

STATE OF TEXAS §
§
COUNTY OF BEXAR §

**INTERLOCAL AGREEMENT
BETWEEN CITY OF SAN
ANTONIO, TEXAS, AND THE SAN
ANTONIO RIVER AUTHORITY
FOR THE SAN PEDRO CREEK
IMPROVEMENTS PROJECT**

This Interlocal Agreement (“Agreement”) is entered into by and between City of San Antonio, A Texas municipal corporation, acting by and through its City Manager or her designee, pursuant to Ordinance No. _____, dated _____, 2017 (hereinafter referred to as “CITY”, and the San Antonio River Authority, a conservation and reclamation district (hereinafter referred to as “RIVER AUTHORITY”), and all of which may also be referred to herein individually as a “PARTY” or collectively as the “PARTIES”.

WHEREAS CITY has committed significant funding toward the improvement and restoration of San Pedro Creek through the San Pedro Creek Improvements Project (hereinafter referred to as the “PROJECT”) managed by the **RIVER AUTHORITY**; and

WHEREAS CITY has made a significant investment in providing drainage improvements and access to our local rivers and creeks through the construction of parks and linear hike and bike trails; and

WHEREAS, RIVER AUTHORITY in cooperation with **CITY** and involving extensive stakeholder participation completed the San Pedro Creek Improvements Conceptual Plan, which has rich historical and environmental significance to the founding of the city and is today a concrete drainage channel through the heart of the governmental center of downtown; and

WHEREAS, BEXAR COUNTY has made a significant investment in providing drainage improvements to the San Pedro Creek through the San Pedro Creek Improvements Project; and

WHEREAS, RIVER AUTHORITY is responsible for the project management of the San Pedro Creek Improvements Project, which is under construction at the time of the execution of this Agreement; and

WHEREAS, the **PARTIES** both desire the development of drainage improvements, parks and linear hike and bike trails to complement the **RIVER AUTHORITY** San Pedro Creek Improvements Project; and

WHEREAS, CITY has authority to improve San Pedro Creek using 2017 Bond funds from the Parks, Recreation and Open Space Proposition and 2017 Bond funds from the Drainage and Flood Control Proposition; and

WHEREAS \$4,900,000 of the 2017 Bond funds has been approved for the San Pedro Creek Improvements project in the Parks, Recreation and Open Space Proposition by the San Antonio City Council and the voters; and

WHEREAS \$14,600,000 of the 2017 Bond funds has been approved for the San Pedro Creek Improvements project in the Drainage and Flood Control Proposition by the San Antonio City Council and voters; and

WHEREAS, the PARTIES wish to enter into an agreement whereby the **RIVER AUTHORITY** will manage and implement the investment of CITY 2017 Bond funds in the currently ongoing design and construction of San Pedro Creek Improvements for **CITY**.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the undersigned PARTIES agree to the terms and conditions outlined below.

I. PURPOSE

This Agreement outlines the roles and responsibilities of the PARTIES with regard to the land acquisitions, design, and construction of the PROJECT, (including project management and construction management), according to the terms and conditions detailed below.

II. AUTHORITY

The PARTIES are authorized to make this Agreement, which is intended to increase the efficiency and effectiveness of the Parties in completing the PROJECT, in accordance with the provisions of the Interlocal Cooperation Act, being Chapter 791 of the Texas Government Code.

III. SCOPE OF THE PROJECT

The Scope of Work includes the following, which is listed in further detail in Exhibit A:

- The Bond Project ("BOND PROJECT"), which includes work for San Pedro Creek funded through 2017 Bond funds (\$4.9M for San Pedro Creek Park improvements and \$14.6M for San Pedro Creek Drainage work) improvements to be used for allowable expenses. The PROJECT will design and construct San Pedro Creek improvements and drainage and flood control improvements, linear hike and bike trails, and other related improvements along the San Pedro Creek. It is the intent of the PARTIES that the PROJECT will result in the construction of park improvements, drainage and flood control improvements for San Pedro Creek. Additional Scope of Work may be added administratively by the Director of Transportation and Capital Improvements to this Agreement with the mutual consent of the PARTIES.

IV. ROLES AND RESPONSIBILITIES FOR THE PROJECT

EXECUTIVE COMMITTEE:

An Executive Committee comprised of the CITY Transportation and Capital Improvements Department Director or designee(s), Bexar County Manager or designee(s) and RIVER AUTHORITY General Manager, or designee(s), will provide executive management oversight of the BOND PROJECT. The Executive Committee

will meet and communicate in meetings, e-mails and/or telephone calls more frequently as the PARTIES deem appropriate. RIVER AUTHORITY Project Manager(s) and RIVER AUTHORITY Project Engineer(s) will attend all Executive Committee meetings. RIVER AUTHORITY will schedule, coordinate, draft and distribute the agenda, with guidance from CITY and COUNTY and conduct the Executive Committee meetings. The Executive Committee meetings will include project updates by the RIVER AUTHORITY General Manager, or designee(s), and items for discussion, direction and approval from CITY and COUNTY.

CITY'S RESPONSIBILITIES:

CITY provides oversight and approval on the BOND PROJECT and delivers timely direction to RIVER AUTHORITY on decisions requiring action by CITY relating to project budgets, schedules, construction and implementation.

(1) CITY identifies the Transportation and Capital Improvements (TCI) Director as project contact for the BOND PROJECT.

(2) CITY shall provide timely review and approval of design, construction documents, and budgets for the PROJECT and any necessary associated land acquisitions. The CITY's TCI Director or designee(s) must review and approve changes in scope and/or modifications to design of PROJECT produced after execution of this AGREEMENT.

(3) CITY shall participate in project meetings as needed.

(4) CITY will fund the costs of PROJECT in accordance with the terms and conditions of Article VI.

(5) CITY will adhere to all applicable law relative to the PROJECT including CITY ordinances relating to design and construction within the River Improvement Overlay.

(6) CITY shall operate and maintain the PROJECT improvements and its respective facilities as delineated in the Operations & Maintenance Agreement for the San Pedro Creek Culture Park to be finalized at a later date between the PARTIES and Bexar County.

RIVER AUTHORITY'S RESPONSIBILITIES:

(1) RIVER AUTHORITY serves as project manager and administrator of the BOND PROJECT and is responsible and accountable to the CITY to ensure quality design, construction and execution of the BOND PROJECT within available funding to support the BOND PROJECT.

