

	§	
STATE OF TEXAS	§	USAA REALCO LA CANTERA
	§	PARKWAY RESURFACING PROJECT
COUNTY OF BEXAR	§	FUNDING AGREEMENT
	§	

This Funding Agreement is hereby made and entered into by and between the City of San Antonio (hereinafter referred to as "City"), a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance Number \_\_\_\_\_, dated \_\_\_\_\_, and USAA Realco (hereinafter referred to as "Grantee"), a Texas Corporation, acting by and through its officers, hereto duly authorized. City and Grantee collectively are referred to herein as "Parties" and individually referred to as "Party".

WHEREAS, City continues to look for ways to improve its streets and public right-of-way for the benefit of its citizens and visitors to San Antonio; and

WHEREAS, the pavement surface of La Cantera Parkway between IH-10 and Loop 1604, a City street and public-right-of-way, has degraded and is in need of repair; and

WHEREAS, Grantee owns property along and abutting La Cantera Parkway, including the Shops at La Cantera; and

WHEREAS, Grantee is willing to partner with the City to provide funding for up to 50% to mill and overlay La Cantera Parkway between IH-10 and Loop 1604; and

WHEREAS, these improvements were identified and programmed as part of the FY 2017-2022 Capital Improvement Program Budget; and

WHEREAS, Grantee will retain a contractor to resurface the street, while City staff provides inspection services to ensure that the project is completed in accordance with the City's standards and specifications; and

WHEREAS, this Agreement will enable Grantee to manage the communication with all the critical stakeholders at the Shops at La Cantera and ensure that the work is timed and executed in a manner that is least impactful to all in the area; and

WHEREAS, City has identified Grantee as the appropriate party with which to contract for the fulfillment of its public purpose of improving its streets and public right-of-way; and

WHEREAS, City has identified up to **SIX HUNDRED THOUSAND DOLLARS AND NO/100 (\$600,000.00)** in the FY 2017-2022 Capital Improvement Program Budget to participate in the Project (hereafter referred to as "City Funding"); and

WHEREAS, through this Funding Agreement, the City's Transportation and Capital Improvement Department (hereafter referred to as "TCI") is designated as the managing City department for the oversight of the Funding Agreement; and

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

### **I. RECITALS**

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

### **II. TERM**

This Agreement shall commence on the later of:

- (a) the effective date of the Authorizing Ordinance; or
- (b) the later of the signatures of the Parties.

The Term shall expire upon the earlier to occur of:

- (a) final payment by the City of all City Funding under this Agreement;
- (b) completion of the Project; or
- (b) termination of this Agreement as otherwise provided herein.

### **III. GENERAL RESPONSIBILITIES OF GRANTEE**

3.01 Provided Grantee receives the funding described in **Article VI** of this Agreement and subject to the other terms and conditions of this Agreement, including, but not limited to, force majeure provisions, Grantee hereby accepts full responsibility for \_\_\_\_\_ by \_\_\_\_\_ 20\_\_, as described in this Agreement. The Project shall consist of the milling and overlay of the surface of La Cantera Parkway between IH101 and Loop 1604.

3.02 The current budget estimates of the Project are approximately **ONE MILLION TWO HUNDRED THOUSAND AND NO/100 (\$1,200,000.00)**. Grantee shall provide all necessary funding for the Project beyond City's Funding of **SIX HUNDRED THOUSAND DOLLARS AND NO/100 (\$600,000.00)**. Grantee shall provide evidence to City that all Project funds have been secured prior to the receipt of any City Funding under this Funding Agreement. In the event that the scope of the project is adjusted downward, City shall have the option of adjusting its commitment downward accordingly. City is not responsible for any costs over the estimated amount of the Project unless agreed to in writing in the form of an amendment to this Funding Agreement.

3.03 Unless written notification by Grantee to the contrary is received and approved by City, Grantee's President/Chief Executive Officer shall be Grantee's designated representative responsible for the management of this Agreement.

3.04 The Director of TCI or his/her designee shall be responsible for the administration of this Agreement on behalf of City until the completion of the City-funded portion of the Project.

3.05 Communications between City and Grantee shall be directed to the designated representatives of each as set forth in paragraphs numbered 3.03 and 3.04 hereinabove.

