

STATE OF TEXAS §
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COUNTY OF BEXAR §

**DEVELOPER PARTICIPATION AGREEMENT
BETWEEN THE CITY OF SAN ANTONIO AND
XJ 1869 RANCHES, LTD. FOR THE HARDY OAK/
HUEBNER EXPANSION PROJECT**

This Developer Participation Agreement 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 _____, 20____ (hereafter referred to as "City"), and XJ 1869 Ranches, Ltd, a Texas Limited Liability Company acting through its Managing Partner, its successors and permitted assigns (hereafter referred to as "Developer"), acting by and through its officers, hereto duly authorized. City and Developer individually are referred to herein as a "Party" and collectively referred to herein as "the Parties."

RECITALS:

WHEREAS, City and Developer seek to design and construct extensions to both Hardy Oak Boulevard and Huebner Road (hereafter referred to as "the Hardy Oak/Huebner Expansion Project" or "the Project"); and

WHEREAS, Developer shall design and construct an extension of Huebner Road, from its current point of termination at the west end of Developer's Classen-Steubing Ranch property, at Huebner Road and Reagan High School, to the proposed intersection of Hardy Oak Boulevard and Huebner Road within Developer's Classen-Steubing Ranch property; and

WHEREAS, Developer shall design and construct an extension between the two existing sections of Hardy Oak Boulevard, from its termination at the north end of Developer's Classen-Steubing Ranch property through Developer's land and connect to Hardy Oak Boulevard at the south end of Developer's property; and

WHEREAS, constructing the Project will provide significant public benefit to citizens of San Antonio by providing a major positive impact of the traffic patterns in the City's Stone Oak area; and

WHEREAS, City, through its Parks Department, will purchase a portion of Developer's Steubing Ranch Property, utilizing a combination of Proposition 1 (Edwards Aquifer Protection Program) funds and 2012 – 2017 Bond Program funds, in the form of Certificates of Obligation, from the Hardy Oak Boulevard (Stone Oak Parkway to Knights Cross Drive) Project; and

WHEREAS, upon the purchase by City of a portion of Developer's Classen-Steubing Ranch property, Developer shall construct the two roadways (Huebner Road and Hardy Oak Boulevard), as outlined in this Development Agreement; and

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

WHEREAS, Developer is the fee simple owner of the property referenced in the proposed location of the Project; and

WHEREAS, the public benefit to be gained from the Project is the provision of alternative traffic routes for use by the citizens of San Antonio and relief of the ever-growing traffic issues in the area; and

WHEREAS, the total estimated cost of the roadway improvements to be designed and constructed by Developer is **TWELVE MILLION SIX HUNDRED THOUSAND DOLLARS AND NO/100 (\$12,600,000.00)**; and

WHEREAS, the Authorizing Statutes Texas Local Government Code Section 212 limits the participation of the municipality to a level not to exceed 30 percent (30%) of the total contract price; and

WHEREAS, City is being asked to contribute the not-to-exceed amount of **ONE MILLION FIVE HUNDRED FORTY SIX THOUSAND EIGHT HUNDRED DOLLARS AND NO/100 (\$1,546,800.00)**, or 12.27% of the total cost of the projected construction costs; and

WHEREAS, the Authorizing Statutes further allows participation by the municipality at a level not to exceed 100 percent (100%) of the total cost for any Oversizing of improvements required by the municipality; and

WHEREAS, City requires Developer to oversize and construct both Hardy Oak Boulevard and Huebner Road each from two lanes to four lanes and construct the intersection of Hardy Oak and Huebner Road to reflect this Oversizing requirement; and

WHEREAS, the total cost to Oversize the improvements to both Hardy Oak Boulevard and Huebner Road is **FOUR MILLION SEVEN HUNDRED ONE THOUSAND FOUR HUNDRED DOLLARS AND NO/100 (\$4,701,400.00)**; and

WHEREAS, this Agreement with the Developer for the Hardy Oak/Huebner Expansion Project limits the City of San Antonio participation to a level not to exceed 30 percent (30%) of the total Contract Price for the Hardy Oak/Huebner Expansion Project, plus the entire cost of the Oversizing, resulting in City's total participation in the Project of an amount not to exceed **SIX MILLION TWO HUNDRED FORTY EIGHT THOUSAND TWO HUNDRED DOLLARS AND NO/100 (\$6,248,200.00)**; and

WHEREAS, Contract oversight and management services provided by the Transportation & Capital Improvements Department (hereafter referred to as "TCI") requires funding in the not-to-exceed amount of **ONE HUNDRED TWENTY FOUR THOUSAND NINE HUNDRED SIXTY FOUR DOLLARS AND NO/100 (\$124,964.00)**, representing two percent (2%) of City's total funding of the Project and shall be deducted from City's total participation in the Project, leaving a net total participation by City of the not-to-exceed amount of **SIX MILLION ONE HUNDRED TWENTY THREE THOUSAND TWO HUNDRED THIRTY SIX DOLLARS AND NO/100 (\$6,123,236.00)**; and

WHEREAS, Developer shall complete the design of the Project on or before May 1, 2017; and

WHEREAS, Developer shall complete the construction of the Project on or before December 31, 2019.

NOW THEREFORE, the Parties hereto severally and collectively agree to and, by the execution hereof, are bound by the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described.

I. RECITALS

Each of the Recitals stated hereinabove are incorporated into and made a part of this Agreement.

II. DEFINITIONS

2.01 "Agreement" or "Contract" means this Developer Participation Agreement between the City of San Antonio, Texas and Developer.

2.02 "Appropriation" shall mean the amount appropriated by the San Antonio City Council for the Project, or the not-to-exceed amount of **SIX MILLION TWO HUNDRED FORTY EIGHT THOUSAND TWO HUNDRED DOLLARS AND NO/100 (\$6,248,200.00)**.

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

2.04 "City's Representative" means the Director of TCI or such other person as City's Representative may designate in writing to Developer from time to time.

2.05 "City Share" means, for the purposes of determining reimbursements due to Developer, pursuant to this Agreement, an amount not to exceed thirty percent (30%) of total estimated Contract Price of the Huebner/Hardy Oaks Expansion Project or a not-to-exceed total of **ONE MILLION FIVE HUNDRED FORTY SIX THOUSAND EIGHT HUNDRED DOLLARS AND NO/100 (\$1,546,800.00)**, representing 12.27% of the total cost of the projected construction costs of the Project, as authorized by the Authorizing Statutes, **plus** One Hundred Percent (100%) of certain costs which pertain to the Oversizing or a not-to-exceed amount of **FOUR MILLION SEVEN HUNDRED ONE THOUSAND FOUR HUNDRED DOLLARS AND NO/100 (\$4,701,400.00)**, for a total cumulative amount for this Agreement not to exceed the amount of the Appropriation of **SIX MILLION TWO HUNDRED FORTY EIGHT THOUSAND TWO HUNDRED DOLLARS AND NO/100 (\$6,248,200.00)**. Out of City's Share, the not-to-exceed amount of **ONE HUNDRED TWENTY FOUR THOUSAND NINE HUNDRED SIXTY FOUR DOLLARS AND NO/100 (\$124,964.00)** shall be deducted and paid to TCI for Contract management and oversight, leaving a net City Share paid to Developer of the not-to-exceed amount of **SIX MILLION ONE HUNDRED TWENTY THREE THOUSAND TWO HUNDRED THIRTY SIX DOLLARS AND NO/100 (\$6,123,236.00)**.

2.06 "Contract Documents" means this Developer Agreement and its **"Exhibit A"** through **"Exhibit G"**, attached hereto, incorporated herein by reference and made a part hereof for all purposes.

2.07 "Construction Documents" means the design, plans, specifications and estimates for the Project, which shall be provided and paid for by Developer pursuant to the terms of this Agreement. The Construction Documents shall illustrate the dimensions, Project materials, methods of construction, methods of excavation and other details of the Project.

2.08 "Developer Property" means the real property described in **Exhibit B**, comprised of five hundred ninety four (594) acres.

2.09 "Developer's Representative" means the person executing this Agreement on behalf of the Developer or such other person as Developer may designate to City in writing from time to time.

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

2.11 "Director" means the Director of the Transportation & Capital Improvements Department of the City of San Antonio.

2.12 "Hardy Oak/Huebner Expansion Project" means the phased public infrastructure improvements to the construction of an extension of Huebner Road and the construction of a connection of Hardy Oak Boulevard (labeled as **Exhibit A**). The scope of the Project is described in **Exhibit A-1** hereto.

2.13 "Oversizing" means, collectively, those public improvements more fully described in **Exhibit A** hereto related to the Hardy Oak/Huebner Expansion Project and oversized at the request of City, beyond requirements set forth in the City's Unified Development Code. City shall pay 100% of the increased cost for Oversizing in an amount not to exceed **FOUR MILLION SEVEN HUNDRED ONE THOUSAND FOUR HUNDRED DOLLARS AND NO/100 (\$4,701,400.00)**.

2.14 "Project" means the design and development of both Hardy Oak Boulevard and Huebner Road by the construction of Huebner Road, from its current point of termination at the west end of Developer's property at Huebner Road and Reagan High School to the proposed intersection of Hardy Oak Boulevard and Huebner Road within Developer's property, along with the connection of the two sections of Hardy Oak Boulevard, from the north end of Developer's property through Developer's property to the south end of Developer's property.

