENERAL RESPONSIBILITIES OF DEVELOPER AND CITY  
RESPONSIBILITIES OF DEVELOPER:**

4.01 Developer hereby accepts full responsibility for the performance of all services and activities described in this Contract to complete the design and construction of the Project not later than three (3) years from the date of execution of this Contract. Construction of the Project shall be in accordance with City Unified Development Code (hereinafter referred to as "UDC") all applicable state and federal environmental requirements, including all City applicable construction and development regulations.

4.02 Current budget estimates for the Project is **TEN MILLION EIGHT HUNDRED FORTY-SIX THOUSAND TWO HUNDRED SIXTY-THREE DOLLARS AND NO/100 (\$10,846,263.00)**. Developer shall provide all necessary funding for the Project beyond City Share.

4.03 Unless written notification by Developer to the contrary is received and approved by City, the Project Manager shall be the Developer designated representative responsible for the management of this Contract with TCI.

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

4.05 The Director of TCI or his/her designee shall be responsible for the administration of this Contract on behalf of City until the completion of the Project.

4.06 Developer shall provide City its plans and specifications for the Project, and such Plans shall be subject to the review and approval of City. After approval by City, Developer shall not make any substantial changes to the Plans without the prior written approval of Director. This Section does not relieve Developer of the burden of obtaining all necessary governmental approvals, including those provided by City through its relevant development departments and relevant boards and commissions including the Historic and Design Review Commission, and the State of Texas Commission on Environmental Quality (Article 9102).

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

4.06.02 Developer shall coordinate all required environmental permits for the Project with City's Environmental Division.

4.07 Developer shall provide a schematic showing the width of the drainage improvements to be built as part of the Project.

4.08 Developer shall dedicate and/or obtain at no cost to City an Easement required by City's UDC for construction of the drainage improvements, unless such improvements are made within existing City rights-of-way.

4.09 Any development of the Project affecting the floodplain shall comply with UDC.

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

4.10.01 Developer shall pay as part of the Project Cost all required costs for utility removal, replacement and relocation.

#### **RESPONSIBILITIES OF CITY:**

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

4.12 City shall pay City Share.

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

5.01 Developer warrants and represents that it shall comply with all applicable federal, state and local laws and regulations and shall use all reasonable efforts to ensure said compliance by any and the Construction Contractor and Subcontractors that may work on the Project.

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

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

5.02.02 Government Code Chapter 2258 and Ordinance No. 71312, as amended by Ordinance No. 2008-11-20-1045, regarding Prevailing Wage Rate regulations required for certain Public Works Contracts, including ensuring that is Construction Contractor and Subcontractors submit certified payrolls to City on a weekly basis utilizing the form required by the Wage and Hour office of TCI.

- A. The requirements of Chapter 2258 of the Texas Government Code, entitled "Prevailing Wage Rates," shall apply to this Agreement. Developer agrees that its Construction Contractor will comply with City Ordinance No. 71312 and its successors such as Ordinance No. 2008-11-20-1045 and shall require Subcontractors to comply with City Ordinance 71312 and its successors such as City Ordinance No. 2008-11-20-1045 and Developer shall not accept affidavits.
- B. In accordance with the provisions of Chapter 2258 of the Texas Government Code and City Ordinance No. 2008-11-20-1045, upon request City, acting through Director, will provide Developer with the appropriate wage determination which includes the general prevailing rate of per diem wages in this locality for each craft or type of workman needed to perform the construction work on this Project. The Developer 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 Developer calls for bids for construction of a given phase. The Developer is further required to cause the latest prevailing wage determination decision to be included in bids and contracts with the Construction Contractor and all Subcontractors for construction of each Phase. Developer is responsible for and shall collect and monitor weekly certified payrolls and perform site visits to ensure the prevailing wage is being paid to all workmen. City shall audit certified payroll records as necessary in accordance with this Agreement.
- C. Upon audit of the records and certified payrolls under this section, should City or its auditors find any violations, Developer shall cause its Construction Contractor to forfeit, as a penalty to 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 Contractor or any Subcontractor. The establishment of prevailing wage rates in accordance with Chapter 2258, Texas Government Code shall not be construed to relieve Developer from its obligation under any federal or state law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed under this Agreement

5.03. Developer shall ensure that the drainage and water quality improvement portion of the Work is completed in accordance with the requirements described in **Exhibit E**, pertaining to City's Small Business Economic Development Advocacy Ordinance, as amended.