3.06 Grantee shall provide City its Plans and Scope of Work for the Project and such Plans and Scope of Work shall be subject to the review and approval of City, acting in its capacity as grantor under this Funding Agreement. After approval by City, the Plans and Scope of Work shall be attached, incorporated into this Funding Agreement by reference and labeled as "**Exhibit A**". Grantee shall not make any substantial changes to the Plans and Scope of Work without the prior written approval of City. The approvals given in this **Section 3.06** do not relieve Grantee of the burden of obtaining all necessary governmental approvals, if required, including those provided by City through its relevant development departments and relevant boards and commissions and the State of Texas Commission on Environmental Quality (Article 9102). Nor does City's approval of the Plans release Grantee of the responsibility for the correction of Grantee's mistakes, errors or omissions contained in the Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved.

3.07 City shall have authority to inspect the Project throughout the design process to ensure compliance with the Plans and to request copies of the Plans performed by or on behalf of Grantee and third parties. Grantee shall cause its Designer to provide, when submitting a City Funding payment request to City, certifications of progress on the Plans, certifying design has been conducted in compliance with the scope of work approved by City with regard to the Plans. Grantee shall notify City and City shall have the right to attend all scheduled design meetings of the Project.

3.08 Grantee hereby accepts full responsibility for the performance of all services and activities described in this Agreement to complete the Project (resurfacing of La Cantera Parkway between IH10 and Loop 1604) not later than \_\_\_\_\_ 20\_\_.

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

4.01 Grantee warrants and represents that it will comply with all federal, state and local laws and regulations and will use all reasonable efforts to ensure said compliance by any and all Consultants and Sub-Consultants working on the Project.

4.02 Grantee agrees it procured and will procure all contracts under this Agreement through open competitive processes which are advertised to the public in an appropriate manner.

4.03 Project plans shall conform to Americans with Disabilities Act requirements and must be approved by the Texas Department of Licensing and Regulation. Final approval of Project Plans shall be the responsibility of Grantee.

4.04 **Small Business Economic Development Advocacy Program.** This Project received a waiver, with regard to compliance with all Small/Minority and Woman Owned Business Terms and Conditions as attached hereto, incorporated herein by reference and labeled as “**Exhibit B**”.

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

5.01 City shall reimburse Grantee for all eligible expenses incurred hereunder. Notwithstanding any other provisions of this Agreement, the total of all payments and other obligations made or incurred by City hereunder shall not exceed the sum of **SIX HUNDRED THOUSAND DOLLARS AND NO/100 (\$600,000.00)** (hereafter referred to as “City Funding”).

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

5.03 City Funding shall consist of reimbursements paid to Grantee for costs of the Project, not to exceed **SIX HUNDRED THOUSAND DOLLARS AND NO/100 (\$600,000.00)**. The City Funding provided under this Funding Amendment only may be used for the portions of the Project which are dedicated to public use/public purpose. No City funds may be used for non-public aspects of the Project

5.04 Except as otherwise set forth herein, Grantee further expressly understands and agrees this Agreement in no way obligates City’s General Fund monies or any other monies or credits of City.

## **VI. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY GRANTEE**

6.01 Grantee agrees to maintain readily identifiable records providing accurate, current, separate, and complete disclosure of the status of any City funds received pursuant to this Agreement. Grantee further agrees:

- (A) Maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Agreement and with all generally accepted accounting practices; and

- (B) Grantee's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

6.02 Grantee shall retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials (hereinafter "records") pertaining to activities pertinent to this Agreement for a minimum of four (4) years from the completion of the Project.

6.03 City shall reimburse Grantee, at minimum, on a monthly basis upon receipt and approval of an invoice through City's Project Reporting Information Management Exchange Link (hereafter referred to as "PRIMElink") within thirty (30) days after receipt of an approved invoice. City retains the right, at City's sole option, to reimburse Grantee the entirety of City Funding in a single reimbursement.

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

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

6.06 City agrees to provide Grantee written notice regarding any expenditure for which Grantee has requested reimbursement under this Agreement which City reasonably determines to be outside the permissible parameters of this Agreement. Said notice shall provide Grantee thirty (30) days from receipt of said notice to cure the deficiency or refund to City any sum of money paid by City to Grantee determined to:

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

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

## **VII. ALLOWABLE EXPENDITURES**

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

- Project design and change orders
- Project Management/Design Management
- Design contingencies
- Architectural/Engineering Design Contract and Amendments

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 the terms of this Agreement and all applicable city, state and federal laws, regulations and/or ordinances.