(2) RIVER AUTHORITY will contract and manage all professional services and construction services on the BOND PROJECT. All solicitation documents produced after execution of this AGREEMENT will be submitted to CITY for review and approval.

(3) RIVER AUTHORITY shall submit all design and construction documents for BOND PROJECT to CITY for review and approval prior to implementation.

(4) RIVER AUTHORITY shall manage and deliver the BOND PROJECT within

authorized funding levels and within CITY's total funding commitment set out in this Agreement.

- (5) The design and construction documents will be prepared to allow value engineering of the BOND PROJECT and shall be prepared to allow for additive alternatives based upon funds available for the BOND PROJECT.
- (6) **RIVER AUTHORITY** shall provide not less than monthly financial status reports on the BOND PROJECT to the Executive Committee throughout the duration of the BOND PROJECT. The format for the monthly status reports shall be in paper and electronic (.pdf) format and will also be entered into CITY's PrimeLink project management system.
- (7) **RIVER AUTHORITY** shall allow approved CITY representatives access to the BOND PROJECT during construction to ensure conformance of construction with the approved plans and specifications, permits and easements.
- (8) **RIVER AUTHORITY** shall provide presentations and reports on BOND PROJECT as requested by CITY.
- (9) **RIVER AUTHORITY** shall acquire all necessary rights-of-way and easements for the BOND PROJECT, subject to approval of CITY. PARTIES will determine which entity will own the rights-of-way and easements after acquisition.
- (10) **RIVER AUTHORITY** shall serve as local sponsor with the United States Army Corps of Engineers (USACE). RIVER AUTHORITY shall coordinate all aspects of the implementation of the BOND PROJECT involving the USACE.
- (11) **RIVER AUTHORITY** shall acquire all required local, state and federal permits for the BOND PROJECT, including but not limited to permits required by the Texas Department of Licensing and Regulation, the Texas Commission on Environmental Quality, the USACE and those associated with the Texas Accessibility Standards.
- (12) **RIVER AUTHORITY** shall coordinate with appropriate local, state and federal governmental agencies to facilitate to effective execution of the BOND PROJECT.
- (13) **RIVER AUTHORITY** shall coordinate appropriate involvement of stakeholders to facilitate the effective implementation of the BOND PROJECT. **RIVER AUTHORITY** shall coordinate all meetings as appropriate in a coordinated effort with CITY's project contact(s), or designee(s), in advance of the date, time, and location for ALL meetings
- (14) **RIVER AUTHORITY** shall adhere to all applicable laws relative to the PROJECT including CITY ordinances relating to design and construction within the San Antonio city limits, the River Improvement Overlay, or other applicable districts established by the CITY.
- (15) **RIVER AUTHORITY** shall operate and maintain the PROJECT improvements and its respective facilities as delineated in the Operations & Maintenance Agreement for the San Pedro Creek Culture Park to be finalized at a later date between the PARTIES and Bexar County.

V. TERM AND PROJECT SCHEDULE

This Agreement shall commence upon the execution date of the last signatory party and shall continue until PROJECT completion. Project Implementation Schedule "SCHEDULE" for the BOND PROJECT will be developed by the **RIVER AUTHORITY** within ninety (90) calendar days following execution of this Agreement and submitted to **CITY** for its review and approval.

RIVER AUTHORITY may recommend modifications to the SCHEDULE, which will be subject to the review and approval of **CITY**. Regular SCHEDULE updates identifying progress and changes will be submitted to the **CITY** throughout the duration of the BOND PROJECT.

VI. FUNDING

At the time of execution of this Interlocal Agreement, available funding consists of **CITY FUNDING** and **RIVER AUTHORITY FUNDING** as outlined below. In addition, Bexar County has committed \$132,800,000 for the design, construction, property acquisition, and **RIVER AUTHORITY** project management fees for the PROJECT at the time of the execution of this AGREEMENT. Should additional funding become available, this agreement does not preclude the incorporation and use of such funding to supplement or expand PROJECT budgets and scopes of work, as mutually agreed to by PARTIES, with such additional funding to be incorporated into this Interlocal Agreement by **CITY**, through its Transportation and Capital Improvements Director.

A. CITY FUNDING

CITY has established PROJECT funding of \$19,500,000 minus \$390,000 which will be retained by the City for the BOND PROJECT to be utilized for all costs associated with the design and construction of the BOND PROJECT. Allowable expenses to be approved by **CITY** from the **CITY FUNDING** are:

- contractual payments to design professionals
- permit fees
- contractual payments to construction contractors
- environmental evaluation and remediation costs
- right of way acquisition costs
- SARA Project Management fee (funded by Bexar County)
- project administration costs
- other expenditures which may be approved by **CITY**.

Within ninety (90) calendar days following execution of the Agreement, **RIVER**

AUTHORITY will develop a budget for the **BOND PROJECT**, based on the **CITY FUNDING**, to incorporate all allowable costs ("BUDGET"). The **BUDGET** will be subject to the **CITY's** review and approval.

The **PARTIES** acknowledge that the availability of the **CITY FUNDING** is dependent on the receipt of bond sales by **CITY**. The **PARTIES** will work together to plan and implement the **PROJECT** based on the **SCHEDULE** and **CITY** reserves the right to modify the **SCHEDULE** as needed based on actual and/or projected bond sales.

RIVER AUTHORITY may recommend modifications to the **BUDGET**, which will be subject to **CITY's** review and approval; however, such modifications must remain within the limits of the **CITY FUNDING**.

In each **CITY** fiscal year, **CITY** staff will request that the City Council appropriate a portion of the **CITY FUNDING** in the **CITY's** Capital Budget, based on the **SCHEDULE** and **BUDGET**.

