

**AN ORDINANCE 2006-01-05-33**

**AUTHORIZING THE EXECUTION OF A FUNDING AGREEMENT WITH THE WITTE MUSEUM FOR THE EXPENDITURE OF UP TO \$464,300.00 FROM ONE-TIME GENERAL FUND DOLLARS FOR FACILITY INFRASTRUCTURE IMPROVEMENTS AT THE WITTE MUSEUM, LOCATED IN DISTRICT 9.**

\* \* \* \* \*

**WHEREAS**, in the FY06 Annual Budget, City Council authorized the use of one-time General Fund dollars totaling \$1,864,300.00 for facility infrastructure improvements at the Sunken Garden Theater, Japanese Tea Garden, San Antonio Botanical Garden Conservatory, and the Witte Museum's Ruiz House and Tree House; and

**WHEREAS**, the action specified that City funds would provide a challenge-match initiative to leverage funds from the private sector; and

**WHEREAS**, the agreement approved by this ordinance will provide funding of \$464,300.00 to the Witte Museum, a non-profit corporation, for a minimum 50% match of funds for improvements to the Witte Museum's Ruiz House and Tree House; and

**WHEREAS**, the Witte Museum will accept full responsibility to oversee, manage, perform and provide all of the activities and services necessary to satisfactorily complete the projects; **NOW THEREFORE:**

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

**Section 1.** The City Manager, or her designee, is hereby authorized to execute a Funding Agreement with the Witte Museum to provide up to \$464,300.00 to the Witte Museum in support of facility infrastructure improvements to the Witte Museum's Ruiz House and Tree House. A copy of the Funding Agreement in substantially complete form is attached hereto as Exhibit I.

**Section 2.** Funds for this expenditure are available in Cost Center 7001990031, Four Park Improvement Projects, General Ledger 5201040, Fees to Professional Contractors.

**Section 3.** Payment is authorized to the Witte Museum on a reimbursement basis for a maximum of \$464,300.00. The funds should be encumbered with the issuance of a purchase order.

**Section 4.** The financial allocations in this Ordinance are subject to approval by the Director of Finance for the City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific Cost Centers, WBS Elements, Internal Orders, General Ledger Accounts, and Fund Numbers as necessary to carry out the purpose of this Ordinance.

**Section 5.** This ordinance shall become effective on and after January 15, 2006.

PASSED AND APPROVED this 5<sup>th</sup> day of January, 2006.



M A Y O R

PHIL HARDBERGER

ATTEST: Lucia M. West  
City Clerk

APPROVED AS TO FORM: Hollis Young  
for City Attorney



such as: Design Development, Construction Documents, Construction Costs and Construction Contingency, and Building Materials and Components. CITY recognizes that the GRANTEE will need additional funds to complete the improvement projects. It is the responsibility of the GRANTEE to prove the availability of a minimum 50% match funding by December 31, 2006. It is the responsibility of the GRANTEE to complete these improvements and GRANTEE hereby agrees to complete these improvements by December 31, 2007.

CITY funds are to be expended to complete renovation of the Ruiz House as a first priority with funds for the HEB Science Tree House to be used as the full match to the CITY funds. If Ruiz House renovations (with CITY funds) and the Tree House renovations (with private funds) are fully completed, any remaining CITY funds can be released for the Main Building renovations with prior approval from the Parks and Recreation Director ("Director").

2.02 Unless written notification by GRANTEE to the contrary is received and approved by CITY, GRANTEE'S President shall be GRANTEE'S designated representative responsible for the management of this AGREEMENT.

2.03 The Director or his designee, is responsible for the administration of this AGREEMENT on behalf of CITY.

2.04 Communications between CITY and GRANTEE shall be directed to the designated representatives of each as set forth in paragraphs numbered 2.02 and 2.03 hereinabove.

2.05 GRANTEE shall submit the Projects' plans to the Director for review and approval and GRANTEE shall process plans through the CITY design and building requirements prior to commencement of any work.

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

3.01 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 contractors and subcontractors that may work on the Projects.

3.02 To the extent applicable, GRANTEE agrees to abide by the bidding laws which apply to CITY use of CITY funds, including without limitation, Chapter 252 of the local government code.

