

AN ORDINANCE 2006 - 01 - 19 - 0083

AUTHORIZING THE EXECUTION OF A FUNDING AGREEMENT WITH THE SAN ANTONIO MUSEUM OF ART IN AN AMOUNT NOT TO EXCEED \$100,000.00 FROM THE COMMUNITY AND VISITOR FACILITIES FUND FOR ROOF REPLACEMENT AT THE SAN ANTONIO MUSEUM OF ART, IN DISTRICT 1, AND PROVIDING FOR PAYMENT.

* * * * *

WHEREAS, the San Antonio Museum of Art is in need of resurfacing and replacement of its existing roof at the Grand Hall Building and the Cowden Building located at 200 West Jones in Council District 1; and

WHEREAS, funds in the amount of \$100,000.00 were budgeted in the FY 2005-2006 budget process and are available in the Community and Visitor Facilities Fund to the San Antonio Museum of Art for roof replacement; and

WHEREAS, approval of this Ordinance is continuation of Council policy to invest in the City's arts and culture industry; **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 between the City of San Antonio and the San Antonio Museum of Art for a one-time \$100,000.00 contribution to the San Antonio Museum Of Art for roof replacement. A copy of a funding agreement is attached hereto and incorporated herein for all purposes as **Attachment I**.

SECTION 2. The following financial adjustments are hereby authorized to effect this Ordinance:

- a) Funds for this expenditure are part of the FY06 budget in Fund 29006000, Cost Center 8003010001, and General Ledger 5201040.
- b) Payment not to exceed \$100,000.00 is authorized to the San Antonio Museum of Art and should be encumbered with a purchase order.

SECTION 3. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager or the City Manager's designee, correct allocation to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal

Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 4. This ordinance shall be effective on the 29th day January, 2006.

PASSED AND APPROVED this the 19th day of January, 2006.



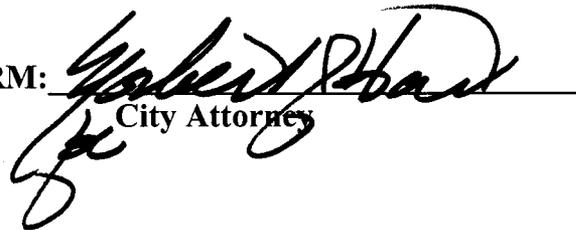
M A Y O R

PHIL HARDBERGER

ATTEST:


CITY CLERK

APPROVED AS TO FORM:


City Attorney

STATE OF TEXAS § **FUNDING AGREEMENT FOR INFRASTRUCTURE**
 § **IMPROVEMENTS AT SAN ANTONIO**
COUNTY OF BEXAR § **MUSEUM OF ART**

This 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 No. _____ dated _____, and the SAN ANTONIO MUSEUM OF ART (hereinafter referred to as "MUSEUM"), a Texas non-profit corporation, acting by and through its Director, Dr. Marion Ottinger.

WHEREAS, funds for this contribution were made available during the FY 2005-2006 budget process; and

WHEREAS, MUSEUM hereby accepts the funding offered by CITY as well as the responsibilities and duties necessary to fully implement and manage the Projects;

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.

ARTICLE I.
PURPOSE

1.01 The purpose of this Funding Agreement is to memorialize the funding contribution being made by the City of San Antonio to fund the construction cost associated with the infrastructure improvements to be made at the San Antonio Museum of Art facility; more specifically the roof replacements at the Grand Hall Building and the Cowden Building; and to set the provisions to be followed in the utilization of these funds.

ARTICLE II.
RESPONSIBILITIES AND DUTIES OF PARTIES

2.01 Provided MUSEUM receives the funding described in Section 6.01, MUSEUM hereby accepts full responsibility for the performance of all services and activities described in this AGREEMENT to fully implement the Projects. The funds provided for under this AGREEMENT shall only be used for work directly related to the Projects, namely roof replacements at the Grand Hall Building and the Cowden Building. It is the responsibility of the MUSEUM to complete these improvements and MUSEUM hereby agrees to perform and/or provide the following:

- A. MUSEUM's Responsibility:
 - 1. Solicit bids for project construction in adherence to the San Antonio Museum of Art procurement process.

2. Award construction contract to the contractor with the lowest responsive and responsible bid.
 3. Provide project oversight during construction.
 4. Provide the City a monthly report on the status of Project to include invoices submitted by Contractor
- B. CITY's Responsibilities. Pursuant to this Agreement, the City shall perform and/or provide the following:

Provide funding in an amount not to exceed \$100,000.00 for construction costs associated with the repairs of the roof at the San Antonio Museum of Art

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

2.03 The Public Works Director ("Director") or his designee, is responsible for the administration of this AGREEMENT on behalf of CITY.

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

ARTICLE III.

COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS

3.01 MUSEUM 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, MUSEUM agrees to and shall utilize a Sealed Bid or a Request for Proposal ("RFP") process to award any applicable contracts for which the Funds are used, as described and set out in Chapter 252 of the Local Government Code.