Upon receipt by **RIVER AUTHORITY** of each installment of **CITY FUNDING**, the funds shall be immediately deposited into an appropriate **RIVER AUTHORITY** account with its depository financial institution. The **CITY FUNDING** shall be at all times fully secured by a combination of FDIC Insurance coverage, or other Federal insurance, and collateral, acceptable to **CITY**, at 102% of the amount of uninsured deposits, in accordance with the provisions of the Public Funds Collateral Act (Chapter 2257, Texas Government Code). **CITY FUNDING** shall be disbursed by **RIVER AUTHORITY** only in payment of allowable expenses as set forth above in this **ARTICLE VI. CITY FUNDING, Section A**. If any portion of the **CITY FUNDING** is invested by **RIVER AUTHORITY** prior to disbursement, the funds shall be invested only in Authorized Investments, which are defined as any investment authorized pursuant to the **SARA'S** Investment Policy as amended from time to time. **RIVER AUTHORITY** shall notify **CITY** in writing of any changes in authorized investments (Changed Investments) under **RIVER AUTHORITY'S** Investment Policy prior to such changes becoming effective. **CITY** shall have the right to notify **RIVER AUTHORITY** in writing at the address specified in Article XIX. Notice of this Agreement that **CITY FUNDING** may not be invested in any Changed Investments. **RIVER AUTHORITY'S** notice to **CITY** regarding Changed Investments shall be directed to **CITY'S** Transportation and Capital Improvements Department, Compliance Division, at the address specified in Article XIX. Notice of this Agreement.

For the entire term of this Agreement, **RIVER AUTHORITY** shall, maintain in full force and effect a fidelity bond providing "third party" coverage for each **RIVER AUTHORITY** employee who is authorized to access any portion of the **CITY FUNDING**. The minimum amount of coverage provided by the fidelity bond shall be equal to the advance(s) of **CITY FUNDING** the **RIVER AUTHORITY** has received and that are on deposit in the **RIVER AUTHORITY** account.

RIVER AUTHORITY shall provide **CITY** with a hard or electronic copy of its Comprehensive Annual Financial Report (CAFR) prepared by its external auditor along with the letter on the conduct of the audit. The CAFR and the letter shall be delivered to **CITY** at its Transportation and Capital Improvements Department, Compliance Division, at the address specified in Article XIX. Notice of this Agreement, not later than six (6) months after the end of each **RIVER AUTHORITY** fiscal year during the term of this Agreement.

B. RIVER AUTHORITY FUNDING:

Total BOND PROJECT funding is further detailed in Exhibit A. Allowable expenses from the **RIVER AUTHORITY** funding are:

- Design Project Manager
- Public Outreach
- San Pedro Economic Impact Study

VII. PAYMENT

PAYMENT FROM CITY:

RIVER AUTHORITY will prepare and submit to **CITY** initial estimates of necessary and reasonable funds "the ADVANCE" needed for 90 days of cash flow at the beginning of the Design and Construction Phases, respectively for the BOND PROJECT. These initial estimates will reflect approved BOND PROJECT costs based on the BOND PROJECT

SCHEDULES and BUDGETS. Upon review and approval by **CITY**, **CITY** will provide a funds advance for each BOND PROJECT to **RIVER AUTHORITY** equal to said estimates and **RIVER AUTHORITY** will place all ADVANCE funds in an interest-bearing bank account and interest earned will be used for the PROJECT. **RIVER AUTHORITY** will use COSA PRIME Link to invoice **CITY** for actual expenditures on a monthly basis for the BOND PROJECT.

Each monthly invoice shall include copies of paid invoices and evidence of **RIVER AUTHORITY** payment. **CITY** will make monthly payments to **RIVER AUTHORITY** upon approval of the monthly invoice.

Upon completion of the Design Phase (100% construction documents) for the BOND PROJECT, **CITY** will work with **RIVER AUTHORITY** to reconcile the net ADVANCE. Any remaining ADVANCE funds will be deducted from the estimates needed for the Construction Phase ADVANCE for each PROJECT. Ninety (90) days prior to the final inspection for the Construction Phase of each PROJECT; **CITY** will work with **RIVER AUTHORITY** to reconcile the net ADVANCE and use up the ADVANCE through final completion and closeout of the PROJECT. **RIVER AUTHORITY** shall continue to submit monthly invoices through the end of the PROJECT even if expenses are paid from the ADVANCE.

CITY will only fund up to the approved amount for the PROJECT as defined in Article VI. Any ADVANCE (including interest earned on the ADVANCE and not expended on the PROJECT) held by **RIVER AUTHORITY** upon project completion and close-out shall be returned to **CITY**.

VIII. ENVIRONMENTAL MATTERS

CITY and **RIVER AUTHORITY** acknowledge that unforeseen hazardous substances or hazardous waste, as such terms are defined by 42 U.S.C. 9601 and Texas Health & Safety Code Sections 361.131 and 501.002, may be encountered during the PROJECT. In that event, **RIVER AUTHORITY**, subject to the prior approval of

CITY, will take appropriate precautions to protect health and welfare, report the conditions to the appropriate authority, and ameliorate any such hazardous substances or hazardous waste that may result from the design and construction. **RIVER AUTHORITY** will allow **CITY** to review and comment on any required environmental remediation and **CITY** approval will be required for environmental remediation on **CITY-owned** land. In the event **RIVER AUTHORITY** identifies a potential environmental remediation on **RIVER AUTHORITY-owned** land in connection with the **PROJECT**, **CITY** and **RIVER AUTHORITY** will work cooperatively to determine an appropriate course of action and any use of **CITY FUNDING** for such remediation is subject to the approval of **CITY**. If the cost of projected remediation causes the projected cost of the **PROJECT** to exceed the amounts authorized by project **BUDGETS**, **RIVER AUTHORITY** shall engage **CITY's** project contact(s), or designee, in a value engineering review of the design and construction documents. Should value engineering fail to bring the projected cost of the **PROJECT** within the project **BUDGETS**, the **PARTIES** may agree to reduce the scope of or delay the **PROJECT**. **CITY** shall agree upon the projected cost of remediation prior to the commencement of work or the issuance of a notice to proceed to a contractor.

The **PARTIES** reserve all rights to seek all available relief from any potentially responsible party or parties concerning the cost of remediation or any other cost incurred by the **PARTIES** resulting from encountering hazardous substances or hazardous waste during the construction phases of the **PROJECT**.

IX. USE OF LAND

The **PARTIES** agree that the **PARTIES** will use land owned, purchased or acquired within the scope of the **PROJECT** for the purposes of the **PROJECT**. The **PARTIES** agree to cooperate with each other in using land owned, purchased or acquired within the scope of the **PROJECT** for purposes compatible with the **PROJECT** and will enter into license agreements, as deemed necessary by the **PARTIES**, to facilitate the **PROJECT**. The **PARTIES** agree that land owned, purchased or acquired within the scope of the **PROJECT** is subject to City of San Antonio ordinances and regulation, including but not limited to the River Improvement Overlay.