2.15 "Project Costs of Developer" means all of Developer's expenses incurred in the design of the Project, along with Developer's costs to construct both the Huebner Road expansion aspect of the Project and the Hardy Oak Boulevard expansion aspect of the Project, in accordance with this Agreement, including, without limitation, all costs to:

2.15.1 design the Project; and

2.15.2 prepare the Construction Documents of the Project including, but not limited to:

- (a) all engineering fees and expenses for all studies, estimates of probable costs and other work performed by Developer's Project Engineer;
- (b) all required utility removal, replacement, and relocation cost of the Project, 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

2.15.3 all costs and expenses to construct the Project.

2.16 "Project Engineer" means the individual working for Developer who prepares signs and seals the Construction Documents.

2.17 "ROW" shall mean all rights of way dedicated by Developer to City for the Project.

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

III. CONTRACT PROVISIONS

3.01 Background. This Agreement 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 on property dedicated as Right of Way(s) to the City. City shall pay the City Share and Developer shall pay the Developer's Share.

3.02 Purpose. The Hardy Oak/Huebner Expansion Project provides for the construction of an extension/connection of Huebner Road, from its current point of termination at the west end of Developer's property, at Huebner Road and Reagan High School to the existing Hardy Oak Boulevard south of Developer's property, and the extension/connection of the two sections of Hardy Oak Boulevard through Developer's property. The construction of the Project will resolve long-standing public safety and access issues associated with traffic congestion on Huebner Road and, with the connection of Hardy Oak Boulevard, afford motorists an alternative route of travel and provide a major positive impact on traffic patterns in the area.

3.03 Temporary Construction Easement and Other Easements. Within ten (10) business days following dedication of the ROW by Developer (pursuant to Section 3.06 herein), City's Representative shall grant the Temporary Construction Easement to Developer for construction of the Project, pursuant to and in the form included as **Exhibit C** hereto. The Temporary Construction Easement Document shall be executed by City, as Grantor, and delivered to Developer simultaneously with Developer's dedication of the ROW.

3.04 Performance of Obligations by Developer's Contractor. Notwithstanding anything herein to the contrary, City acknowledges and agrees all or a portion of Developer's performance obligations herein may be satisfied by Developer's Contractor(s) hired to construct the Project including, without limitation, those requirements for delivery of surety, prevailing wage payments, SBEDA reporting (SBEDA requirements attached and labeled as **Exhibit F** hereto), construction of the Project, insurance, provision of plans and Construction Documents to Director, compliance with all federal, state and local laws and the completion of the 1295 Form (the requirements of the Form 1295 labeled and attached as **Exhibit G** hereto). Developer agrees performance of such obligations by Developer's Contractor does not modify the terms and conditions of this Agreement.

3.05 Road Design Standards. Developer shall design the Project and shall construct the Project – the extensions/connections of Huebner Road and Hardy Oak Boulevard, as described herein – to the standards of a Secondary Arterial in accordance with the requirements of Chapter 35 of the San Antonio City Code (hereafter referred to as the “Unified Development Code” or “UDC”) Table 506-3 Conventional Street Design Standards, said standards outlined in City's Roadway Design Standards, attached hereto and labeled as **Exhibit E**.

3.06 Additional Road Requirements. Developer shall design and construct the Project in accordance with the requirements of City's UDC. No changes to the requirements of City's Unified Development Code shall be accepted without prior written City approval.

3.07 ROW Dedication Required. Prior to commencement of construction of the Project, Developer shall dedicate the ROW, pursuant to the requirements of the UDC and the TIA (hereafter referred to as the “ROW Dedication”). The ROW Dedication shall be done by plat and shall be submitted for acceptance by City, provided the dedication is in conformance with the customary requirements of City. City agrees the obligation of Developer (or its Contractor on behalf of Developer) under this Agreement to provide both a Payment Bond and a Performance Bond, in accordance with the requirements of City's standard surety forms, attached as **Exhibit D** hereto, for the construction of the Project fully shall satisfy the requirements set forth in Section 35-437 of the UDC, which requires provision of surety in connection with the approval and recordation of the plat to dedicate the ROW.

3.08 Progress Payments to Developer. As the Project is designed and constructed, Developer shall submit requests to City for payment of portions of City's Share as may be attributable to the completed engineering and construction of the Project. Any such requests for the payment of City's Share of construction expenses shall be accompanied by a certificate from the Project Engineer certifying, by percentage, the amount of the Work performed and confirming that such Work was performed in accordance with the Construction Documents, stating the amount of City's Share attributable thereto and Developer's Share and shall include a breakdown of labor, names of contractors and materials used. Upon approval of the draw request, City shall pay City's Share due within thirty (30) days following City's receipt of such approved reimbursement request, subject to the terms and conditions of this Agreement. Developer initially shall pay all costs incurred from time to time with respect to the Work.

3.09 Performance and Payment Bonds Required. Prior to the commencement of construction, Developer shall provide (or cause its Contractor to provide) City with:

3.09.1 a Performance Bond and a Payment Bond, both submitted on City's approved

Payment and Performance Bond forms, in accordance with and in satisfaction of Section 212.073 of the Texas Local Government Code in the estimated amount of the construction costs for the Project, reflecting City as beneficiary there under (hereafter referred to as the "Provision of Bonds"); and

3.09.2 insurance certificates showing City as a named insured in types and amounts described herein (hereafter referred to as the "Provision of Insurance"). The foregoing shall remain in force and effect throughout the course of construction of the Project.

3.09.3 Developer accepts and agrees bond and insurance expenses incurred by Developer or Developer's contractors pursuant to this Agreement shall be and remain the obligation of Developer and be subject to the terms and conditions herein.

3.10 No Third Party Beneficiaries. Each of Developer's Project construction contracts shall:

3.10.1 Prohibit third party beneficiaries other than City, which specifically shall be designated as a third party beneficiary;

3.10.2 Not be assignable by the Developer; and

3.10.3 Provide City access to Developer's portion of the Project at all reasonable times for inspection purposes; and

3.10.4 Include provisions in which Developer's Contractor acknowledge therein it has read this Agreement and understands City has certain rights there under and pursuant to this Agreement.

3.11 Transfer of Title. Developer warrants title to all Work it performs, pursuant to this Agreement, shall pass to City upon Substantial Completion of its portion of the Project's construction and acceptance by City. Developer further warrants all Work performed under this Agreement shall be free and clear of any and all liens, claims, security interests or encumbrances in favor of Developer's Contractors, any Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and/or equipment relating to the Work. **DEVELOPER SHALL INDEMNIFY AND HOLD CITY HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY DEVELOPER'S CONTRACTOR, SUBCONTRACTORS OR ANYONE CLAIMING BY, THROUGH OR UNDER DEVELOPER'S CONTRACTOR OR SUBCONTRACTOR FOR ITEMS COVERED BY PAYMENTS MADE BY CITY TO DEVELOPER.** Subject to this **Section 3.11**, upon the transfer of title of Work to City, City shall assume all ownership and maintenance responsibilities for the Project, provided:

3.11.1 all water quality basins exclusively benefitting City by mitigating storm water pollutants originating solely from City streets to be constructed by Developer pursuant to government regulations and the Construction documents;

3.11.2 City's acceptance of the water quality basins shall be in writing and issued within fifteen (15) business days, provided the Project Engineer certifies each water basin constructed is in accordance with the Construction Documents;

3.11.3 the water quality basins shall:

3.11.3.1 be located in dedicated Public Right of Ways;

3.11.3.2 be designed in accordance with City, San Antonio Water System (hereafter referred to as "SAWS") and the Texas Commission for Environmental Quality (hereafter referred to as "TCEQ");

3.11.3.3 serve only public City streets; and

3.11.3.4 be accepted by SAWS, and TCEQ, prior to City's absorption.

3.11.4 City shall have ingress/access to all water quality basins to provide servicing and maintenance. In the event the water quality basins are located on private property, City shall be provided access to all water quality basins through a dedication by plat with ingress/egress access dedication.

3.12 Certification of Contractor and Vendor Payments. For each reimbursement request, Developer (or Developer's Contractor) shall certify:

3.12.1 there are no known liens or bond claims outstanding at the date of the reimbursement request;

3.12.2 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 reimbursement request;

3.12.3 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

3.12.4 releases from all Developer's Contractors, Subcontractors and 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 certificate as appropriate and identify all exceptions to the requested certifications.

3.13 Payment of Reimbursement Request. City shall, within thirty (30) calendar days after receipt of Developer's reimbursement request, either pay the reimbursement request is such amount as City determines properly is due or notify Developer in writing of City's reasons for withholding payment in whole or in part, as provided in **Section 3.08** herein.

3.14 Verification of Work by City for Payment. The payment of each reimbursement request will constitute City's understanding, based on City's evaluation of the Work and the data comprising the reimbursement request, the Work or portion thereof has been completed and, to the best of City's knowledge, information and belief, the quality of the work is in accordance with the Construction Documents. The foregoing representations are subject to:

- 3.14.1 an evaluation of the Work for conformance with the Construction Documents;
- 3.14.2 results of subsequent tests and inspections;
- 3.14.3 correction of minor deviations from the Construction Documents prior to completion; and
- 3.14.4 any specific qualifications herein.

The payment of each reimbursement request further will constitute a representation that Developer is entitled to payment in the amount paid. However, the issuance of a payment will not be a representation that City has:

- 3.14.5 made exhaustive or continuous on-site inspections to check the quality or quantity of the Work covered by the reimbursement request;
- 3.14.6 reviewed construction means, methods, techniques, sequences or procedures;
or
- 3.14.7 reviewed copies of requisitions received from subcontractors and material suppliers and other data requested by the City to substantiate the Developer's right to payment.