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

- Personnel costs, salaries or wages paid directly by Grantee or an affiliated organization of Grantee
- Travel and travel-related expenses
- Costs or fees for consultant and/or professional services, except for those directly related to the Project (including but not limited to costs and fees of the Architect)
- Costs or fees associated with attendance of Grantee at meetings, seminars, or conferences
- Costs or fees associated with regular maintenance and operation of Grantee
- Fundraising
- Equipment and Furnishings, except for items of a capital nature which are being provided by Grantee's general contractor and shown on the approved Plans and specifically approved by City.
- Advertising

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

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

Grantee further represents and warrants:

- (A) All information, data or report heretofore or hereafter provided to City is, shall be, and shall remain complete and accurate in all material respects as of the date shown on the information, data or report, and from said date shown, shall not have undergone any significant change without written notice to City.
- (B) It is financially stable and capable of fulfilling its obligations under this Agreement and Grantee shall provide City immediate written notice of any adverse material change in the financial condition of Grantee that may materially and adversely affect its obligations hereunder.
- (C) No litigation or proceedings presently are pending or, to Grantee's knowledge, threatened against Grantee.
- (D) None of the provisions contained herein contravene or in any way conflict with the authority under which Grantee is doing business or with the provisions of any existing indenture or agreement of Grantee.

#### **IX. ACCESSIBILITY OF RECORDS**

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

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

#### **X. MONITORING AND EVALUATION**

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

#### **XI. INDEMNITY**

11.01 Grantee covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, the City of San Antonio and the elected officials, employees, officers, directors, volunteers and representatives of City, individually and collectively,

from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon City directly or indirectly arising out of resulting from or related to Grantee's activities under this Agreement, including any acts or omissions of Grantee, any agent, officer, director, representative, employee, consultant or subcontractor of Grantee, and their respective officers, agents, employees, directors and representatives while in the exercise of performance of the rights or duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of City, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT GRANTEE AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

11.02 The provisions of this INDEMNITY 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. Grantee shall advise City in writing within twenty four (24) hours of any claim or demand against City or Grantee known to Grantee related to or arising out of Grantee's activities under this Agreement and shall see to the investigation and defense of such claim or demand at Grantee's cost. City shall have the right, at its option and at its own expense, to participate in such defense without relieving Grantee of any of its obligations under this **Article XI**.

**11.03 NOTWITHSTANDING THE FOREGOING, TO THE EXTENT PROVIDED BY LAW, CITY SHALL BE RESPONSIBLE FOR ALL CLAIMS, DEMANDS, AND CAUSES OF ACTION AGAINST CITY ARISING IN FAVOR OF ANY PERSON, BECAUSE OF PERSONAL INJURIES OR DEATH OR DAMAGE TO PROPERTY, OCCURRING, GROWING OUT OF, OR INCIDENT TO, RELATED TO OR RESULTING DIRECTLY OR INDIRECTLY FROM THE OCCURRENCE OF ACTIVITIES OR OMISSION OF ACTIVITIES CONTEMPLATED BY THIS AGREEMENT, CAUSED BY THE NEGLIGENCE OF CITY AND/OR ITS EMPLOYEES.**

## **XII. INSURANCE & BONDS**

12.01 Prior to the commencement of any design work under this Agreement, Grantee shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to TCI, which shall be clearly labeled "**USAA REALCO LA CANTERA PARKWAY RESURFACING PROJECT**" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. City shall not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable



endorsements, directly from the insurer's authorized representative to 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 City's Risk Manager, shall have authority to waive this requirement.

12.02 City reserves the right to review the insurance requirements of this Article XII 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 shall City allow modification whereby City may incur increased risk.