5.03 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 Developer.

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

6.01 Developer shall be responsible for the design and construction of the Project and all associated costs, if any, in excess of City Share.

6.02 City shall reimburse Developer only for eligible expenses incurred hereunder. Notwithstanding any other provisions of this Contract, the total of all payments and other obligations made or incurred by City hereunder shall not exceed the amount appropriated by City Council in connection with this Contract.

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

6.04 Funding shall consist of a one-time reimbursement not to exceed 30% of the total contract price for the Project up to a maximum of **EIGHT HUNDRED SEVENTEEN THOUSAND DOLLARS AND NO/100** (\$817,000.00) paid to Developer for costs of design and construction of the Project.

6.05 It is further expressly understood and agreed by City and Developer that City's obligations under this Contract shall not exceed **EIGHT HUNDRED SEVENTEEN THOUSAND DOLLARS AND NO/100** (\$817,000.00). City's obligation to pay the funds under this Contract is limited to the amount appropriated by San Antonio City Council. Additionally, it is expressly understood and agreed by City and Developer that this Contract in no way obligates City's General Fund monies or any other monies or credits of City.

6.06 Upon request by Developer and upon review, acceptance and approval of Developer's request by City, as well as upon City's receipt and acceptance of all documents associated with the Project and Agreement, City shall transfer the funds identified in **Section 6.04** herein to Developer for completion of the Project.

6.07 City shall have the right to inspect work completed to ensure conformance with the approved Plans.

6.08 City shall reimburse Developer on a monthly basis upon receipt and approval of an invoice through the City's Project Reporting Information Management Exchange Link (hereafter referred to as "COSA PRIMElink") or any other updated program used by City for this purpose.

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

6.01 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.

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

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

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

6.12 Upon termination of this Agreement, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in this **Article 6** as a result of any auditing or monitoring by City, Developer shall refund such amount to City within (30) thirty working days of City's written request specifying the amounts disallowed or disapproved.

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

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



7.01.01 That maintenance of the Records shall be in compliance with all terms, provisions, and requirements of this Contract and with all generally accepted accounting practices; and

7.01.02 That Developer's record system shall contain sufficient documentation to provide, in reasonable detail, justification for each expenditure.

7.02 Developer agrees to retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials for the Project (hereinafter "Records") pertaining to activities pertinent to this Contract for a minimum of four (4) years from the completion of the Project. Records shall be retained by Developer in an electronic format and Developer shall forward the records to City prior to the four (4) year retention period.

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

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

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

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

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

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

8.01 Developer grants City or its designees the right to audit, examine or inspect, at City's election, all of the Records relating to the performance of the Work under the Contract during the term of the Contract and retention period herein. The audit, examination or inspection may be performed by a City designee, which may include its internal auditors or an outside representative engaged by City.

8.02 “Developer’s records” shall include any and all information, materials and data of every kind and character generated as a result of the work under this Contract. Example of Developer records include but are not limited to billings, books, general ledger, cost ledgers, invoices, production sheets, documents, correspondence, meeting notes, subscriptions, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, procedures, federal and state filings for issue in question, and any and all other agreements, sources of information and matters that may in City’s sole judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Contract Documents. 8.03 City agrees that it shall exercise the right to audit, examine or inspect only during regular business hours, with at least five (5) business days prior written notice. The Developer agrees to allow City’s designee access to all of the Records, and current or former employees of Developer, deemed necessary by City or its designee(s), to perform such audit, inspection or examination. Developer also agrees to provide adequate and appropriate work space necessary to City or its designees to conduct such audits, inspections or examinations.