3.15 City may withhold Payment in whole or in part, to the extent reasonably necessary to protect City, if City determines the requirements of **Section 3.12** herein cannot be achieved. If City is unable to make payment in the amount of the reimbursement request, City shall notify Developer, as provided in **Section 3.13** herein. If Developer and City cannot agree on a revised amount, City promptly shall issue Payment to Developer 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 Developer is responsible, including loss resulting from acts and omissions because of Developer's default. City shall pay the undisputed portions of such request for reimbursement within the time frames established in this **Article III**.

3.16 If the above reasons for withholding payment are resolved to the benefit of Developer, payment by City shall be made for amounts previously withheld. City shall not be deemed in default by reason of withholding payment as provided for in **Section 3.15** herein.

3.17 Payment of Contractor, Subcontractors and Vendors. Developer shall require Developer's Contractor to pay all bills for labor and materials performed and furnished by others, in connection with the Project's design and Developer's portion of the construction, furnishing and equipping of the improvements and the performance of the Work related to the Project and shall, if requested, provide City with evidence of such payment. Developer's failure to require such payments by its Contractor within such time shall constitute a material breach of this Agreement, unless the Developer is able to demonstrate to City bona fide disputes associated with the unpaid Subcontractor and/or Supplier and its/their work. Developer's Contractor shall include a provision in each of its subcontracts imposing the same payment obligations on its Subcontractors as are applicable to Developer's Contractor hereunder and, if City so requests, Contractor shall provide copies of such Subcontractor payments to City. If Developer's Contractor has failed to make payment promptly to its Consultant(s), Contractor(s) and/or for materials or labor used in the Work, said non-payment shall be deemed a material breach of this Agreement and City shall be entitled to withhold subsequent payment(s) to Developer to the extent necessary to protect City against claims or liens on the Project.

- 3.17.01 City shall, on request, furnish to Developer's Contractor or 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 Contractor or Subcontractor.
- 3.17.02 City shall not have an obligation to pay or to see to the payment of money to Developer's Consultant(s) and/or Contractor(s), except as may otherwise be required by law, if any.
- 3.17.03 Payments to material suppliers shall be treated in a manner similar to that provided in this **Section 3.17**, regarding Contractors and Subcontractors.
- 3.17.04 A progress payment, the use or occupancy of the Project or portion thereof by the City shall not constitute acceptance of Work that was not performed or furnished in accordance with the Construction Documents.

3.18 Inspections. The Project shall be accessible at all reasonable times to City's Representative or his/her designee for inspection. Developer acknowledges any inspections performed by City during the course of the Project, for purposes of this Agreement (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, its contractor or any third party. Developer further acknowledges Developer and its Contractor are required to perform their own inspections and inspections conducted by City do not relieve 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.

3.19 Construction Documents. As-Built Plans. Prior to the commencement of Developer's construction of the Project, Developer shall provide City's Development Services Department with a complete set of Construction Documents meeting the requirements of this Agreement 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 for Developer on the Project (hereafter referred to as the "Project Engineer"). Construction of any part of the Project shall in no event commence prior to City approval of the Construction Documents for that part of the Project (hereafter referred to as the "City Plan Approval"). Developer shall cause the Project Engineer to commence 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 Engineer's invoices for the Project as such invoices are received by Developer, and City shall pay City's Share thereof. City shall own the Construction Documents upon payment by City of City's Share of the total Project Engineer charges and Developer shall thereupon obtain and provide Project Engineer's assignment of its interest to City. By execution of this Agreement, Developer hereby assigns its interest in the Construction Documents to City, to become effective upon receipt by Developer of the total City Share of the Project Engineer's fees. 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. Notwithstanding the foregoing, Developer shall be authorized to use the Construction Documents and modify the Construction Documents (subject to the requirements under this Agreement) to allow Developer's contractor and subcontractors to complete the Project. Record drawings/As-Built Plans of the completed Project shall be provided to TCI by Developer no later than sixty (60) calendar days after completion of the Project, as jointly certified by the Project Engineer and City's Representative.

3.20 Construction Warranty. If the Project's Work is found to be defective, either wholly or in part, and/or found to be non-conforming with the Construction Documents during the twelve (12) month period following completion and written acceptance of the Project or portion thereof as defined in the Contract, City immediately shall give Developer written notice thereof; specifying the defect and/or non-conforming Work with particularity. (For purposes of this Agreement, "completion" shall mean written acceptance of the Project by City.) Developer shall cause the correction of such defective or nonconforming Work within thirty (30) calendar days of written 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 correct the specified 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 contractor, at City's option, and the reasonable cost of such correction shall be deemed to be sums due City by Developer, and may be offset against any outstanding amounts due by City to Developer under this Agreement. If no amounts are due by City to Developer, Developer shall reimburse City in full for the costs incurred by City in correcting such defective or non-conforming Work within thirty (30) calendar days of receipt of City's itemized cost breakdown. The cost of City crews shall be determined by prevailing market rates for correcting such specified 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 Agreement.

3.21 Representations and Warranties. Developer and City represent, warrant, certify and agree neither this Agreement 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.

IV. TERM

The term of this Agreement shall commence upon execution of the Agreement by both Parties (hereafter referred to as the “Effective Date”) and continue until the Project is complete and accepted in writing by City (hereafter referred to as the “Term”). Developer shall complete the design of the Project not later than May 1, 2017. Developer shall complete Construction of the Project – the construction of both Huebner Road and Hardy Oak Boulevard – not later than December 31, 2019.

V. GENERAL RESPONSIBILITIES OF DEVELOPER

5.01 Construction Commencement. Notwithstanding anything to the contrary herein, Developer shall be deemed to have commenced construction of the Project upon the occurrence of all of the following, in accordance with the terms and conditions of this Agreement (the “Construction Commencement”):

- A. The Provision of Bonds;
- B. The Provision of Insurance;
- C. Developer submission of all required forms or information under this Agreement;
- D. Developer submission of the Subcontractor/Supplier Utilization Plan;
- E. Developer provision of the Budget for the Project to City;
- F. City Plan Approval; and
- G. Issuance of all required permits and approvals for the Project.

5.01.01 Developer Obligation to Construction Project. Following Construction Commencement, Developer hereby accepts full responsibility for the performance of all services and activities described in this Agreement to complete the Project’s design on or before May 1, 2017 and construction of the Project on or before December 31, 2019. Construction of the Project shall be in accordance with the Construction Documents.

5.01.02 Developer Performance Guarantee. Developer hereby guarantees it shall perform its obligations under this Agreement. Developer, upon this Agreement’s

Effective Date, shall deposit with TCI either a bond, irrevocable letter of credit or cash in an amount equal to five percent (5%) of the estimated cost to design and complete construction of the Hardy Oak/Huebner Expansion Project (hereafter referred to as the “Performance Guarantee”). Notwithstanding any other term or provision hereof, should Construction Commencement not occur prior to the date reasonably required to complete construction by December 31, 2019, and such failure continues beyond the applicable notice and cure provision provided under **Article XI** herein, City may deem Developer in Default whereupon City may, as its sole and exclusive remedy:

- 5.01.02.01 terminate this Agreement and be entitled to retain the Performance Guarantee as liquidated damages arising from such default; and
- 5.01.02.02 recover from Developer any amounts previously paid to Developer in accordance with **Article III** herein within thirty (30) days following said termination. Upon the provision of Bonds by Developer, City immediately shall release the performance Guarantee to Developer upon demand and Developer shall have no further obligations under this Section 5.01.02.

5.02 The estimated cost to complete the Scope of Work of the Project is **TWELVE MILLION DOLLARS SIX HUNDRED THOUSAND AND NO/100 (\$12,600,000.00)**. Developer shall provide (or cause to be provided) all necessary funding for the Project Costs, above and beyond City’s Share, and provide evidence to City all of the Project Costs have been secured.

5.03 Unless written notification by Developer to the contrary is received by City, Developer's Representative shall be responsible for the administration of this Agreement on behalf of Developer until the completion of the Project.

5.04 Unless written notification by City to the contrary is received by Developer, City’s Representative shall be responsible for the administration of this Agreement on behalf of City until the completion of the Project.

5.05 Communications between City and Developer shall be directed to the designated representatives of each as set forth in **Section 5.03** and **Section 5.04** hereinabove.

5.06 Pursuant to **Section 3.19** herein, Developer shall provide City all of the Construction Documents for the Project. After approval by City, Developer shall not make any substantial changes to the Construction Documents without the prior written approval of City. This **Section 5.06** does not relieve Developer of the burden of obtaining all necessary governmental approvals and permits, 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).

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

5.06.02 Developer shall coordinate all required environmental permits for the Project with the Director.

5.07 City shall have authority to inspect the Project throughout the construction process to ensure compliance with the Plans. Developer shall cause its design professional to provide periodic certifications of construction certifying construction has been conducted in compliance with the Plans. Developer shall submit said certification to the TCI Director or his/her designee at the completion of the Project construction. City shall have the right to withhold any or all of the remaining City Funding until certification is provided.

5.08 Any construction of the Project affecting the floodplain shall comply with the UDC and other applicable State or Federal regulations.

5.09 Developer shall coordinate with all utilities affected by the Project's design, as well as its portion of the construction of the Project, and Developer shall pay all required costs for utility removal, replacement and relocation in connection with its portion of the construction of the Project.