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

<u>TYPE</u>	<u>AMOUNTS</u>
1. Workers' Compensation	Statutory
2. Employers' Liability	\$1,000,000/\$1,000,000/\$1,000,000
3. Broad form Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations *b. Independent Contractors c. Products/Completed Operations d. Personal Injury e. Contractual Liability *f. Environmental Impairment/ Impact – sufficiently broad to cover disposal liability. *g. Explosion, Collapse, Underground h. Damage to property rented by Grantee	For <u>B</u> odily <u>I</u> njury and <u>P</u> roperty <u>D</u> amage of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage  h. \$100,000
4. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles c. Hired Vehicles	<u>C</u> ombined <u>S</u> ingle <u>L</u> imit for <u>B</u> odily <u>I</u> njury and <u>P</u> roperty <u>D</u> amage of \$1,000,000 per occurrence

5. Builder's Risk (if applicable)	All Risk Policy written on an occurrence basis for 100% replacement cost during construction phase of any new or existing structure.
6. Property Insurance: For physical damage to the property of City, including improvements and betterment to the Leased Premises	Coverage for replacement value with a minimum co-insurance factor of eighty percent (80%) of the cost of the Contractor's property
*if applicable	

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

12.05 As they apply to the limits required by City, City shall be entitled, upon request and without expense, to receive copies of the policies, declaration page and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Grantee shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City at the address provided below within 10 days of the requested change. Grantee shall pay any costs incurred resulting from said changes.

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

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

- Name City, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under

contract with City, with the exception of the workers' compensation and professional liability policies;

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

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

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

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

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

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

12.12 Grantee and any Consultants and/or Sub-Consultants are responsible for all damage to their own equipment and/or property.

### **XIII. NONDISCRIMINATION**

As a party to this contract, Grantee 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.

#### **XIV. CONFLICT OF INTEREST**

14.01 Grantee 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. Grantee 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.

14.02 Grantee further covenants no member of its governing body or 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.

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

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

#### **XV. 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.

#### **XVI. 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, as well as any responses, inquiries, correspondence and related material submitted by Grantee shall become and remain the

property of Grantee. City shall have the right to audit, inspect and/or copy all of Grantee's records pertaining to this Project.

## **XVII. CONTRACTING**

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

17.02 City shall in no event be obligated to any third party, including any Consultants and/or Sub-Consultants of Grantee, for performance of or payment for work or services.

## **XVIII. CHANGES AND AMENDMENTS**

18.01 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 Grantee under authority granted by formal action of the Parties' respective governing bodies.

18.02 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 automatically shall be 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.

## **XIX. ASSIGNMENTS**

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

## **XX. 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 that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of

the Parties hereto that in lieu of each clause or provision of this Agreement that is invalid, illegal, or unenforceable, there be added as a part of the Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

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

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

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

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

## **XXII. ENTIRE AGREEMENT**

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

## **XXIII. NOTICES**

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

and

Grantee: President/CEO  
USAA Realco

San Antonio, Texas 78205

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

#### **XXIV. PARTIES BOUND**

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

#### **XXV. 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.

#### **XXVI. 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.

#### **XXVII. 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.

#### **XVIII. 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.

#### **XXIX. DEFAULT**

Upon default by Grantee in the performance of its obligations hereunder, City shall give Grantee notice of the same, and Grantee shall have thirty (30) days following receipt of written notice of default from City (or such reasonably longer time as may be

necessary provided Grantee commences the cure within thirty (30) days and continuously and diligently pursues the cure to completion) to cure such default. If Grantee fails to timely cure such default, City may pursue all remedies available in law or at equity and/or other rights City may have in this Agreement; provided that it is expressly agreed that neither Party hereto shall have the right to seek consequential or punitive damages against the other for any default under this Agreement.

### **XXX. LEGAL AUTHORITY**

30.01 Grantee represents, warrants, assures and guarantees it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement and to perform the responsibilities herein required.

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

### **XXXI. FORCE MAJEURE**

If City or Grantee is delayed or prevented from performing any of their respective obligations under this Agreement by reason of strike, labor troubles, or any cause whatsoever beyond such party's reasonable control, the period of such delay or prevention shall be deemed added to the time herein provided for the performance of any such obligation by the delayed party.

### **XXXII. CONDITIONS TO AGREEMENT**

This Agreement, and all obligations of the parties hereunder, expressly is made conditioned on the mutual final agreement to the terms and conditions of the Funding Agreement attached hereto.

*(Signature Page immediately to follow)*



**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**

**USAA REALCO**

By: \_\_\_\_\_  
Mike Frisbie, P.E.  
Director, Department Name

By: \_\_\_\_\_  
Presidnet/CEO

**APPROVED AS TO FORM:**

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

**EXHIBIT A**

**PROJECT PLANS and SCOPE OF WORK**

DRAFT

## **EXHIBIT B**

### **SBEDA**

This Funding Agreement received a waiver from EDD. Said waiver is attached hereto and labeled as Exhibit B.

DRAFT