8.04 Developer acknowledges and agrees it must and shall include this audit clause in any Subcontractor, supplier or vendor contract.

## **IX. ALLOWABLE EXPENDITURES**

9.01 Upon preparation of a Project timeline/schedule and budget by Developer, Developer shall submit said timeline/schedule and budget to City for approval of any costs to be paid from funds received from City hereunder. Costs shall be considered allowable only if so approved in Developer's Project 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 Contract and with all applicable City, state and federal laws, regulations and ordinances affecting Developer's performance hereunder. Only the following categories of costs shall be considered allowable:

- Construction contract
- The cost of bonds required by this Contract
- Construction contingencies with approved change orders
- Design Plans and specifications, surveys, testing and environmental studies

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

9.02 The following shall not be considered allowable costs under this Contract:

- Personnel costs, salaries or wages paid directly by Developer or other similarly affiliated organization
- Travel and travel-related expenses

- Costs or fees for consultant and/or professional services, except for those directly related to the Project
- Costs or fees associated with attendance at meetings, seminars, or conferences
- Costs or fees associated with regular maintenance and operation
- Fundraising
- Equipment and Furnishings, unless provided by Developer's General Developer and shown on the approved Plans
- Advertising
- Right of Way

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

10.01 Developer further represents and warrants that:

- 10.01.01 All information, data and/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.
- 10.01.02 It is financially stable and capable of fulfilling its obligations under this Contract and that Developer shall provide City immediate written notice of any adverse material change in the financial condition of Developer that may materially and adversely affect its performance of the obligations hereunder.
- 10.01.03 No litigation or proceedings presently pending or to Developer's knowledge, threatened against Developer, that will affect its performance of the obligations hereunder.
- 10.01.04 None of the provisions contained herein contravene or in any way conflict with the authority under which Developer is doing business or with the provisions of any existing indenture or agreement of Developer.

## **XI. ACCESSIBILITY OF RECORDS**

11.01 At any time and as often as City may deem necessary, upon three (3) days written notice, Developer shall make all of its records pertaining to this Contract 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.

11.02 Developer agrees and represents that it shall cooperate with City, at no charge to 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 Contract.

## **XII. TERMINATION**

12.01 Notwithstanding any other provision of this Contract, this Contract may be terminated immediately by City for default or any good cause after giving seven (7) days advance written notice and opportunity to cure to the Developer, including but not limited to the following causes:

- 12.01.01 Following an inquiry by TCI, a reasonable belief by City that the Developer or Construction Contractor has abandoned the Work.
- 12.01.02 Following an inquiry by City, a reasonable belief by City that the Developer or Developer's Contractor has become insolvent, bankrupt, or otherwise financially unable to carry on the Work.
- 12.01.03 Following an inquiry by TCI, a reasonable belief by City that collusion exists or has occurred for the purpose of illegally procuring the contract, or that a fraud is being perpetrated on City in connection with the construction of Work under the Contract.
- 12.01.04 Following notice by City, repeated and flagrant violation of safe working procedures by Construction Contractor.

12.02 When the Contract is terminated for any of the causes itemized in **Section 12.01** above or terminated pursuant to Section 2.16, the Developer shall, as of the date specified by City, discontinue the Work, whereupon the company or companies providing surety for the completion of the Work pursuant to Section 2.04 (the "Surety") shall, within fifteen (15) days after the written notice of termination for cause has been served upon Developer and the Surety or its authorized agents, assume the obligations of Developer for the Work or that portion of the Work which City has ordered Developer to discontinue and may:

- 12.02.01 perform the Work with forces employed by the Surety;
- 12.02.02 with the written consent of City, tender a replacement Contractor to take over and perform the Work, in which event the Surety shall be responsible for and pay the amount of any costs required to be incurred for the completion of the Work that are in excess of the amount of funds remaining under the Contract as, of the time of the termination; or

12.02.03 with the written consent of City, tender and pay to City in settlement the amount of money necessary to finish the balance of uncompleted Work under the Contract, correct existing defective or nonconforming work, and compensate City for any other loss sustained as a result of Developer 's Default under this Contract.