X. AUDIT

Each **PARTY** reserves the right to conduct, or cause to be conducted an audit of all funds received or disbursed under this Agreement at any and all times deemed necessary by that **PARTY**. Each **PARTY's** staff, a Certified Public Accounting firm, or other auditors as designated by that **PARTY**, may perform such audit(s). Each **PARTY** reserves the right to determine the scope of every audit. Each **PARTY** agrees to make available to the other **PARTIES** all books, records, documents and reports with respect to matters covered by this Agreement.

XI. SBEDA COMPLIANCE

Subcontracting goals for this Agreement shall apply only to the City Share of allocated funds in the amount of **NINETEEN MILLION FIVE HUNDRED THOUSAND DOLLARS AND NO/100 (19,500,000.00)**. Subcontractor utilization may be applied to the total contract amount for purposes of meeting subcontracting goals based on the City Share.

A. SBEDA Program

The CITY has adopted a Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531 and as amended, also referred to as "SBEDA" or "the SBEDA Program"), which is posted on the City's Economic Development (EDD) website page and is also available in hard copy form upon request to the CITY. The SBEDA Ordinance Compliance Provisions contained in this section of the Agreement are governed by the terms of this Ordinance, as well as by the terms of the SBEDA Ordinance Policy & Procedure Manual established by the 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.

B. Contract Requirements and Commitment

GRANTEE understands and agrees that the following provisions shall be requirements of this Agreement, and by its execution, GRANTEE commits to comply with these requirements. In the absence of a waiver granted by the SBO, failure of GRANTEE to commit, through fully-documented and signed SBO-promulgated Commitment and Subcontractor/Supplier Utilization Plan forms, to satisfying the application of the SBE Prime Contracting Points to its evaluation criteria for solicitation or bid documents shall constitute default.

GRANTEE understands and agrees that GRANTEE is required to insert the provisions of this Article (*SBEDA Ordinance Compliance Provisions*, Sections A through H) into the solicitation and contract documents for its Prime Contractors. GRANTEE understands and agrees that GRANTEE is required to, and responsible for, Prime Contractor and Subcontractor compliance with all provisions of the SBEDA Ordinance and this Agreement including, but not limited to, obtaining all Utilization Documentation from GRANTEE's Prime Contractors and securing Prime GRANTEE and Subcontractor registration in City's CVR.

GRANTEE understands and agrees that the following provisions shall be requirements of this solicitation and the resulting Agreement, and by submitting this executed Agreement, GRANTEE commits to comply with these requirements.

Exception Request - A Respondent to the GRANTEE'S solicitation associated with the scope of work included in this Agreement may, for good cause, request an Exception to the application of the SBEDA Program if the Respondent submits the *Exception to SBEDA Program Requirements Request* form (available at

<http://www.sanantonio.gov/SBO/Forms.aspx>) with its solicitation response to the GRANTEE. The Respondent's Exception request must fully document why: (1) the value of the contract is below the \$50,000.00 threshold for application of the SBEDA Program; or (2) no commercially-useful subcontracting opportunities exist within the contract scope of work; or (3) the type of contract is outside of the scope of the SBEDA Ordinance. **Late Exception Requests will not be considered.**

C. Definitions

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

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

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

Certification Application – this form shall be completed by vendors when applying for Certification and/or re-Certification status for participation in the City of San Antonio's S/M/WBE Program. This form shall be submitted, to the City's certifying agency, every two years by each certified vendor by the anniversary date of its original Certification.

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 GRANTEE to perform such “pass-through” or “conduit” functions that are not commercially useful shall be viewed by the CITY as fraudulent if GRANTEE attempts to obtain credit for such S/M/WBE participation towards the satisfaction of S/M/WBE participation goals or other API participation requirements. As such, under such circumstances where a Commercially Useful Function is not actually performed by the S/M/WBE firm, the GRANTEE shall not be given credit for the participation of its S/M/WBE Subcontractor or joint venture partner towards attainment of S/M/WBE utilization goals, and the GRANTEE and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

Control – the authority of a person or business owner to sign responses to solicitations and contracts, make price negotiation decisions, sell or liquidate the business and have the primary authority to direct the day-to-day management and operation of a business enterprise without interference from others.

Economic Inclusion – efforts to promote and maximize commercial transactions within, between and among all segments of the business population, regardless of race or gender, within the Relevant Marketplace.

Emerging SBE (ESBE) – a certified SBE 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, that is no more than five years old at the time of its original certification as an ESBE or whose annual revenues and number of employees are no greater than 25% of the small business size standards for its industry as established by the U.S. Small Business Administration, that is actively enrolled in the Mentor-Protégé Program for its Industry (once established by the City), and meets the Significant Business Presence requirements as defined herein.

Emerging M/WBE – a certified M/WBE firm that is no more than five years old at the time of its original certification as an Emerging M/WBE that is actively enrolled in the M/WBE or SBE Mentor-Protégé Program for its industry (once established by the City), whose annual revenues and number of employees are no greater than 25% of the small business size standards for its industry as established by the U.S. Small Business Administration, and meets the Significant Business Presence requirements as defined herein.

Goal Setting Committee (GSC) – a committee, or series of committees, appointed and chaired by the City Manager or designee from the Executive Team that includes, at a

minimum, the Small Business Office Manager or designee, and the Director of Purchasing & General Services (P&GS) or Director of Transportation & Capital Improvements Department (TCI) or their designees, and the Director or designee of the Originating Department (if the Originating Department is neither P&GS nor TCI,) all without duplication of designees. The City Manager or designee may also appoint two ex-officio members of the Small Business Advocacy Committee to serve on any GSC purely in an advisory and non-voting capacity. The GSC establishes S/M/WBE Program Goals for the City of San Antonio (e.g., Annual Aspirational Goals and Contract-by-Contract Subcontracting Goals) based upon Industry Categories, vendor availability and project-specific characteristics. The GSC also makes determinations about which Affirmative Procurement Initiatives (APIs) are to be applied to specific contracts based upon various criteria.