VI. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS

6.01 Developer warrants and represents it shall comply with all federal, state and local laws and regulations and will use all reasonable efforts to ensure said compliance by any and all Consultants, Sub-Consultants, Contractors and Subcontractors working on the Project.

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

6.02.01 Government Code provisions regarding performance and payment bonds as set forth in **Section 3.09** herein.

6.02.02 **PREVAILING WAGE RATE AND LABOR STANDARD PROVISIONS.**

A. The requirements of Chapter 2258 of the Texas Government Code, entitled "Prevailing Wage Rates," shall apply to this Agreement. 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 will require subcontractors to comply with City Ordinance 71312 and its successors such as Ordinance No. 2008-11-20- 1045.

B. In accordance with the provisions of Chapter 2258 of the Texas Government Code and Ordinance No. 2008-11-20-1045, Developer's Representative shall request upon advertisement of construction bids, and City shall 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. Developer is required and shall require same of its construction Contractor, all Subcontractors, Consultants and

Sub-Consultants to comply with each updated schedule of the general prevailing rates in effect at the time Developer seeks proposals or bids for construction of a given phase. Developer further is required to cause the latest prevailing wage determination decision to be included in bids and contracts with Developer's General Contractor, Subcontractor, Consultant(s) and Sub-Consultant(s) 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 City deems 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 the Contractor or any subcontractor. The establishment of prevailing wage rates, in accordance with Chapter 2258 of the Texas Government Code, shall not be construed to relieve the 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.

- 6.02.03 Developer shall comply with the requirements of the City of San Antonio Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531, as amended), as further described in **Exhibit E** hereto (also referred to as the "SBEDA Requirements").

6.03 Construction Documents 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.

VII. PAYMENT BY CITY

7.01 City shall pay to Developer City's Share not to exceed **SIX MILLION TWO HUNDRED FORTY EIGHT THOUSAND TWO HUNDRED DOLLARS AND NO/100 (\$6,248,200.00)**. City's Share includes the payment to TCI of **ONE HUNDRED TWENTY FOUR THOUSAND NINE HUNDRED SIXTY FOUR DOLLARS AND NO/100 (\$124,964.00)**, representing two percent (2%) of City's total funding of the Project and shall be deducted from City's total participation in the Project for contract oversight and management, leaving a net total participation by City of the not-to-exceed amount of **SIX MILLION ONE HUNDRED TWENTY THREE THOUSAND TWO HUNDRED THIRTY SIX DOLLARS AND NO/100 (\$6,123,236.00)**.

7.02 City's Share reflects up to thirty percent (30%) of the total estimated price of the total Project Costs, pursuant to the terms and conditions of this Agreement. By this Agreement, City agrees to Developer an amount not to exceed **ONE MILLION FIVE HUNDRED FORTY SIX THOUSAND EIGHT HUNDRED DOLLARS AND NO/100 (\$1,546,800.00)**, or 12.27% of the total cost of the projected construction costs.

7.02 City Share reflects 100% of the estimated Oversizing costs of the Project, pursuant to the terms and conditions of this Agreement. By this Agreement, City agrees to pay Developer an amount not to exceed **FOUR MILLION SEVEN HUNDRED ONE THOUSAND FOUR HUNDRED DOLLARS AND NO/100 (\$4,701,400.00)**, representing 100% of the Oversizing costs of the Project.

VIII. FUNDING AND ASSISTANCE BY CITY

8.01 City shall pay Developer only for allowable and defined Project Costs incurred hereunder. Notwithstanding any other provisions of this Agreement, the total for all payments and other obligations made to Developer hereunder shall not exceed the Appropriation and City's Share.

8.02 City shall not be obligated or liable under this Agreement to any party, other than Developer, for payment of any monies or provision of any goods or services.

8.03 Developer accepts and agrees City's funding obligations under this Agreement are limited to City's Share of the Project. Additionally, it is expressly understood and agreed by City and Developer this Agreement in no way obligates payment of City's General Fund monies.

IX. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY DEVELOPER

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

9.01.01 the maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Agreement and with all generally accepted accounting practices; and

9.01.02 Developer's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

9.02 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 will have the right to inspect work completed to ensure conformance with the approved Construction Documents.

9.03 City agrees to provide Developer written notice regarding any expenditure in a reimbursement request that City cannot confirm is an eligible Project Cost under this Agreement or

related to the Construction Documents. Said notice will provide Developer thirty (30) days from receipt of said notice to provide additional information. Failure to provide sufficient information may result in City's denial of the reimbursement for the expenditure under review. Within thirty (30) days following written demand by City, Developer shall refund to City any sum of money for the expenditure in question previously paid by City to Developer that has been determined to:

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

9.03.02 not be supported by adequate documentation to fully justify the expenditure.

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

X. RIGHT OF REVIEW AND AUDIT

10.01 Developer grants City or its designee(s) the right to audit, examine or inspect, at the City's election, Developer's Records (as defined below) relating to the performance of the Work under this Agreement during the term of this Agreement and retention period herein. Such audit, examination or inspection may be performed by a City designee, which may include its internal auditors or an outside representative engaged by City. Developer agrees to retain its records in an electronic format for a minimum of four (4) years following termination of this Agreement (and forward the electronic records to City at the end of the four year period), unless there is an ongoing dispute under the Agreement; then, such retention period shall extend until final resolution of the dispute. For purposes of this Agreement, "Developer's Records" means any and all information, materials and data of every kind and character generated as a result of the Work under this Agreement. Examples of Developer records include but are not limited to billings, books, records, 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, written accounting policies, procedures, federal and state filings for issue in question, and any and all other relevant materials, agreements, sources of information and matters that may, in City's judgment, have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Contract Documents.

10.02 Notwithstanding the foregoing, City agrees Developer's retention and authorized audit of the Developer's Records shall not include the retention, disclosure, review or audit of records of the Developer or its affiliates unrelated to the Contract or the Work performed by or for Developer relating to performance of Work under this Agreement. It is expressly agreed by the City Developer shall not be required to disclose or retain the following:

- 10.02.1 time sheets, personnel or payroll records of Developer's employees;
- 10.02.2 private information about the employees or directors or partners of Developer;
- 10.02.3 information pertaining to the revenues, assets, liabilities, securities or position of Developer;
- 10.02.4 contributions or distributions of partner entities of the Developer;
- 10.02.5 financial records of the Developer, other than those related to the performance of Work under this Agreement,
- 10.02.6 financial records of partner entities of Developer, other than those related to performance of Work under this Agreement;
- 10.02.7 federal or State tax filings of any sort;
- 10.02.8 organization formation documents of any sort;
- 10.02.9 private plans, engineering drawings or analyses, architectural drawings or analyses, financial projections, marketing materials, real estate agreements of any type, or other documents or records of any kind, without limitation, pertaining to the development, sale, leasing or construction of Developer Property (other than those related to performance of Work under this Agreement);
- 10.02.10 memoranda or correspondence between Developer and its attorneys;
- 10.02.11 memoranda or correspondence of any sort between partner entities of Developer unrelated to the Developer's performance of Work under this Agreement; or
- 10.02.12 information pertaining to insurance coverage of Developer or its partner entities, other than is required for Developer's performance of Work under this Agreement.

10.03 City agrees it will exercise the right to audit, examine or inspect only during regular business hours and following five (5) days prior written notice to Developer. Developer agrees to allow City or its designee access to Developer's Records 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.

10.04 Developer must include this audit clause and right of review in any Consultant, Sub-Consultant, Contractor, Subcontractor, and supplier or vendor contract. Notwithstanding the foregoing, it is expressly agreed City's rights to audit apply only to Developer's Records.

XI. ALLOWABLE EXPENDITURES

11.01 Prior to the commencement of Project construction, Developer shall submit an estimated construction schedule and budget to complete the Project (hereafter referred to as the "Budget"), including contingency amounts to City's Representative for prior approval of any costs to be paid from funds received hereunder. Costs shall be considered allowable only if so approved in Developer's construction budget, or otherwise approved in advance by City's Representative in writing, and incurred directly and specifically in the performance of and in compliance with this Agreement and with all city, state and federal laws, regulations and ordinances affecting Developer's operations hereunder. Only the following categories of Project Costs shall be considered allowable (hereafter referred to as the "Eligible Expenses"):

- Construction costs, including bonds and insurance expenses
- Project Management fees/expenses
- Construction contingencies with approved change orders
- Design Plans and specifications
- Advertising and outreach expenses of Developer to comply with contractor solicitation and SBEDA Ordinance, as required by this Agreement.

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

11.03 The following shall not be considered allowable Project Costs under this Agreement:

- 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 projects
- Costs or fees associated with attendance at meetings, seminars, or conferences
- Costs or fees associated with regular maintenance and operation
- Fundraising
- Equipment and Furnishings, unless provided by Developer's General Developer and shown on the approved Plans
- Advertising, other than those expenses specified above
- Right of Way

XII. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

Developer further represents and warrants:

- 12.01.01 all information, data or reports heretofore or hereafter provided to City is/are, shall be and shall remain complete and accurate as of the date shown on the information, data or report and, since said date shown, shall not have undergone any significant change without written notice to City.
- 12.01.02 it is financially stable and capable of fulfilling its obligations under this Agreement and Developer shall provide City immediate written notice of any adverse material change in the financial condition of Developer materially and adversely affecting its obligations hereunder.
- 12.01.03 no litigation or proceedings are presently pending or to Developer's knowledge, threatened against Developer affecting its ability to fulfill its obligations specified herein.
- 12.01.04 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.