12.03 Should Surety assume responsibility of Developer to complete the Work, the Surety shall assume Developer's place in all respects, and the amount of funds remaining unpaid under the Contract shall be paid to the Surety by City for all Work performed by the Surety or the replacement Contractor (as the case may be) in accordance with the terms of the Contract Documents, subject to any rights of City to deduct any costs, damages, or actual damages that City may have incurred, including but not limited to additional fees, expenses and attorneys' fees, as a result of such termination.

12.04 The balance of City's Share remaining at the time of Developer's Default shall become due and payable to the Surety as the Work progresses, subject to all of the terms, covenants, and conditions of the Contract Documents. If the Surety does not, within the time specified, exercise its obligation to assume the obligations of Developer then City shall have the power to complete the Work by contract or otherwise, as it may deem necessary. Developer agrees that City shall have the right to take possession of or use any or all of the materials, plant, tools, equipment, supplies, and property of every kind owned and provided by Developer for the purpose of the Work , and to procure other tools, equipment, labor, and materials for the completion of the Work, and to charge to the account of the Developer the expenses of completion and labor, materials, tools, equipment, and incidental expenses. The expenses incurred by City to complete the Work shall be deducted by City out of the balance of City Share remaining unpaid to or unearned by Developer. Developer and the Surety shall be liable to City for any costs incurred in excess of the balance of City Share for the completion and correction of the Work, and for any other costs, damages, expenses (including but not limited to additional fees and attorney's fees), and actual damages, as the case may be, incurred as a result of the termination. In no case, shall the Developer or Surety be liable for consequential damages or claims.

12.05 In the event that City assumes responsibility for completing the Work under Section 12.04, City shall not be required to obtain the lowest bid for the Work of completing the construction, but the expenses to be deducted from City Share shall be the actual cost of such Work and the other damages. In case City's costs and damages are less than the sum which would have been payable under the Contract if the same had been completed by the Developer, then City may pay to Developer (or the Surety, in the event of a complete termination) the difference, provided that Developer (or the Surety) shall not be entitled to any claim for damages or for loss of anticipated profits. In the event such costs for completion and damages exceed the amount which would have been payable under the Contract if the same had been completed by Developer, then Developer and Surety shall pay the amount of the excess to City on notice from City for the excess amount owed.

### **XIII. INDEMNITY**

13.01 Developer covenants and agrees to INDEMNIFY and HOLD HARMLESS City elected officials, agents, employees, officers, directors, consultants, subconsultants and representatives of City individually or collectively, (collectively, the "*City Parties*") from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury, death and property damage, (the "Damages") made upon City, arising out of or resulting from Developer's negligent activities or omissions in the performance of Work under this Contract, including any negligent acts or omissions of any agent, officer, director, representative, employee, consultant, subconsultant, Contractor or Subcontractor of Developer, and their respective officers, agents, employees, directors and representatives (collectively "*Developer Parties*") while in the exercise of the performance of the Work under this Contract, all without, however, waiving any governmental immunity available to City under Texas law and without waiving any defenses of the parties under Texas law. THE INDEMNITY PROVIDED FOR IN THE PARAGRAPH SHALL EXPRESSLY NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF CITY, OR CITY PARTIES IN SUCH INSTANCE WHERE SUCH NEGLIGENCE CAUSES PERSONAL INJURY, DEATH OR PROPERTY DAMAGE, INCLUDING BUT NOT LIMITED TO THE DRAINAGE IMPROVEMENTS SPECIFIED BY CITY OR REQUIRED BY CITY TO BE INSTALLED BY DEVELOPER UNDER THIS AGREEMENT. IN THE EVENT DEVELOPER AND CITY AND/OR BEXAR COUNTY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS; WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS , LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

13.02 The provisions of this indemnity are solely for the benefit of the parties, hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Developer shall promptly advise City in writing within 72 hours of any claim or demand against City or Developer known to Developer and related to or arising out of Developer's negligent activities or omissions under this Contract, and shall see to the investigation and defense of such claim or demand at Developer's cost. Notwithstanding any condition imposed by a policy of insurance to which Developer and City are named, City shall retain the right, at its option and at its own expense, to participate in such defense provided by any insurance or self-insurance of Developer under this section without relieving Developer of any of its obligations under this section.