Good Faith Efforts – documentation of the GRANTEE’s or Respondent’s intent to comply with S/M/WBE Program Goals and procedures including, but not limited to, the following: (1) Utilization Documentation within a solicitation response or contract reflecting the Respondent’s or GRANTEE’S commitment to comply with SBE or M/WBE Program Goals as established by the GSC for a particular contract; or (2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., timely advertisements in appropriate trade publications and publications of wide general circulation; timely posting of SBE or M/WBE subcontract opportunities on the City of San Antonio website; solicitations of bids/proposals/qualification statements from all qualified SBE or M/WBE firms listed in the Small Business Office’s directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime 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 or GRANTEE; 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 GRANTEE’s Good Faith Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

Graduation – an SBE firm permanently graduates from the City of San Antonio SBE program when it meets the criteria for graduation set forth in Section III.E.7 of this Ordinance. A firm’s graduation or temporary suspension from the SBE program does not necessarily affect its eligibility to be certified and to participate in the City’s S/M/WBE Program as an M/WBE. An M/WBE firm permanently graduates from the M/WBE program when it meets the criteria for graduation as set forth in this Ordinance in Section III.E.7. An M/WBE firm that graduates from the M/WBE program is no longer eligible to participate in the Race-Conscious APIs as described herein at Sections III D.2, D.4, D.6, D.8 & D.10 and is also ineligible to participate in the SBE program APIs at Sections III D.1, D.3, D.5, D.7 & D.9 of this Ordinance. However, a graduated M/WBE firm may continue to participate in and benefit from other Race-Neutral non-industry-specific remedies of the S/M/WBE Program as described in Section III.C of this Ordinance.

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

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

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

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

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

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

Native Americans: Persons having no less than 1/16th percentage origin in any of the Native American Tribes, as recognized by the U.S. Department of the Interior, Bureau of Indian Affairs and as demonstrated by possession of personal tribal role documents.

Minority/Women Business Enterprise (M/WBE) – firm that is certified as a Small Business Enterprise and also as either a Minority Business Enterprise or as a Women

Business Enterprise, and which is at least fifty-one percent (51%) owned, managed and Controlled by one or more Minority Group Members and/or women, and that is ready, willing and able to sell goods or services that are purchased by the City of San Antonio.

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

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

Payment – dollars actually paid to GRANTEE, Prime Contractors 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 the GRANTEE for purposes of providing goods or services for the City.

Race-Conscious – any business classification or API wherein the race or gender of business owners is taken into consideration (e.g., references to M/WBE programs and APIs that are listed herein under the heading of “Race-Conscious”).

Race-Neutral – any business classification or API wherein the race or gender of business owners is not taken into consideration (e.g., references to SBE programs and APIs that are listed herein under the heading of “Race-Neutral”).

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

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

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

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

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

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

Significant Business Presence – to qualify for this Program, a S/M/WBE must be

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

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

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

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

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

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

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

Utilization Documentation - the Commitment Form and subsequent Subcontractor/Supplier Utilization Plan is a binding part of this Agreement and which states the GRANTEE's commitment for the use of Joint Venture Partners and / or Subcontractors/Suppliers in the performance of this Agreement, and states the name, scope of work, and dollar value of work to be performed by each of GRANTEE's Joint Venture partners and

Subcontractors/Suppliers in the course of the performance of this Agreement, 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 EDD Director or designee.

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

D. SBEDA Program Compliance – General Provisions

As GRANTEE acknowledges that the terms of the CITY's SBEDA Ordinance, as amended, together with all requirements, guidelines and procedures set forth in the CITY's SBEDA Policy & Procedure Manual are in furtherance of the CITY's efforts at Economic Inclusion and, moreover, that such terms are part of GRANTEE'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. GRANTEE voluntarily agrees to fully comply with these SBEDA program terms as a condition for being awarded this Agreement by the CITY. Without limitation, GRANTEE further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. GRANTEE shall cooperate fully with the Small Business Office and other CITY departments in their data collection and monitoring efforts regarding GRANTEE's utilization and payment of Subcontractors, S/M/WBE firms, and HUBZone firms, as applicable, for their performance of Commercially Useful Functions to fulfill the scope of work for this Agreement including, but not limited to, the timely submission of completed forms and/or Utilization Documentation or any other required documentation promulgated by SBO, through the Originating Department, pursuant to the SBEDA Policy & Procedure Manual, timely entry of data into monitoring systems, and ensuring the timely compliance of its Subcontractors with this term;
2. GRANTEE shall cooperate fully with any CITY or SBO investigation (and shall also respond truthfully and promptly to any CITY or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of GRANTEE or its Subcontractors or suppliers;

3. GRANTEE shall permit the SBO, upon reasonable notice, to undertake inspections as necessary including, but not limited to, Agreement-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;
4. GRANTEE shall immediately notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to GRANTEE's Subcontractor / Supplier Utilization Plan for this Agreement, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by GRANTEE to replace the 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 GRANTEE 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.
5. GRANTEE shall immediately notify the Originating Department and SBO of any transfer or assignment of its Agreement with the CITY, as well as any transfer or change in its ownership or business structure.
6. GRANTEE shall retain all records of its Subcontractor payments for this Agreement for a minimum of four years, or as required by state law, following the conclusion of this Agreement or, in the event of litigation concerning this Agreement, for a minimum of four years, or as required by state law, following the final determination of litigation, whichever is later.
7. In instances wherein the SBO determines that a Commercially Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in a GRANTEE's Subcontractor / Supplier Utilization Plan, the 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 the GRANTEE and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA

Ordinance.

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

E. SBEDA Program Compliance – Affirmative Procurement Initiatives

The CITY has applied the following contract-specific Affirmative Procurement Initiative to this contract:

M/WBE Subcontracting Program. In accordance with SBEDA Ordinance Section III. D. 2. (b), this contract is being awarded pursuant to the M/WBE Subcontracting Program. GRANTEE agrees to subcontract at least *twenty-one percent (21%)* of the contract value to certified M/WBE firms headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA) and

Segmented M/WBE Goal. In accordance with SBEDA Ordinance Section III. D. 2. (d), this contract is being awarded pursuant to Segmented M/WBE Goals. GRANTEE agrees to subcontract at least *two percent (2%)* contract value to certified African American Business Enterprise (AABE) firm(s) headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). This *two percent (2%)* subcontracting goal will also count toward the aforementioned *twenty-one percent (21%)* M/WBE subcontracting goal.