XIII. ACCESSIBILITY OF RECORDS

13.01 At any time and as often as City may deem necessary, upon five (5) calendar days written notice (but in no case more than once monthly), Developer shall make Records available to City or any of its authorized representatives, at no charge to the City, pursuant to **Article X** herein, and shall permit City or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

13.02 To the extent required by law, Developer agrees to cooperate with City to satisfy requests for information provided to City and subject to the Texas Public Information Act related specifically to the execution of this Project.

XIV. DEFAULT/TERMINATION

14.01 Default. Each failure of a Party to perform its obligations in accordance with the terms and conditions of this Agreement shall be deemed a "Default."

14.02 Other Defaults by Developer. In addition to the foregoing, the following occurrences may be deemed a Default of the Developer:

- 14.02.01 Failure or refusal of Developer, Developer's Designer and/or Developer's Contractor to start the Work to meet the date(s) established for the Project's delivery, as set forth in this Agreement.
- 14.02.02 City's reasonable belief the progress of the Work being made by Developer, Developer's Designer and/or Contractor is insufficient to complete the Work within the specified and agreed upon time.
- 14.02.03 Failure or refusal of Developer and/or Developer's Contractor to provide sufficient and proper equipment or construction forces to properly execute the Work in a timely manner, following receipt of written notice by the City of such concerns.
- 14.02.04 City's determination Developer, Developer's Designer and/or Developer's Contractor has abandoned the Work or Project, following written request of Developer to provide documentation to the contrary.
- 14.02.05 City's determination Developer and/or Developer's Contractor has become insolvent, bankrupt or otherwise financially unable to carry on the Work, following a written request of Developer to provide evidence to the contrary.
- 14.02.06 Failure or refusal of Developer, following receipt of written notice from City, to observe any material requirements of the Construction Documents.
- 14.02.07 Failure or refusal of Developer, Developer's Designer and/or Developer's Contractor promptly to 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.
- 14.02.08 A reasonable belief by City collusion exists or has occurred for the purpose of illegally procuring the contract, Designer, Contractor or a Sub-Consultant and/or Subcontractor, or a fraud is being perpetrated on City in connection with the construction of Work under the Contract.
- 14.02.09 Repeated and flagrant violation of safe working conditions by Developer's and/or Developer's Contractor following receipt of written notice by the City of such violations.
- 14.02.10 The willful and persistent violation of Developer and/or Developer's Contractor to carry out the Work in accordance with the Construction Documents.
- 14.02.11 The failure or refusal of Developer to carry out the Work in accordance with the approved Subcontractor/Supplier Utilization Plan for this Project.

14.03 Cure Period, Termination. Upon the occurrence of a Default by either Party in the performance of its obligations hereunder and the failure to cure such Default within thirty (30) calendar days following receipt of written notice of default from the non-defaulting Party (or such reasonably longer time as may be necessary, provided the defaulting party commences the cure within thirty (30) days and continuously and diligently pursues the cure to completion), the non-defaulting party shall have the right to terminate this Agreement.

14.03.01 Cure Period for Failure to Achieve SBEDA Requirements. Notwithstanding the foregoing, upon the occurrence of a Default by Developer for failure to perform the SBEDA Requirements, pursuant to **Section 6.02.03** herein, and the failure of Developer to cure such Default within fifteen (15) calendar days following receipt of written Notice of Default from City (or such reasonable time period required to cure such Default), City may terminate this Agreement as its sole remedy for such Default.

14.04 Suspension of Payments to Developer. In the event of an uncured Default by Developer (following Construction Commencement) and written Notice to Developer thereof, City may deem Developer in Default and invoke the terms of Default herein described. The declaration of Default may occur to protect City from loss for which Developer is responsible, including losses resulting from acts and omission because of:

- 14.04.01 defective Work not remedied;
- 14.04.02 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;
- 14.04.03 failure of Developer to make payments properly to Contractors, Subcontractors, Consultants and/or Sub-Consultants or for labor, materials or equipment under **Section 3.17** herein;
- 14.04.04 reasonable evidence the Work cannot be completed in the Contract Term and Developer has failed to provide City adequate assurance of its continued performance; and/or
- 14.04.05 damage to City property or a City contractor.

When the above reasons for withholding payment are remedied, payment shall be made by City for amounts previously withheld. Developer acknowledges and accepts City shall not be deemed in default by reason of withholding payment as provided for herein.

14.05 Completion of Project Following Termination by City.

- 14.05.01 In the event this Agreement is terminated by City following Construction Commencement and only if City elects to enforce the performance bond for the Project and/or construct the Project (or portion(s) thereof), Developer

hereby grants City a twenty-five (25) foot wide construction easement on each side of the ROW to complete the construction of the Project. This Agreement shall operate as an agreement by Developer to allow City access to the Property as necessary to complete the Project in accordance with the Construction Documents.

14.05.02 In the event this Agreement is terminated by City following Construction Commencement and only if City elects to enforce the performance bond for the Project and/or construct the Project, Developer shall, as of the date specified by City, discontinue the Work or portion of the Work as City shall designate, whereupon the entity issuing Developer's performance bond (hereafter referred to as the "Surety") shall, within fifteen (15) calendar days after the receipt of written notice of termination has been served upon Developer and 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 Surety may:

14.05.02.01 perform the Work with forces employed by Surety;

14.05.02.02 at City's sole option and with the written approval consent of City, tender a Replacement Contractor to take over and perform the Work, in which event Surety shall be responsible for and pay the amount of any costs required to be incurred for the completion of the Work in excess of the amount of City's Share remaining under the Contract as of the time of the termination; or

14.05.02.03 at City's sole option and with the written approval and 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 the City for any other loss sustained as a result of Developer's Default, less City's Share remaining under the Contract at the time of termination.

14.05.03 In the event of termination of this Agreement following Construction Commencement, Surety shall assume Developer's obligations in all respects, and the amount of funds remaining unpaid to Developer under the Agreement shall be paid by City to Surety for all Work performed by Surety or the Replacement Contractor in accordance with the terms of the Construction Documents, subject to any rights of City to deduct any costs, damages or actual damages City may have incurred including, but not limited to, additional fees, expenses and attorneys fees, as a result of such termination.

14.05.04 Any balance of City's Share remaining at the time of the Agreement termination shall become due and payable to Surety as the Work progresses, subject to all of the terms, covenants and conditions of the Contract

Documents. If Surety does not, within the time specified, exercise its obligation to assume the performance obligations of Developer under the Contract (or that portion of the Work which City has ordered Developer to discontinue) then City shall have the power to complete the Work in accordance with the Construction Documents, by contract or otherwise, as it may deem necessary. Developer accepts and agrees City shall have the right to take possession of or use any or all of the materials, plants, tools, equipment, supplies and property of every kind provided by Developer for the purpose of the Work (or to procure other tools, equipment, labor and materials for the completion of the Work) and to charge to the account of Developer the expenses of completion and labor, materials, tools, equipment and incidental expenses, up to an amount not to exceed the Contract Price. The expenses incurred by City to complete the Work shall be deducted by City out of any balance of City's Share remaining unpaid to or unearned by Developer. Developer and Surety shall be liable to City for any costs incurred in excess of the balance of City's Share available 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, up to an amount not to exceed the Contract Price.

14.06 Upon Surety's assumption of Developer's obligations, City shall not be required to obtain the lowest bid for the Work of completing the Project in accordance with the Construction Documents, but the expenses to be deducted from City's Share shall be the actual cost of such Work and the other damages and City shall use its best efforts to minimize the cost of completing the Work. Notwithstanding the foregoing, City agrees it shall not enter into contracts or incur unreasonable charges to complete the Work and agrees to look first to Surety in all cases to complete the Work, prior to engaging in self-help to remedy any default by Developer hereunder. In case City's costs and damages are less than City's Share, which would have been payable under the Contract if the same had been completed by Developer, then City may pay to Developer or Surety, as appropriate, the difference, provided Developer (or Surety) shall not be entitled to any claim for damages or for loss of anticipated profits. In the event the actual cost for completion and damages exceeds the amount which would have been payable to Developer under the Contract, if the same had been completed by Developer, then Developer or its Surety shall pay the amount of the excess costs to City following receipt of notice from City for the excess amount owed, up to an amount equal to the Contract Price, less City's Share. When only a particular portion of the Work is being completed by City under the provisions of this **Article XIV**, Developer shall continue the remainder of the Work in conformity with the terms of the Agreement and in such manner as not to hinder or interfere with the performance of workmen employed and provided by City.

14.07 Limited Remedies of Both Parties. Except for the express remedies set forth above, the Parties agree no other remedies are available in the event of a Default. It expressly is agreed neither Party shall have the right to seek consequential, special or punitive damages against the other for any default under this Agreement.

XV. INDEMNITY

15.01 Developer covenants and agrees to **FULLY INDEMNIFY**, and **HOLD HARMLESS** City and City's elected officials, agents, employees, officers, directors, officially designated volunteers, 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 under this Agreement, including any negligent acts or omissions of any agent, officer, director, representative, employee, Consultant, volunteer, Sub-Consultant, licensee, sub-licensee, Contractor or Subcontractor of Developer or Subcontractor of Developer, and their respective officers, agents, employees, directors and representatives, volunteers consultant, (collectively "Developer Parties") while in the exercise of the performance of the rights or duties under this Agreement. **THE INDEMNITY PROVIDED FOR IN THE PARAGRAPH SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF CITY, OR THE CITY PARTIES IN SUCH INSTANCE WHERE SUCH NEGLIGENCE CAUSES PERSONAL INJURY, DEATH OR PROPERTY DAMAGE. IN THE EVENT DEVELOPER AND CITY 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, CITY WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

15.02 The provisions of this Indemnity provision solely are 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 three (3) business days 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 Agreement, 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 **Article XV** without relieving Developer of any of its obligations under this **Article XV**.