#### **XIV. INSURANCE**

14.01 Prior to the commencement of any Work under this Contract, Developer shall furnish copies of all required endorsements and an original completed Certificate( s) of Insurance to TCI, which shall be clearly labeled, "*Developer Participation Contract Developer Drainage,*" 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. City shall 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 City. City shall have no duty to pay or perform under this Contract until such certificate and endorsements have been received and approved by TCI. No officer or employee, other than City's Risk Manager, shall have authority to waive this requirement.

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

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

*(Remainder of page intentionally left blank)*

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

14.04 Developer agrees to require the Construction Contractor to obtain all insurance coverages with minimum limits of not less than those limits delineated in Section 14.03 (Insurance Table) from each Subcontractor and provide a Certificate of Insurance and Endorsement that names the Developer and City as an additional insured.

14.05 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 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). Developer and its Construction 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. Construction Contractor shall pay any costs incurred resulting from said changes.

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

14.06 Developer agrees that with respect to the above required insurance, all insurance policies of its Construction Contractor are to contain or be endorsed to contain the following provisions:



- 14.06.01 Name City and Bexar County and their 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 City, with the exception of the workers' compensation and professional liability policies;
- 14.06.02 Provide for an endorsement that the "other insurance" clause shall not apply to City of San Antonio where City and Bexar County are additional insured shown on the policy;
- 14.06.03 Workers' compensation and employers' liability policies shall provide a waiver of subrogation in favor of City and Bexar County.
- 14.06.04 Provide thirty (30) calendar days advance written notice directly to City of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance notice for nonpayment of premium.

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

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

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

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

## **XV. GUARANTEE/WARRANTY**

City agrees that Developer is installing drainage improvements under this Contract under specifications and plan approvals of City and TCI. PROJECT Manager shall be responsible for ensuring Project is constructed in material compliance with the Plans and Specifications, approved by City or other governmental entities.

## **XVI. DESIGN PER CITY REQUIREMENTS**

Developer Guarantees that design and construction of the Regional Drainage and Water Quality Public Infrastructure Improvements UTEX Boulevard Improvements, On-site Public Roadway Improvements and Regional Drainage Channel Improvements shall meet the requirements of City's UDC.

## **XVII. NONDISCRIMINATION**

**Non-Discrimination.** As a Party to a contract with City and in connection with the construction of the Project, Developer understands and agrees to comply with the *Non-Discrimination Policy* of City of San Antonio contained in Chapter 2, Article X of 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. Developer represents and warrants that it has complied with City's *Non-Discrimination Policy* throughout the course of this solicitation and Agreement award process and shall continue to comply with said *Non-Discrimination Policy*. As part of said compliance, Developer shall adhere to City's *Non-Discrimination Policy* in the solicitation, selection, hiring or commercial treatment of Subcontractors, vendors, suppliers or commercial customers, nor shall Developer retaliate against any person for reporting instances of such discrimination. This **Article XVI** is not enforceable by or for the benefit of, nor creates any obligation to, any third party. Developer shall incorporate this clause into each of its Subcontractor and supplier agreements entered into, pursuant to all City agreements/contracts.

## **XVIII. CONFLICT OF INTEREST**

18.01 Developer covenants that no member of its governing body or of its executive officers presently has any business interest, direct or indirect, which would conflict in any manner or degree with the performance under this Contract. Developer further covenants that in the performance of this Contract, no persons having such interest shall be employed or appointed as a member of its governing body or of its executive staff.

18.02 City covenants that no member of its governing body or of its staff shall possess any interest in, or use their position for a purpose that is or gives the appearance of being motivated by desire for private gain for themselves or others, particularly those with which they have family, business, or other ties.