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

Subcontractor Diversity: The City of San Antonio strongly encourages each firm to be as inclusive as possible, and to reach out to all segments of the M/WBE community in its efforts to exercise good faith in achieving the M/WBE subcontracting goal of 21% and

AABE Subcontracting goal of 2% that have been established for this contract. While the relative availability of ready, willing, and able firms within various ethnic and gender categories will vary significantly from contract to contract based upon the particular trades that are involved, overall in the San Antonio Construction industry, as reflected in the City's Centralized Vendor Registration system for the month of March 2015, African-American owned firms represent approximately 2.76% of available subcontractors, Hispanic-American firms represent approximately 16.47%, Asian-American firms represent approximately 1.14%, Native American firms represent approximately 0.13%, and Women-owned firms represent approximately 4.91% of available construction subcontractors.

F. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, the GRANTEE represents and warrants that it has complied with throughout the course of this solicitation and contract award process, and will continue to comply with, the CITY's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, GRANTEE shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation or, on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring or commercial treatment of 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 the 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. GRANTEE's certification of its compliance with this Commercial Nondiscrimination Policy as submitted to the CITY pursuant to the solicitation for this contract is hereby incorporated into the material terms of this Agreement. GRANTEE shall incorporate this clause into each of its Subcontractor and supplier agreements entered into pursuant to CITY contracts.

G. Prompt Payment

Upon execution of this Agreement by GRANTEE, GRANTEE shall be required to submit to CITY accurate progress payment information with each invoice regarding each of its Subcontractors, including HUBZone Subcontractors, to ensure that the GRANTEE's reported subcontract participation is accurate. GRANTEE 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 GRANTEE's noncompliance with these prompt payment provisions, no final retainage on the Prime Contract shall be released to GRANTEE, and no new CITY contracts shall be issued to the CONTRACTOR until the CITY's audit of previous subcontract payments is complete and payments are verified to be in accordance with the specifications of the Agreement.

H. Violations, Sanctions and Penalties

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

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

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

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

XII. THIRD PARTY CLAIMS

RIVER AUTHORITY and **CITY** acknowledge they are political subdivisions of the State of Texas and are subject to, and comply with, the applicable provisions of the Texas Tort Claims Act, as set out in Civil Practices and Remedies Code, Section 101.001 *el seq.* and the remedies authorized therein regarding claims or causes of action that may be asserted by third parties for accident, injury or death.

XIII. INSURANCE

Prior to the commencement of any work under this Agreement, **RIVER AUTHORITY** shall require its contractor to furnish copies of all required endorsements and completed Certificate(s) of Insurance to the **CITY's** Transportation and Capital Improvements Department, which shall be clearly labeled "*San Pedro Creek Improvements Project*" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The **CITY** will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the **CITY**. The **CITY** shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the **CITY's** Transportation and Capital Improvements Department. No officer or employee, other than the **CITY's** Risk Manager, shall have authority to waive this requirement.

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

The **RIVER AUTHORITY's** contractor's financial integrity is of interest to the **CITY**; therefore, subject to **RIVER AUTHORITY's** contractor's right to maintain reasonable deductibles in such amounts as are approved by the **CITY**, **RIVER AUTHORITY's** contractor shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at **RIVER AUTHORITY's** contractors sole expense, insurance coverage written on an occurrence basis, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed on the next page:

<u>TYPE</u>	<u>AMOUNTS</u>
<p>1. Workers' Compensation</p> <p>2. Employers' Liability</p>	<p><i>Statutory</i></p> <p>\$1,000,000.00/\$1,000,000.00/ \$1,000,000.00</p>
<p>3. Commercial General Liability Insurance to include coverage for the following:</p> <p>a. Premises/Operations</p> <p>b. Products/Completed Operations</p> <p>c. Personal/Advertising Injury</p> <p>*d. Environmental Impairment/Impact – sufficiently broad to cover disposal liability.</p> <p>*e. Explosion, Collapse, Underground</p>	<p>For <u>Bodily Injury</u> and <u>Property Damage</u> of:</p> <p>\$1,000,000.00 per occurrence;</p> <p>\$2,000,000.00 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage</p>
<p>4. Business Automobile Liability:</p> <p>a. Owned/leased vehicles</p> <p>b. Non-owned vehicles</p> <p>c. Hired Vehicles</p>	<p><u>Combined Single Limit</u> for <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000.00 per occurrence</p>
<p>5. *Professional Liability (Claims-made basis)</p> <p>To be maintained and in effect for no less than two years subsequent to the completion of the professional service.</p>	<p>\$1,000,000.00 per claim, to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error, or omission in professional services.</p>
<p>6. Umbrella or Excess Liability Coverage</p>	<p>\$5,000,000.00 per occurrence combined limit <u>Bodily Injury</u> (including death) and <u>Property Damage</u>.</p>
<p>7. *Builder's Risk</p>	<p>All Risk Policy written on an occurrence basis for 100% replacement cost during construction phase of any new or existing structure.</p>

RIVER AUTHORITY agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverages required of **RIVER AUTHORITY's** contractor herein, and provide a certificate of insurance and endorsement that names the **RIVER AUTHORITY** and the **CITY** as additional insureds. Any such subcontractor shall provide the **CITY** with said certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by **CITY's** Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this agreement. Such modification may be enacted by letter signed by **CITY's** Risk Manager, which shall become a part of the contract for all purposes.

As they apply to the limits required by the **CITY**, the **CITY** shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). **RIVER AUTHORITY's** 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. **RIVER AUTHORITY's** contractor shall pay any costs incurred resulting from said changes.

City of San Antonio

Attn: Transportation and Capital Improvements Department

P.O. Box 839966

San Antonio, Texas 78283-3966

RIVER AUTHORITY will require its contractor to agree that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

Name the **CITY**, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the **CITY**, with the exception of the workers' compensation and professional liability policies:

- Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the **CITY** is an additional insured shown on the policy;
- Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of the **CITY**.
- Provide advance written notice directly to **CITY** of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance notice for nonpayment of premium

Within five (5) calendar days of a suspension, cancellation or non-renewal of

coverage, **RIVER AUTHORITY's** contractor shall provide a replacement Certificate of Insurance and applicable endorsements to **CITY**. **CITY** shall have the option to suspend **RIVER AUTHORITY's** contractor's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

In addition to any other remedies the **CITY** may have upon **RIVER AUTHORITY's** contractor's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the **CITY** shall have the right to order **RIVER AUTHORITY's** contractor to stop work hereunder, and/or withhold any payment(s) which become due to **RIVER AUTHORITY's** contractor hereunder until **RIVER AUTHORITY's** contractor demonstrates compliance with the requirements hereof.