3.03 If applicable, plan design must conform to Americans with Disabilities Act requirements and must be approved by the Texas Department of Licensing and Regulation before construction may begin.

#### **IV. LEGAL AUTHORITY**

4.01 GRANTEE represents, warrants, assures, and guarantees that 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.

4.02 The signer of this AGREEMENT for GRANTEE represents, warrants, assures and guarantees that he or 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.

#### **V. PERFORMANCE BY GRANTEE**

5.01 GRANTEE, in accordance and compliance with the terms, provisions and requirements of this AGREEMENT, shall oversee, manage, perform, and provide all of the activities and services necessary to satisfactorily complete the Projects.

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

6.01 In consideration of GRANTEE'S performance of all services and activities set forth in this AGREEMENT, CITY agrees to 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 \$464,300.00.

6.02 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.

6.03 It is further expressly understood and agreed by CITY and GRANTEE that the CITY'S obligations under this AGREEMENT are based on a minimum 50% match (\$232,150.00) of the CITY'S funds to be provided by the GRANTEE and that CITY'S obligation to pay the funds under this AGREEMENT is limited to the amount of matching funds from other sources that GRANTEE is able to demonstrate to CITY'S satisfaction. Failure to match CITY funds will result in expenditure of the budgeted funds by the CITY at the project site as it deems appropriate.

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

7.01 GRANTEE understands and agrees that it shall maintain a numbered account for the receipt and disbursement of all funds received pursuant to this AGREEMENT and further agrees that all checks and withdrawals from such account shall have itemized documentation in support thereof pertaining to the use of CITY funds provided under this AGREEMENT.

7.02 GRANTEE agrees to maintain records that will provide accurate, current, separate, and complete disclosure of the status of any funds received pursuant to this AGREEMENT. GRANTEE further agrees:

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

7.03 GRANTEE agrees to 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 Projects.

7.04 In order to be reimbursed for work completed, GRANTEE shall submit to the 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 the CITY. Prior to payment from CITY, CITY will inspect work completed to ensure conformance with pre-approved plans. GRANTEE will be reimbursed for work completed at 66.7% of the invoice presented to the CITY until all CITY funds are expended.

7.05 CITY agrees to provide GRANTEE written notice regarding any expenditure the CITY reasonably determines to be outside the permissible parameters of this AGREEMENT. Said notice will provide GRANTEE thirty (30) days from receipt of said notice to cure the deficiency or refund to the 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.

7.06 Upon termination of this AGREEMENT, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in section 7.05 above 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 therefor wherein the amount disallowed or disapproved shall be specified.

## **VIII. ALLOWABLE EXPENDITURES AND OWNERSHIP OF PROPERTY**

8.01 Upon preparation of a construction 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 construction budget, or otherwise approved in advance by CITY in writing, and incurred directly and specifically in the performance of and in compliance with this AGREEMENT and with all city, state and federal laws; regulations and ordinances affecting GRANTEE's operations hereunder. Only the following categories of costs shall be considered allowable:

- Bid Advertising
- Architectural Contract
- Architectural Contingencies
- Engineer Contract
- Engineer Contingencies
- Construction Contract
- Construction Contingencies
- Building Materials and Components

Expenditures of the funds provided under this AGREEMENT shall only 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.

8.02 The following shall not be considered allowable costs under this AGREEMENT:

- Personnel costs, salaries or wages paid directly by GRANTEE
- Out of town travel
- 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

8.03 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.

8.04 CITY and GRANTEE agree and understand that the Witte Museum is owned by CITY and any improvements made to the facility, shall be the sole property of CITY as further controlled by the lease agreement between CITY and GRANTEE.

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

9.01 GRANTEE further represents and warrants that:

- (A) All information, data or reports heretofore or hereafter provided to CITY is, shall be, and shall remain complete and accurate as of the date shown on the information, data, or report, and that since said date shown, shall not have undergone any significant change without written notice to CITY.
- (B) It is financially stable and capable of fulfilling its obligations under this AGREEMENT and that GRANTEE shall provide CITY immediate written notice

of any adverse material change in the financial condition of GRANTEE that may materially and adversely effect its obligations hereunder.

- (C) No litigation or proceedings are presently 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.