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

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

### **XIX. POLITICAL ACTIVITY**

None of the activities performed hereunder shall involve, and no portion of the funds received hereunder shall be used, either directly, for any political activity including, but not limited to, an activity to further the election or defeat of any candidate for public office or for any activity undertaken to influence the passage, defeat or final content of local, state or federal legislation.

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

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 to TCI or City department by Developer, shall, upon receipt, become the property of City.

### **XXI. CONTRACTING**

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

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

### **XXII. CHANGES AND AMENDMENTS**

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

22.02 It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this Contract and that this Contract does not waive compliance therewith.

### **XXIII. ASSIGNMENTS**

Developer shall not transfer, pledge or otherwise assign this Contract, any interest in and to same, or any claim arising there under, without first procuring the written approval of City. Any attempt at transfer, pledge or other assignment shall be void *ab initio* and shall confer no rights upon any third person. Any such assignment, whether voluntary or involuntary, by operation of law, under legal process or proceedings, by receivership, in bankruptcy or otherwise, without the prior written consent of City shall, at City's option, be of no force and effect whatsoever. Any consent to any such assignment or transfer shall not constitute a waiver of any of the restrictions of this Section and the provisions of this Section shall apply to each successive assignment or other transfer hereunder, if any.

### **XXIV. SEVERABILITY OF PROVISIONS**

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

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

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

25.02 No act or omission of either Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to either Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

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

## **XXVI. ENTIRE AGREEMENT**

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

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

## **XXVII. NOTICES**

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

<b>CITY:</b> Engineer	Transportation & Capital Improvements Director/City  City of San Antonio P.O. Box 839966 San Antonio, Texas 78283-3966
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With Copies to:	Office of City Clerk City of San Antonio P.O. Box 839966 San Antonio, Texas 78283-3966
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DEVELOPER: Robert Williamson, Sr. VP of Real Estate  
16211 La Cantera Pkwy  
San Antonio, TX 78256

With Copies to: SSFCU Legal Services  
16211 La Cantera Pkwy  
San Antonio, TX 78256

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

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

## XXVIII. MISCELLANEOUS

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

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

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

28.04 Partial Invalidity. Any provisions or part of this Contract held to be void or unenforceable under any law or regulation shall be deemed stricken and any remaining provisions shall continue to be valid and binding upon the parties and construed as close as reasonably possible to their original intent.

28.05 No Oral Modification. This Contract shall not be modified orally or by course of conduct or dealing. Any modification of this Contract shall be in writing, and signed by the authorized party.

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

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

### **XXIX PARTIES BOUND**

This Contract 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.

### **XXX. 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 venturers or any other similar such relationship between the Parties hereto.

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

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

### **XXXII. GENDER**

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

**XXXIII. CAPTIONS**

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

**XXXIV. LEGAL AUTHORITY**

34.01 City represents, warrants, assures, and guarantees that it possesses the legal authority, pursuant to a proper, appropriate and official motion, resolution or action passed or taken, to enter into this Contract and to perform the responsibilities herein required.

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

**EXECUTED IN DUPLICATE ORIGINALS**, each of which shall have the full force and effect of an original this the \_\_\_\_\_ day of May, 2015.

**CITY OF SAN ANTONIO**

**SECURITY SERVICE FEDERAL CREDIT UNION**, a federally chartered credit union

By: \_\_\_\_\_  
Sheryl Sculley  
City Manager

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**APPROVED AS TO FORM:**

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



**EXHIBIT A**

DRAFT

**EXHIBIT B**

DRAFT

**EXHIBIT C**

DRAFT

# EXHIBIT D

## SBEDA TERMS & CONDITIONS SBE SUBCONTRACTING GOAL

### SBEDA Ordinance Compliance Provisions

#### SBEDA Program

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

#### Definitions

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

**Centralized Vendor Registration System (CVR)** – a mandatory electronic system wherein City requires all prospective Respondents and Subcontractors that are 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 are also used by the Goal Setting Committee for measuring relative availability and tracking utilization of SBE and M/WBE firms by Industry or commodity codes, and for establishing Annual Aspirational Goals and Contract-by-Contract Subcontracting Goals.