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

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

It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement and that no claim or action by or on behalf of the **CITY** shall be limited to insurance coverage provided.

RIVER AUTHORITY's contractor and any Subcontractors are responsible for all damage to their own equipment and/or property.

XIV. APPLICABLE LAWS

All of the work performed under this Agreement by the **PARTIES** and their contractors shall comply with all applicable laws, rules, regulations and codes of the United States and State of Texas and with the charter, ordinances, bond ordinances and rules and regulations of City of San Antonio, **CITY** and **RIVER AUTHORITY**. **RIVER AUTHORITY** has existing Cooperative Agreements with Bexar County regarding the design and the construction of the San Pedro Creek Improvements Project. In the event of a conflict between the terms of this AGREEMENT and the Cooperative Agreements between **RIVER AUTHORITY** and Bexar County, the **PARTIES** will work cooperatively with Bexar County in good faith to amicably resolve the conflict.

XV. PREVAILING WAGE RATE AND GENERAL LABOR CONDITIONS

The Provisions of Chapter 2258, Texas Government Code, and City Ordinance 2008-11- 20-1045, are expressly made a part of this Agreement. In accordance therewith, the **RIVER AUTHORITY** shall provide the **CITY** with sufficient documentation to verify that the provisions of Chapter 2258, Texas Government Code, and City Ordinance 2008-11-20-1045 are met. The **RIVER AUTHORITY** shall request the applicable wage decision of the general prevailing rate of per diem wages

in this locality for each craft or type of workman needed to perform this Agreement prior to the bidding of the PROJECT. Such wage decision shall be obtained from the CITY's Labor Compliance Office for inclusion by the RIVER AUTHORITY or its contractor in the construction solicitation. RIVER AUTHORITY shall ensure that the following prevailing wage requirements are met: hold a pre-construction meeting with its Contractor and explain the requirements of this provision and that such requirement are also applicable to all subcontractors; collect certified payrolls on a weekly basis and periodically review said certified payrolls; ensure that apprentices are properly documented per Department of Labor Standards; required postings are on the jobsite in a conspicuous location; perform site interviews of employees and compare to certified payrolls to assure proper work classification and wage rates; and investigate all claims pertaining to wage violations. CITY may request periodic reports or support to ensure adherence to prevailing wage rates provisions. RIVER AUTHORITY will maintain completed "Project Certification for Monitoring Prevailing Wages" form (attached hereto) for each construction pay request and make available to the City upon request.

If, as a result of CITY's review, the CITY finds any violations, RIVER AUTHORITY will ensure that RIVER AUTHORITY's contractor shall forfeit as a penalty to the CITY sixty dollars (\$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 Agreement, by the contractor or any sub-contractor under him.

The establishment of prevailing wage rates pursuant to Chapter 2258, Texas Government Code and City Ordinance 2008-11-20-1045 shall not be construed to relieve the RIVER AUTHORITY, RIVER AUTHORITY's contractor or any subcontractor from his 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 hereunder. The RIVER AUTHORITY and its Contractor and any subcontractor, in the execution of this PROJECT, agrees that he shall not discriminate in his employment practices against any person because of race, color, creed, sex or origin. The RIVER AUTHORITY and its Contractor and any subcontractors agrees that he/she will not engage in employment practices which have the effect of discriminating against employees or prospective employees because of race, color, religion, national origin, sex, age, handicap or political belief or affiliation.

This Agreement provision and the related wage decision shall be included in any subcontract entered into by the RIVER AUTHORITY's contractor. Any questions regarding this provision shall be made via e-mail at LaborComplianceOffice-LCO@san.antonio.gov.

XVI. DEFAULT/TERMINATION

As used in this Article, "default" shall mean the failure of CITY or RIVER AUTHORITY to perform any obligation in the time and manner required by this Agreement, except where such failure to perform is the result of Force Majeure as defined in this Article.

Upon failure of either PARTY to perform any obligation required hereunder, the PARTY not in default may give written notice of such default to the PARTY in default. The PARTY in default shall have thirty (30) days within which to cure such default, and

if cured within such time, the default specified in such notice shall cease to exist.

Should the PARTY in default fail to cure an alleged default, the PARTY not in default shall thereupon have the right to terminate this Agreement by sending written notice to the other PARTY in default of such termination and specifying the effective date thereof, which date shall not be sooner than the end of ten (10) days following the day on which such notice is sent. Upon termination of this Agreement, each PARTY shall be entitled to receive just and equitable compensation for any work satisfactorily performed prior to such termination.

Neither PARTY shall be liable to the other PARTY for the failure to perform its obligations under this Agreement when such failure is attributable solely to Force Majeure.

Force Majeure shall mean any cause beyond the reasonable control of any PARTY, including, without limitation, failure, or imminent threat of failure, of facilities or equipment, flood, freeze, earthquake, storm, fire, lightning, other acts of God, epidemic, war, acts of a public enemy, riot, civil disturbance or disobedience, strike, lockout, work stoppages, other industrial disturbances or dispute, labor or material shortage, sabotage, restraint by court order or other public authority, and action or non-action by, or failure or inability to obtain the necessary authorizations or approvals from, any governmental agency or authority, which by the exercise of due diligence it could not overcome; provided that none of the circumstances listed above shall be considered to be an event of Force Majeure to the extent such circumstance: (i) is due to the act, neglect, omission, breach of contract or of statutory duty, negligence or misconduct of the PARTY claiming Force Majeure, its representatives, agents, contractors or subcontractors or (ii) could have been prevented, overcome or remedied if the PARTY claiming Force Majeure had exercised reasonable diligence. Nothing contained herein shall be construed so as to require the PARTIES to settle any strike, lockout, work stoppage or any industrial disturbance or dispute in which it may be involved, or to seek review of or take any appeal from any administrative or judicial action.

XVII. ADVERSARIAL PROCEEDINGS

The PARTIES agree that under no circumstances will the funds received under this Agreement be used, either directly or indirectly, to pay costs or attorney's fees incurred in any adversarial proceeding against any PARTY or any other public entity.