XVI. INSURANCE

16.01 Prior to the commencement of any work under this Agreement, Developer shall furnish (or cause to be furnished) copies of all required endorsements and an original completed Certificate(s) of Insurance (hereafter referred to as the "Certificate") to City's Transportation & Capital Improvements (TCI) Department, which shall be clearly labeled "**Developer Participation Agreement: Hardy Oak/Huebner Development Project**" 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 will not accept Memorandum of Insurance or Binders as proof of insurance. The original Certificate (s) or form must have the agent's original signature, if agent is authorized to bind the insurance company, 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 Agreement until such Certificate and endorsements have been received and approved by City's TCI Department. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

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

16.03 Developer's financial integrity is of interest to City. Therefore, subject to Developer's right to maintain reasonable deductibles in such amounts as are approved by City, Developer shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Developer'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 on the following table:

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

| | |
|-------------------|----------------|
| c. Hired Vehicles | per occurrence |
| * if applicable | |

16.04 Developer agrees to obtain (or cause to be obtained) all insurance coverages with minimum limits of not less than those limits delineated in **Section 16.03** (Insurance Table) herein from each contractor and provide a Certificate of Insurance and Endorsement naming Developer and City as an additional insured.

16.05 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). Consultant 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 ten (10) calendar days of the requested change. Developer shall pay any costs incurred resulting from said changes:

City of San Antonio
Transportation & Capital Improvements Department
Attn: Contract Services Division
P.O. Box 839966
San Antonio, Texas 78283-3966

16.06 Developer agrees, with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:

- 16.06.01 Name City, its officers, officials, employees, volunteers and elected representatives as additional insureds by endorsement, with respect to 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;
- 16.06.02 Provide for an endorsement the "other insurance" clause shall not apply to the City of San Antonio where City is an additional insured shown on the policy;
- 16.06.03 Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of City.
- 16.06.04 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.

16.07 Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, Developer shall provide a replacement Certificate of Insurance and applicable

endorsements to City. City shall have the option to stop construction of the Project should there be a lapse in coverage at any time during this Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.

16.08 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 Developer's or its Contractors' performance of the work covered under this Agreement.

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

16.10 It is understood and agreed the insurance requirement of City upon Developer is in addition to and separate from any other obligation contained in this Agreement.

XVII. WARRANTIES

17.01 Developer guarantees the design and construction of the Project shall meet or exceed the requirements of City's Unified Development Code (including plat variances permitted by the City's Planning Commission) and be constructed in strict compliance with the Construction Documents, subject to change orders and modifications permitted by the Director.

17.02 Representations and Warranties. Developer and City represent, warrant, certify and agree this Agreement, the Contract Documents and/or 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.

XVIII. NONDISCRIMINATION

As a party to an Agreement with City, Developer understands and agrees to comply with the *Non-Discrimination Policy* of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein. Developer represents and warrants 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 Consultants, Sub-Consultants, Contractors, Subcontractors, vendors, suppliers or commercial customers, nor shall Developer retaliate against any person for reporting instances of such discrimination. Developer shall provide equal opportunity for Consultants, Sub-Consultants, Contractors, Subcontractors, vendors and suppliers to participate in all of its public sector and private sector sub-consulting and supply opportunities, provided nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy

the effects of marketplace discrimination which have occurred or are occurring in City's Relevant Marketplace. Developer acknowledges it understands and agrees a material violation of this **Article XVIII** shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification of Developer from participating in City contracts or other sanctions. This **Article XVIII** is not enforceable by or for the benefit of, nor creates any obligation to, any third party. Developer's certification of its compliance with this *Non-Discrimination Policy*, as submitted to City pursuant to the solicitation for this Agreement, is hereby incorporated into the material terms of this Agreement. Developer shall incorporate this clause into each of its Consultant, Sub-Consultant, Contractor, Subcontractor and supplier agreements entered into, pursuant to City agreements/contracts.

XIX. CONFLICT OF INTEREST

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

19.02 City further covenants 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.

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

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

XX. POLITICAL ACTIVITY

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

XXI. 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 by Developer pertaining to the Project (but excluding information marked as proprietary or confidential information of Developer, to the extent permitted by law), shall, upon receipt, become the property of City.

XXII. CONTRACTING

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

22.02 City shall, in no event, be obligated to any third party, including any contractor, subcontractor or vendor of Developer, for performance of or payment for work or services.

XXIII. CHANGES AND AMENDMENTS

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

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

XXIV. ASSIGNMENTS

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

XXV. SEVERABILITY OF PROVISIONS

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

XXVI. NON-WAIVER OF PERFORMANCE

26.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained.

26.02 Any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either Party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

26.03 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.

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

XXVII. ENTIRE AGREEMENT

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

27.02 The terms of this Agreement 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 no such statements, representations, agreements or understandings exist. The Parties further intend this Agreement constitutes the complete and exclusive statement of the Parties' intent and 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 Agreement shall be effective unless it is made in a writing signed by the Parties hereto.

XXVIII. NOTICES

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

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

With copy to: Office of the City Clerk
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

DEVELOPER: XJ 1869 Ranches, Ltd.
c/o Robert Ernest Schlott III
19227 Classen Crest
San Antonio, Texas 78258

With copy to: Shauna Weaver, P.E.
Pape-Dawson Engineers
2000 NW Loop 410
San Antonio, Texas 78213

28.02 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) calendar days of such change.

28.03 Any communication so addressed and mailed shall be deemed to be given on the earliest of:

28.03.1 when actually received or delivered;

28.03.2 when proof of return of certified mail is received; or

28.03.3 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.

XXIX. MISCELLANEOUS

29.01 Conflicts between Documents. In the event of any conflict between the Exhibits hereto and the terms and provisions of this Agreement, the terms and provisions of this Agreement shall control.

29.02 Waiver. It is understood and acknowledged by both Parties City exercises no control over the means of accomplishing Developer's portion of the Work on the Project. No approval by City shall impose any liability on City for any risk or damage to persons or property or the 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.

29.03 Third Party Beneficiaries. There shall be no third party beneficiaries to this Agreement.

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

29.05 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 Agreement, 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, (i.e. Fire, flood, natural disasters) and permit and government-caused delays, by Endangered Species Act, or Army Corps of Engineers review, 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.

XXX. PARTIES BOUND

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

XXXI. 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.

XXXII. TEXAS LAW TO APPLY

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

XXXIII. GENDER

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

XXXIV CAPTIONS

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

XXXV. LEGAL AUTHORITY

35.01 The person executing this Agreement for City represents, warrants, assures, and guarantees they possess the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement and to perform the responsibilities herein required.

35.02 The signer of this Agreement for Developer represents, warrants, assures and guarantees he or she has full legal authority to execute this Agreement 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 _____, 20_____.

CITY OF SAN ANTONIO

**DEVELOPER
XJ 1869 RANCHES, LTD.**

By: _____
Sheryl Sculley
City Manager

By: _____
Printed Name: _____
Title: _____

APPROVED AS TO FORM:

CITY ATTORNEY

EXHIBIT A
DESCRIPTION OF PROJECT

EXHIBIT A-1:

**DEVELOPER'S SCOPE OF PROJECT
FULL PROJECT DESIGN
CONSTRUCTION OF
HUEBNER ROAD EXPANSION
AND
HARDY OAK BOULEVARD EXPANSION**

EXHIBIT B
DEVELOPER'S PROPERTY

EXHIBIT C
TEMPORARY CONSTRUCTION EASEMENT

DRAFT

EXHIBIT D
CITY'S BOND/SURETY FORMS

DRAFT

PAYMENT BOND

STATE OF TEXAS)
COUNTY OF BEXAR)
CITY OF SAN ANTONIO)

The City of San Antonio, a municipal corporation in the State of Texas (hereafter referred to as "City") and _____, a _____ with its principal place of business located at _____ (hereafter referred to as "Contractor" or "Principal") have entered into a Contract (hereafter referred to as "the Contract") dated _____, 20__ for the _____ Project (hereafter referred to as "the Project"). Said Contract is incorporated by reference into this Statutory Payment Bond, pursuant to Chapter 2253 of the Texas Government Code (hereafter referred to as "this Bond").

By virtue of this Bond, Contractor as Principal and _____, with its physical address at _____, a mailing address of _____ and a business telephone number of _____ as Surety (hereafter referred to as "Surety") do hereby acknowledge each to be bound to City as an Oblige in the maximum amount of _____ Dollars (\$XXXXXXXX) (hereafter referred to as the "Bond Sum"). Contractor and Surety hereby further bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally for payment of this Bond, as provided herein.

- 1. GENERAL CONDITIONS.** It is a condition of this Bond that if Contractor promptly makes payment of all sums for all labor, services, materials and equipment furnished for use in the performance of the Scope of Work required by the Contract, Surety's obligations pursuant to this Bond are null and void. Otherwise, Surety's obligations shall remain in full force and effect. Surety waives any requirement to be notified of alterations or extensions of time, or any other duly authorized modifications, made by City to the Contract.
- 2. SURETY OBLIGATION.** Surety's obligation under this Bond is for the benefit and sole protection of all persons supplying labor, services, materials and equipment in the prosecution of said Contract. Surety's obligation to the Claimant(s) shall not exceed the Bond Sum.