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

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

**Good Faith Efforts** – documentation of Contractor’s or Respondent’s intent to comply with S/M/WBE Program Goals and procedures including, but not limited to, the following: (1) documentation within a solicitation response reflecting the Respondent’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 City of San Antonio website; solicitations of bids/proposals/qualification

statements from all qualified SBE or M/WBE firms listed in the Small Business Office's directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Contractor's posting of a bond covering the work of SBE or M/WBE Subcontractors; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by the Respondent; and documentation of consultations with trade associations and consultants that represent the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Subcontractors.) The appropriate form and content of Contractor's Good Faith Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

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

**Independently Owned and Operated** – ownership of an SBE firm must be direct, independent and by Individuals only. Ownership of an M/WBE firm may be by Individuals and/or by other businesses provided the ownership interests in the M/WBE firm can satisfy the M/WBE eligibility requirements for ownership and Control as specified 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** – an adult person that is of legal majority age.

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

**Joint Venture** – Joint ventures are manifested by written agreements between two or more Independently Owned and Controlled business firms to form a third business entity solely for purposes of undertaking distinct roles and responsibilities in the completion of a given contract. Under this business arrangement, each joint venture partner shares in the management of the joint venture and also shares in the profits or losses of the joint venture enterprise commensurately with its contribution to the venture.

**Originating Department** – City department or authorized representative of City which issues solicitations or for which a solicitation is issued.

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

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

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

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

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

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

**SBE Subcontracting Program** – an API in which Prime Contractors or vendors are required to make Good Faith Efforts to subcontract a specified percentage of the value of prime contract dollars to certified SBE firms. Such subcontracting goals may be set and applied by the GSC on a contract-by-contract basis to those types of contracts that provide subcontract opportunities for performing Commercially Useful Functions wherein there have been ongoing disparities in the utilization of available SBE Subcontractors.

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

**Significant Business Presence** – to qualify for this Program, a S/M/WBE must be headquartered or have a *significant business presence* for at least one year within the Relevant Marketplace, defined as: an established place of business in one or more of the eight counties that make up the San Antonio Metropolitan Statistical Area (SAMSA), from which 20% of its full-time, part-time and contract employees are regularly based, and from which a substantial role in the S/M/WBE's performance of a Commercially Useful Function is conducted. A location utilized solely as a post office box, mail drop or

telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a significant business presence.

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

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

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

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

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

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

**Subcontractor/Supplier Utilization Plan** – a binding part of this contract agreement which states Contractor's commitment for the use of Joint Venture Partners and / or Subcontractors/Suppliers in the performance of this contract agreement, and states the name, scope of work, and dollar value of work to be performed by each of Contractor's Joint Venture partners and Subcontractors/Suppliers in the course of the performance of this contract, specifying the S/M/WBE Certification category for each Joint Venture partner and Subcontractor/Supplier, as approved by the SBO Manager. Additions,



deletions or modifications of the Joint Venture partner or Subcontractor/Supplier names, scopes of work, of dollar values of work to be performed requires an amendment to this agreement to be approved by the IEDD Director or designee.

#### SBEDA Program Compliance – General Provisions

As Contractor acknowledges that 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, that such terms are part of Contractor's scope of work as referenced in this Agreement, these SBEDA Ordinance requirements, guidelines, and procedures are hereby incorporated by reference into this Agreement, and are considered by the parties to this Agreement to be material terms. Contractor voluntarily agrees to fully comply with these SBEDA program terms as a condition for being awarded this contract by City. Without limitation, Contractor further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

Contractor fully shall cooperate with the Small Business Office and other City departments in their data collection and monitoring efforts regarding Contractor's utilization and payment of Subcontractors, S/M/WBE firms, and HUBZone firms, as applicable, for their performance of Commercially Useful Functions on this contract including, but not limited to, the timely submission of completed forms and/or documentation promulgated by SBO, through the Originating Department, pursuant to the SBEDA Policy & Procedure Manual, timely entry of data into monitoring systems, and ensuring the timely compliance of its Subcontractors with this term;