XVIII. ASSIGNMENT

No PARTY may assign or transfer its interest in this Agreement or any portion thereof without the written consent of the governing bodies of each of the PARTIES. Any attempt to transfer, pledge or otherwise assign shall be void *ab initio* and shall confer no rights upon any third person or party.

XIX. NOTICE

For purposes of this Agreement, all notices among the PARTIES shall be deemed sufficient if in writing and mailed certified mail, return receipt requested, postage prepaid, to the addresses set forth below:

CITY:

Mike Frisbie, Director of Transportation and
Capital Improvements
City of San Antonio
P.O. Box 839966
San Antonio, TX 78283-3966

RIVER AUTHORITY:

Suzanne Scott General Manager
San Antonio River Authority
100 East Guenther Street
San Antonio, TX 78204

Notices of changes of address must be made in writing delivered to the last known address of each other PARTY within five (5) business days of the change.

XX. GOVERNING LAW AND VENUE

The PARTIES agree that this Agreement shall be governed by and construed in accordance with the laws of the State of Texas. Any action or proceeding brought to enforce the terms of this Agreement or adjudicate any dispute arising out of this Agreement shall be brought in a court of competent jurisdiction in City of San Antonio, Texas.

XXI. GENDER AND TENSE

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

XXII. AUTHORITY

The signers of this Agreement represent that they have full authority to execute this Agreement on behalf of **CITY** and **RIVER AUTHORITY**, respectively, and that the respective governing bodies of **CITY** and **RIVER AUTHORITY**, have authorized the execution of this Agreement.

XXIII. INDEPENDENT CONTRACTOR

It is expressly agreed and understood that each PARTY is and shall be deemed to be an independent contractor, responsible for its respective acts or omissions and that each of the other PARTIES shall be in no way responsible therefore, and that no PARTY hereto has authority to bind the other PARTY nor to hold out to third parties that it has the authority to bind the other PARTY. Nothing herein contained shall be deemed or construed to create the relationship of employer-employee, principal-agent, an

association, joint venture, partners, or partnership or impose a partnership duty, obligation or liability among the PARTIES. No third party beneficiaries are created by this Agreement. This Agreement is not intended to and shall not create any rights in or confer any benefits upon any other person other than the PARTIES.

XXIV. SEVERABILITY

If any clause or provision of this Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to Local Government Code Chapter 271, then and in that event it is the intention of the PARTIES that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the PARTIES hereto that in lieu of each clause or provision of this Agreement that is invalid, illegal or unenforceable, there be added as a part of this Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provisions as may be possible, to be legal, valid and enforceable.

XXV. AMENDMENT

No amendment, modification, or alteration of the terms hereof shall be binding unless the same be in writing, dated subsequent to the date hereof, and be duly executed by the PARTIES hereto.

XXVI. MULTIPLE COUNTERPARTS

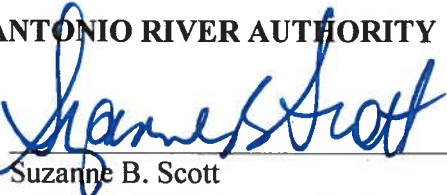
This Agreement may be executed in separate identical counterparts by the PARTIES hereto and each counterpart, when so executed and delivered, will constitute an original instrument, and all such separate identical counterparts will constitute but one and the same instrument.

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

CITY OF SAN ANTONIO

By: _____
Mike Frisbie, P.E.
Director, Transportation & Capital Improvements

SAN ANTONIO RIVER AUTHORITY

By:  _____
Suzanne B. Scott
General Manager, San Antonio River Authority

APPROVED AS TO FORM:

CITY ATTORNEY

EXHIBIT A
PROJECT SCOPE AND FUNDING SOURCES

It is anticipated that funds will support project work that includes, but is not limited to, the management of water conveyance and storm water management, water quality elements, public access and safety components, landscaping, and adopted park amenities. At this time, all Project funding by Bexar County, the City of San Antonio, and the River Authority is dedicated to the completion of Phase 1 and Phase 2, as detailed below:

- Phase One limits begin at the tunnel inlet and ends at Cesar Chavez Boulevard, and is approximately 3,850 feet in length. Phase One includes the first of three impoundment gates located at Travis and Nueva streets as well as replacement of five street bridges. Key elements in this section include the tri-centennial plaza at the tunnel inlet and an entertainment plaza next to the Alameda Theater.

- Phase Two begins at Guadalupe Street just downstream of the tunnel outlet and ends at the Union Pacific Railroad bridge south of Alamo Street, and is approximately 2,200 feet in length. Phase Two includes the third impoundment gate at Alamo Street and replacement of three street bridges. This segment includes high and low bank paseos with bench seating and overlooks along the creek.

**San Pedro Creek Improvements
Project Funding
Funds Committed by Entity**

	Total
Bexar County	
Preliminary Engineering Report	\$ 605,000
Design	15,875,461
Construction ¹	108,410,437
ROW ²	5,642,417
Predesign / Design SARA PM	626,445
SARA CA/Public Information Services ⁴	1,640,240.00
Total Bexar County	\$ 132,800,000
Bexar County - Tricentennial Public Art	
Construction	755,000
Total Bexar County - Tricentennial Public Art	\$ 755,000
Bexar County Total	\$ 133,555,000
City of San Antonio	
Construction	\$ 19,500,000
Total City of San Antonio	\$ 19,500,000
Utility Reimbursement	
Construction	\$ 6,635,312
Total Utility Reimbursement	\$ 6,635,312
San Antonio River Authority⁶	
Economic Study ⁵	\$ 25,000
Design PM / Public Outreach ³	935,000
Total San Antonio River Authority	\$ 960,000
Total San Pedro Creek Project	\$ 160,650,312

1. Includes Preconstruction services of CMAR and designer, Construction Services of CMAR and designer, Materials Testing, and Public Art.
2. Includes SARA real estate labor, acquisition services, and property acquisition.
3. Includes SARA Design PM labor and public outreach.
4. Includes SARA Construction Phase Project Management and Public Information Services for Phases 1 and 2.
5. \$25,000 Steven R. Nivin - San Pedro Economic Impact Study.
6. SARA will be funding and performing the operations and maintenance activities for the San Pedro Creek Culture Park as segments are opened to the public.
7. \$19,500,000 City of San Antonio Contributions includes \$390,000 to be retained by the City of San Antonio.

EXHIBIT B
SBEDA COMMITMENT FORM