#### **X. ACCESSIBILITY OF RECORDS**

10.01 At any time 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.

10.02 GRANTEE agrees and represents that it will 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.

#### **XI. MONITORING AND EVALUATION**

11.01 GRANTEE agrees that CITY may carry out reasonable monitoring and evaluation activities so as to ensure compliance by GRANTEE with this AGREEMENT and with all other laws, regulations and ordinances related to the performance hereof.

#### **XII. INDEMNITY**

12.01 GRANTEE covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually or collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal bodily injury, death and property damage, made upon the 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 or performance of the rights or duties under this AGREEMENT, all without, however, waiving any governmental immunity available to the CITY under Texas law and without waiving any defenses of the parties under Texas law. IT IS FURTHER COVENANTED AND AGREED THAT SUCH INDEMNITY SHALL APPLY EVEN WHERE SUCH COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY, AND/OR

**SUITS ARISE IN ANY PART FROM THE NEGLIGENCE OF THE CITY, THE ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND/OR REPRESENTATIVES OF CITY, UNDER THIS AGREEMENT. The provisions of this INDEMNITY are solely for the benefit of the parties hereto and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity. GRANTEE shall promptly advise the CITY in writing of any claim or demand against the CITY or GRANTEE known to the 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. The 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 paragraph.**

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

### XIII. INSURANCE

13.01 GRANTEE shall require indemnification from the Contractor it hires and shall ensure and be responsible for hiring contractors licensed by the CITY to install any and all equipment for the Projects and to require and confirm that all contractor performing any work authorized by this AGREEMENT have all commercially reasonable insurance in types and amounts that will adequately protect the Projects, the CITY, GRANTEE and the Museum. Insurance must include at a minimum (1) Workers Compensation, (2) Commercial General Liability with endorsements for premises/operations, independent contractor's liability (if applicable), personal injury, contractual liability, broad form property damage liability and (3) Builder's Risk (if applicable).

### XIV. NONDISCRIMINATION

14.01 GRANTEE covenants that it, or agents, employees or anyone under its control, will not discriminate against any individual or group on account of race, color, sex, age, religion, national origin, handicap or familial status, in employment practices or in the use of or admission to the premises, which said discrimination GRANTEE acknowledges is prohibited.

## **XV. CONFLICT OF INTEREST**

15.01 GRANTEE covenants that 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 that 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.

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

15.03 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.

## **XVI. POLITICAL ACTIVITY**

16.01 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.

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

17.01 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 GRANTEE, shall, upon receipt, become the property of CITY.

## **XVIII. CONTRACTING**

18.01 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 contractors with this AGREEMENT shall be the responsibility of GRANTEE. GRANTEE is responsible to ensure that all permits required for the activities under this AGREEMENT are obtained.

18.02 CITY shall in no event be obligated to any third party, including any sub-contractor of GRANTEE, for performance of or payment for work or services.

**XIX. CHANGES AND AMENDMENTS**

19.01 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.

19.02 It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this AGREEMENT and that 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.

**XX. ASSIGNMENTS**

20.01 GRANTEE 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.

**XXI. SEVERABILITY OF PROVISIONS**

21.01 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.

**XXII. NON-WAIVER OF PERFORMANCE**

22.01 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.

22.02 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.

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

### **XXIII. ENTIRE AGREEMENT**

23.01 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 be in writing, dated subsequent to the date hereof, and duly executed by the Parties.

### **XXIV. NOTICES**

24.01 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 Parks and Recreation  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

GRANTEE: Marise McDermott  
Witte Museum  
3801 Broadway  
San Antonio, Texas 78209-6396

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.

### **XXV. PARTIES BOUND**

25.01 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.

**XXVI. RELATIONSHIP OF PARTIES**

26.01 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.

**XXVII. TEXAS LAW TO APPLY**

27.01 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.

**XXVIII. GENDER**

28.01 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.

**XXIX. CAPTIONS**

29.01 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.

**EXECUTED IN DUPLICATE ORIGINALS**, each of which shall have the full force and effect of an original this the \_\_\_ day of \_\_\_\_\_, 2005.

**CITY OF SAN ANTONIO**

**WITTE MUSEUM**

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

By:   
Marise McDermott  
President and CEO

ATTEST: \_\_\_\_\_  
CITY CLERK

**APPROVED AS TO FORM:**

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