THIS BOND is entered into this _____ day of _____, 20__.

SURETY (seal)

By: _____
(Signature)

(Print Name)

(Print Title)

[ATTACH POWER OF ATTORNEY]

ATTEST: _____

CONTRACTOR

By: _____
(Signature)

(Print Name)

(Print Title)

[Additional signatures, if any, appear on
attached page]

ATTEST: _____

PERFORMANCE BOND

STATE OF TEXAS)
COUNTY OF BEXAR)
CITY OF SAN ANTONIO)

The City of San Antonio, a municipal corporation in the State of Texas (hereafter referred to as "City") and _____, a _____ with its principal place of business located at _____ (hereafter referred to as "Contractor" or "Principal") have entered into a Contract (hereafter referred to as "the Contract") dated _____, 20__ for the _____ Project (hereafter referred to as "the Project"). Said Contract is incorporated by reference into this Statutory Performance Bond, pursuant to Chapter 2253 of the Texas Government Code (hereafter referred to as "this Bond").

By virtue of this Bond, Contractor as Principal and _____ with its physical address at _____, a mailing address of _____ and a business telephone number of _____ as Surety (hereafter referred to as "Surety") do hereby acknowledge each to be bound to Owner as an Oblige in the maximum amount of _____ Dollars (\$XXXXXXXX) (hereafter referred to as the "Bond Sum"). Contractor and Surety hereby further bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally for payment of this Bond, to City as provided herein.

1. **GENERAL CONDITIONS.** It is a condition of this Bond that if Contractor promptly performs its Contract obligations (hereafter referred to as the "Work"), Surety's obligations pursuant to this Bond are null and void. Otherwise, Surety's obligations shall remain in full force and effect. Surety waives any requirement to be notified of alterations or extensions of time, or any other duly authorized modifications, made by City to the Contract. Upon making demand on this Bond, City shall make the Contract balance (equal to the total amount payable by City to Contractor pursuant to the Contract less amounts paid by City to Contractor) available to Surety for completion of the Work.
2. **SURETY OBLIGATION.** If Contractor does not faithfully construct and complete said work, as defined in the Scope of Work under its contract with City, and City invokes its contractual rights and declares Contractor in default, Surety promptly shall remedy the default and, at City's sole option, Surety shall:
 - A. within a reasonable time (but not later than thirty (30) days after Surety receives written notice of Contractor's/Principal's Default), with written notice to City, step into and assume the role, all rights and all obligations of the defaulting Contractor/Principal under the Contract. Upon assumption of this role, Surety and all sureties directly shall contract with a Completion Contractor hired/engaged by Surety and all sureties to complete the structure(s), Work and improvements, pursuant to the Scope of Work in the Contract with Contractor/Principal. The selection of the Completion Contractor must be approved in writing by City and such approval shall not unreasonably be withheld. Surety and all sureties solely shall be responsible for any and all costs incurred, up to the Bond Sum, to complete the structure(s), Work and improvements, pursuant to the Scope of Work in the Contract with Contractor/Principal; or
 - B. In the event Surety fails to contract with a Completion Contractor within ninety (90) days of receipt of City's written notice of Default, City may, at City's sole discretion, select a Completion Contractor in accordance with Texas Law. In this event of Surety and all sureties failing to contract with a Completion Contractor within ninety (90) days of receipt of City's written notice of Default, Surety and all sureties

then shall pay City any and all costs, up to the Bond Sum, for City's selected Completion Contractor to complete the structure(s), Work and improvements, as defined in the Scope of Work in the Contract with Contractor/Principal; or

- C. At City's sole discretion, Surety and all sureties shall pay to City City's estimated amount for City to execute a Project Completion Contract with a Completion Contractor, selected by City in accordance with Texas Law, solely to complete the structure(s), Work and improvements, pursuant to the Scope of Work in the Contract with Contractor/Principal. Surety and all sureties shall pay City any and all costs, up to the Bond Sum, for the City-selected Completion Contractor to complete the structure(s), Work and improvements, as defined in the Scope of Work in the contract with Contractor/Principal.

3. **VENUE.** The obligations of the parties under this Bond shall be performable in Bexar County, Texas. If legal action, such as civil litigation, is necessary in connection with this Bond, exclusive venue shall be in Bexar County, Texas.

THIS BOND is entered into this _____ day of _____, 20____.

SURETY (seal)

CONTRACTOR

By: _____
(Signature)

By: _____
(Signature)

(Print Name)

(Print Name)

(Print Title)

(Print Title)

[ATTACH POWER OF ATTORNEY]

[Additional signatures, if any, appear on
attached page]

ATTEST: _____

ATTEST: _____

EXHIBIT E

CITY OF SAN ANTONIO ROADWAY DESIGN STANDARDS

DRAFT

EXHIBIT F

**SBEDA TERMS & CONDITIONS
SBE SUBCONTRACTING GOAL(S)**

DRAFT

SBEDA ORDINANCE COMPLIANCE PROVISIONS

A. Solicitation Response and Contract Requirements and Commitment

Developer understands and agrees the following provisions shall be requirements of this Developer Participation Agreement, if awarded, and Developer to complying with these requirements.

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

Exception Request - Developer may, for good cause, request an Exception to the application of the SBEDA Program if Developer submits the *Exception to SBEDA Program Requirements Request* form (available at <http://www.sanantonio.gov/SBO/Forms.aspx>). Developer's Exception request fully must document why: (1) the value of the contract is below the \$50,000 threshold for application of the SBEDA Program; or (2) no commercially-useful sub-consulting and/or 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.**

B. SBEDA Program

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 City's Economic Development (hereafter referred to as "EDD") 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.

C. Definitions

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

Centralized Vendor Registration System (CVR) – a mandatory electronic system wherein City requires all of Developer’s prospective Consultants and Contractors, along with their Sub-Consultants and Subcontractors ready, willing and able to sell goods or services to City to register. The CVR system assigns a unique identifier to each registrant that is then required for the purpose of submitting solicitation responses and invoices, and for receiving payments from City. The CVR-assigned identifiers also are used by City’s Goal Setting Committee for measuring relative availability and tracking utilization of SBE and M/WBE 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 City’s Small Business Office (hereafter referred to as “SBO”) staff determines a firm to be a bona-fide small, minority-, women-owned or emerging small business enterprise. Emerging Small Business Enterprises (hereafter referred to as “ESBEs”) automatically are eligible for Certification as SBEs. Any firm may apply for multiple Certifications 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 – a S/M/WBE firm performs a Commercially Useful Function when it is responsible for execution of a distinct element of the work of the contract and is carrying out its responsibilities by actually performing, staffing, managing and supervising the work involved. To perform a Commercially Useful Function, the S/M/WBE firm also must be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quantity and quality, ordering the material and installing (where applicable) and paying for the material itself. To determine whether an S/M/WBE firm is performing a Commercially Useful Function, an evaluation must be performed of the amount of work subcontracted, normal industry practices, whether the amount the S/M/WBE firm is to be paid under the contract is commensurate with the work it actually is performing 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 Developer to perform such “pass-through” or “conduit” functions that are not commercially useful shall be

viewed by City as fraudulent if Developer 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, Developer shall not be given credit for the participation of its S/M/WBE Sub-Consultant or joint venture partner towards attainment of S/M/WBE utilization goals, and Developer and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

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

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

(2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., timely advertisements in appropriate trade publications and publications of wide general circulation; timely posting of SBE or M/WBE subcontract opportunities on the City of San Antonio website; solicitations of bids/proposals/qualification statements from all qualified SBE or M/WBE firms listed in the Small Business Office’s directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Consultant’s posting of a bond covering the work of SBE or M/WBE Consultants; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by the Developer; 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 Consultants.) The appropriate form and content of Developer’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 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 sometimes may be referred to as “business categories.”

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 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 certified for participation in City’s M/WBE Program APIs.

Minority Business Enterprise (MBE) – any legal entity, except a joint venture, 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, as defined below, and is ready, willing and able to sell goods or services that are purchased by City. To qualify as an MBE, the enterprise shall meet the Significant Business Presence requirement as defined below. 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.

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

Payment – dollars actually paid to Consultants and/or Sub-Consultants and Vendors for City-contracted goods and/or services.

Points – the quantitative assignment of value for specific evaluation criteria in the vendor selection process used in some Construction, Architectural & Engineering, Professional Services, and Other Services contracts (e.g., up to 10 points out of a total of 100 points assigned for S/M/WBE participation, as stated in a Request for Qualifications or Requests for Proposals).

Prime Consultant – the vendor, Consultant or Contractor to whom a purchase order, contract or Agreement is issued or entered into by City for purposes of providing goods or services for City. For purposes of this agreement, this term refers to Developer.

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 (hereafter referred to as “SAMSA”), currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson.

Developer – the entity submitting a bid, statement of qualifications, proposal in response to a solicitation issued by City or entering into a Developer Participation Agreement with City.

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

Responsive – a firm’s submittal (bid, response or proposal) conforming in all material respects to the solicitation (Invitation for Bid, Request for Qualifications or Request for Proposal) and in 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 City’s MGT Studies analyzed contract utilization and availability data for disparity. City’s SAMSA currently including the counties of Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina and Wilson.

SBE Directory - a listing of small businesses certified for participation in 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 (1) 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 existing for the purpose of making a profit, Independently Owned and Operated by Individuals legally residing in or that are citizens of the United States or its territories, meeting the U.S. Small Business Administration (hereafter referred to as “SBA”) size standard for a small business in its particular industry(ies) and meets the Significant Business Presence requirements, as defined herein.