Contractor fully shall cooperate with any City or SBO investigation (and also shall respond truthfully and promptly to any City or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of Contractor or its Subcontractors or suppliers;

Contractor shall permit the SBO, upon reasonable notice, to undertake inspections as necessary including, but not limited to, contract-related correspondence, records, documents, payroll records, daily logs, invoices, bills, cancelled checks, and work product, and to interview Subcontractors and workers to determine whether there has been a violation of the terms of this Agreement;

Contractor immediately shall notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to Contractor's Subcontractor / Supplier Utilization Plan for this contract, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by Contractor to replace the Subcontractor/Supplier in accordance with the applicable Affirmative Procurement Initiative. All proposed changes to the Subcontractor / Supplier Utilization Plan including, but not limited to, proposed self-performance of work by Contractor of

work previously designated for performance by Subcontractor or supplier, substitutions of new Subcontractors, terminations of previously designated Subcontractors, or reductions in the scope of work and value of work awarded to Subcontractors or suppliers, shall be subject to advanced written approval by the Originating Department and the SBO. Contractor shall require new Subcontractors or Suppliers, prior to submission of Contractor's Change to Utilization Plan form, to register in the Centralized Vendor Registration system, before seeking SBO approval.

Contractor 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.

Contractor shall retain all records of its Subcontractor payments for this contract for a minimum of four years or as required by state law, following the conclusion of this contract or, in the event of litigation concerning this contract, for a minimum of four years or as required by state law following the final determination of litigation, whichever is later.

In instances wherein the SBO determines that a Commercially Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in a Contractor's Subcontractor / Supplier Utilization Plan, Contractor shall not be given credit for the participation of its S/M/WBE or HUBZone Subcontractor(s) or joint venture partner(s) toward attainment of S/M/WBE or HUBZone firm utilization goals, and Contractor and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

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

#### SBEDA Program Compliance – Affirmative Procurement Initiatives

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

**SBE Subcontracting Program.** In accordance with SBEDA Ordinance Sections III. D. 1. (c), this contract is being awarded pursuant to the SBE Subcontracting Program. Contractor agrees to subcontract at least **20%** of its prime contract value to certified SBE firms. The Subcontractor/Supplier Utilization Plan Contractor submitted to City, and that contains the names of the certified SBE Subcontractors to be used by Contractor on this Contract, the respective percentages of the total prime contract dollar value to be awarded and performed by each SBE Subcontractor, and documentation including a description of each SBE Subcontractor's scope of work and confirmation of each SBE 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 Contractor to attain this subcontracting goal for SBE 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 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 SBE 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.

#### Commercial Nondiscrimination Policy Compliance

As a condition of entering into this agreement, Contractor represents and warrants that it has complied with throughout the course of this 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, Contractor shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring or commercial treatment of Subcontractors, vendors, suppliers, or commercial customers, nor shall the company retaliate against any person for reporting instances of such discrimination. The company shall provide equal opportunity for Subcontractors, vendors and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in City's Relevant Marketplace. The company understands and agrees that 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 the company from participating in City contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party. Contractor's certification of its compliance with this Commercial Nondiscrimination Policy as submitted to City pursuant to the solicitation for this contract is hereby incorporated into the material terms of this Agreement. Contractor shall incorporate this clause into each of its Subcontractor and supplier agreements entered into, pursuant to City contracts.

### Prompt Payment

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

### Violations, Sanctions and Penalties

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

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

Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of the SBEDA Ordinance;

Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;

Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of the SBEDA Ordinance; and

Make false statements to any entity that any other entity is, or is not, certified as an S/M/WBE for purposes of the SBEDA Ordinance.

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

Suspension of contract;

Withholding of funds;

Rescission of contract based upon a material breach of contract pertaining to S/M/WBE Program compliance;

Refusal to accept a response or proposal; and

Disqualification of Contractor or other business firm from eligibility for providing goods or services to City for a period not to exceed two years (upon San Antonio City Council approval).

DRAFT