Small Business Office (SBO) – the office within City’s EDD Department primarily responsible for general oversight and administration of the S/M/WBE Program.

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

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

Sub-Consultant – any vendor of Developer providing goods or services to Developer in furtherance of Developer’s performance under an agreement, contract or purchase order with the City. A copy of each binding agreement between Developer and its Consultants, Sub-Consultants, Contractors and Subcontractors shall be submitted to City in writing prior to execution of this Agreement and any modification to this 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 exceeding a certain dollar threshold, as set forth in Section III.E.7 of Attachment A to the SBEDA Ordinance, or the temporary stoppage of Developer’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.

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

Women Business Enterprises (WBEs) - any legal entity, except a joint venture, organized to engage in for-profit transactions, certified for purposes of the SBEDA Ordinance as being a Small Business Enterprise and is at least fifty-one percent (51%) owned, managed and controlled by one or more non-minority women Individuals lawfully residing in or are citizens of the United States or its territories, ready, willing and able to sell goods or services to be purchased by City and meeting 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

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

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

2. Developer fully shall cooperate with any City or SBO investigation (and shall also respond truthfully and promptly to any City or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of Developer, its Consultants, Contractors and/or Suppliers;
3. Developer 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 Sub-Consultants/Suppliers and workers to determine whether there has been a violation of the terms of this Agreement;
4. Developer immediately shall notify the SBO, in writing, on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to Developer's Consultant/Contractor Supplier Utilization Plan for this Agreement, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by Developer to replace the Consultant/Contractor/Supplier in accordance with the applicable Affirmative Procurement Initiative. All proposed changes to the Consultant/Contractor/Supplier Utilization Plan including, but not limited to, proposed self-performance of work by Developer of work previously designated for performance by Consultant, Contractor or Supplier, substitutions of new Consultants, Contractors and/or Suppliers, terminations of previously designated Consultants, Contractors and/or Suppliers or reductions in the scope of work and value of work awarded to Consultants, Contractors and/or suppliers, shall be subject to advanced written approval by the Originating Department and the SBO.
5. Developer immediately shall notify the Originating Department and SBO of any transfer or assignment of its contract with City, as well as any transfer or change in its ownership or business structure.
6. Developer shall retain all records of its Consultant/Contractor/Supplier payments pursuant to this Agreement for a minimum of four (4) years or as required by state law, following the conclusion of this contract or, in the event of litigation concerning this Agreement, for a minimum of four (4) years or as required by state law following the final determination of litigation, whichever is later.

7. In instances wherein the SBO determines that a Commercially Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in a Developer's Consultant/Contractor/Supplier Utilization Plan, Developer shall not be given credit for the participation of its S/M/WBE or HUBZone Consultant(s), Contractor(s) and/or Suppliers or joint venture partner(s) toward attainment of S/M/WBE or HUBZone firm utilization goals and Developer and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties, in accordance with the SBEDA Ordinance.
8. Developer acknowledges City will not execute a contract or issue a Notice to Proceed for this Project until Developer and each of its Consultants, Contractors and Suppliers utilized for meeting SBEDA goals for this Project have registered and/or maintained active status in City's Centralized Vendor Registration System and Developer has represented to City which primary commodity codes each registered Consultant, Contractor and/or Supplier will be performing under for this Agreement.

E. SBEDA Program Compliance – Affirmative Procurement Initiatives

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

SBE Prime Contract Program. In accordance with the SBEDA Ordinance, Section III. D. 3. (b), this Agreement is being awarded pursuant to the SBE Prime Contract Program and, as such, Developer affirms if it presently is certified as an SBE, Developer agrees not to subcontract more than 49% of the contract value to a non-SBE firm, and

M/WBE Prime Contract Program. In accordance with the SBEDA Ordinance, Section III. D. 4. (b), this Agreement is being awarded pursuant to the M/WBE Prime Contract Program and as such, Developer affirms if it presently is certified as an M/WBE (see *Minority/Women Business Enterprise* definition), Developer agrees not to subcontract more than 49% of the contract value to a non-M/WBE firm, and

SBE Subcontracting Program. In accordance with SBEDA Ordinance Section III. D. 3. (a), this Agreement also is being awarded pursuant to the SBE Subcontracting Program. Developer agrees to sub-contract at least _____ percent (____%) of its prime consulting contract value to certified SBE firms headquartered or having a Significant Business Presence within the San Antonio Metropolitan Statistical Area (SAMSA). Developer accepts, agrees and confirms the Consultant/Subcontractor/Supplier Utilization Plan Developer submitted to City for participation in this Agreement (or, if applicable, Developer agrees to submit during the price proposal negotiation

phase of this Agreement) contains the names of the certified SBE Consultants/Contractors/Suppliers to be used by Developer pursuant to this Agreement, the respective percentages of the total prime contract dollar value to be awarded and performed by each SBE Consultant, Contractor and/or Supplier and other documentation, to include a description of each SBE Consultant's, Contractor's and Supplier's scope of work and confirmation each SBE Consultant's, Contractor's and Supplier'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, Developer accepts and agrees its failure to attain the established consulting/contracting/supplier goal for SBE firm participation in the performance of a Commercially Useful Function under the terms of this Agreement shall be a material breach of this Agreement, shall be grounds for termination of its Agreement with City, may result in debarment from performing future City contracts 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: City strongly encourages each Developer to be as inclusive as possible and to reach out to all segments of the M/WBE community, in Developer's efforts to exercise good faith in achieving the SBE Consulting/Contracting/Supplier goal of _____ percent (____%) established for this Agreement. While the relative availability of ready, willing and able firms within various ethnic and gender categories may vary significantly from contract to contract, based upon the particular trades that are involved, overall in the San Antonio Architecture and Engineering industry, as reflected in the City's Centralized Vendor Registration system for the month of October 2015, African-American owned firms represent approximately 1.58% of available subcontractors, Hispanic-American firms represent approximately 10.51%, Asian-American firms represent approximately 1.75%, Native American firms represent approximately 0.18%, and Women-owned firms represent approximately 4.38% of available Architecture and Engineering Consultants.

F. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, Developer represents and warrants it has complied with, throughout the course of this solicitation and contract award process and will continue to comply with, City's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, Developer 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 Sub-Consultants, vendors, Suppliers, or commercial customers, nor shall Developer retaliate against any person for reporting instances of such discrimination. Developer shall provide equal opportunity for Sub-Consultants, vendors and Suppliers to participate in all of Developer's public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this **Section X (F)** 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. Developer understands and agrees a material violation of this **Section X (F)** shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification of Developer from participating in City contracts or other sanctions. This **Section X (F)** is not enforceable by or for the benefit of, and creates no obligation to, any third

party. Developer's certification of its compliance with this Commercial Nondiscrimination Policy, as submitted to City pursuant to the solicitation for this Agreement, hereby is incorporated into the material terms of this Agreement. Developer shall incorporate this clause into each of its Sub-Consultant and Supplier agreements entered into pursuant to City contracts.

G. Prompt Payment

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

H. Violations, Sanctions and Penalties

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

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

Any person or entity violating the provisions of this **Section X (H)** 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 Agreement;
2. Withholding of funds;
3. Rescission of Agreement based upon a material breach of the Agreement pertaining to S/M/WBE Program compliance;
4. Refusal to accept a response or proposal; and
5. Disqualification of Developer 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).

EXHIBIT G

CERTIFICATE OF INTERESTED PARTIES (TEC Form 1295)

Effective January 1, 2016, the City of San Antonio is required to comply with Texas Government Code, Chapter 2252, Subchapter Z, Section 2252.908 (hereafter referred to as “the Code”). The Code states City shall not enter into a contract/agreement with a business entity unless and until the business entity has submitted a Certificate of Interested Parties (hereafter referred to as “Form 1295”) to the City for filing with Texas Ethics Commission (hereafter referred to as “TEC”). The Form 1295 requirement imposed upon City applies to **all** contracts/agreements:

- having a value greater than \$50,000;
- requiring San Antonio City Council approval; and/or
- renewals, extensions or amendments that must be approved by the San Antonio City Council.

TEC has made available on its website the new filing application required to be used by the prospective contracting party to file its Form 1295 with City. The prospective contracting party shall use TEC’s application to enter the required information on Form 1295 and print a copy of the completed form containing a unique certification number for that response/bid.

An authorized agent of the prospective contracting party then must sign the printed copy of the completed form and have the Form 1295 notarized. The notarized completed Form 1295 containing the unique certification number then must be submitted with the prospective contracting party’s submitted contract to City, to ensure City and the contracting party meet the Code requirements. Form 1295 must be completed on-line by the business entity. It is accessible at:

https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm

As a result of this new requirement imposed upon City by the Code, City is requiring **all** parties contracting with the City to complete Form 1295, print a copy showing the unique Certification Number and Date Filed in the Certification of Filing box at the upper right corner of Form 1295 for that contract, sign it, have it notarized and submit it with its executed contract.

City shall review Form 1295 as part of the Minimum Requirements Review performed upon receipt of all contracts. Deficiencies in or missing Form 1295 shall not be a disqualifying error. Instead, City shall notify the prospective contracting party of the requirements necessary to cure the deficiency and/or to submit/re-submit Form 1295 within two (2) days of notice to remain eligible to be considered for a contract award by City. City shall include the prospective contracting party’s Form 1295 in its package prepared for the San Antonio City Council’s consideration of a contract award.