ARTICLE IV.

LEGAL AUTHORITY

4.01 MUSEUM 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 MUSEUM represents, warrants, assures and guarantees that he or she has full legal authority to execute this AGREEMENT on behalf of MUSEUM and to bind MUSEUM to all terms, performances and provisions herein contained.

ARTICLE V.
PERFORMANCE BY MUSEUM

5.01 MUSEUM, 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.

ARTICLE VI.
FUNDING AND ASSISTANCE BY CITY

6.01 In consideration of MUSEUM'S performance of all services and activities set forth in this AGREEMENT which will serve the public purpose of promoting cultural and natural tourism by encouraging, promoting, and improving the natural sciences and by enhancing CITY'S ability to generate exhibits which will increase cultural and natural tourism, 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 \$100,000.00.

6.02 CITY shall not be obligated nor liable under this AGREEMENT to any party, other than MUSEUM, for payment of any monies or provision of any goods or services.

ARTICLE VII.
RECEIPT, DISBURSEMENT AND ACCOUNT
OF FUNDS BY MUSEUM

7.01 MUSEUM 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 MUSEUM agrees to maintain records that will provide accurate, current, separate, and complete disclosure of the status of any funds received pursuant to this AGREEMENT. MUSEUM 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 MUSEUM's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

7.03 MUSEUM 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 On or before the fifteenth (15th) day of any month in which any CITY funding for the projects is spent, MUSEUM shall submit to CITY a report indicating the amount of funds expended, the payee, the date paid, the purpose of the payment, and provides supporting documentation.

7.05 CITY agrees to provide MUSEUM written notice regarding any expenditure the CITY reasonably determines to be outside the permissible parameters of this AGREEMENT. Said notice will provide MUSEUM 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 MUSEUM determined to:

- (A) Have not been spent by MUSEUM 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, MUSEUM 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.

ARTICLE VIII.
ALLOWABLE EXPENDITURES AND OWNERSHIP OF PROPERTY

8.01 Upon preparation of a construction plan and budget by MUSEUM, MUSEUM 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 MUSEUM'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 MUSEUM'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 MUSEUM
- 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 MUSEUM'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.

ARTICLE IX.
FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

9.01 MUSEUM 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 MUSEUM shall provide CITY immediate written notice of any adverse material change in the financial condition of MUSEUM that may materially and adversely effect its obligations hereunder.
- (C) No litigation or proceedings are presently pending or to MUSEUM'S knowledge, threatened against MUSEUM.
- (D) None of the provisions contained herein contravene or in any way conflict with the authority under which MUSEUM is doing business or with the provisions of any existing indenture or agreement of MUSEUM.

ARTICLE X.
ACCESSIBILITY OF RECORDS

10.01 At any time and as often as CITY may deem necessary, upon three (3) days written notice, MUSEUM 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 MUSEUM 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.

ARTICLE XI.
MONITORING AND EVALUATION

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

ARTICLE XII.
INDEMNITY

12.01 MUSEUM 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 MUSEUM'S activities under this AGREEMENT, including any acts or omissions of MUSEUM, any agent, officer, director, representative, employee, consultant or subcontractor of MUSEUM, 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. MUSEUM shall promptly advise the CITY in writing of any claim or demand against the CITY or MUSEUM known to the MUSEUM related to or arising out of MUSEUM'S activities under this AGREEMENT and shall see to the investigation and defense of such claim or demand at MUSEUM'S cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving MUSEUM 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 XIII, is an INDEMNITY extended by MUSEUM

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. MUSEUM 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.

ARTICLE XIII.
INSURANCE

13.01 MUSEUM 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, MUSEUM 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).

ARTICLE XIV.
NONDISCRIMINATION

14.01 MUSEUM 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 MUSEUM acknowledges is prohibited.

ARTICLE XV.
CONFLICT OF INTEREST

15.01 MUSEUM 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. MUSEUM 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 MUSEUM 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.

ARTICLE 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.

ARTICLE 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 MUSEUM, shall, upon receipt, become the property of CITY.

ARTICLE 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 MUSEUM. MUSEUM 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 MUSEUM, for performance of or payment for work or services.

ARTICLE 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 MUSEUM 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.

ARTICLE XX.
ASSIGNMENTS

20.01 MUSEUM 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.

ARTICLE 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.

ARTICLE 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.

ARTICLE 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.

ARTICLE 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 of Public Works
City of San Antonio
6th Floor Municipal Plaza Building
114 West Commerce
San Antonio, Texas 78205

MUSEUM: Dr. Marion Ottinger
Director of the San Antonio Museum of Art
200 West Jones Ave.
San Antonio, Texas 78215

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.

ARTICLE 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.

ARTICLE 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.

ARTICLE 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.

ARTICLE 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.

ARTICLE 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 _____, 2006.

CITY OF SAN ANTONIO

SAN ANTONIO MUSEUM OF ART

By: _____
Sheryl Sculley
City Manager

By: _____
Dr. Marion Ottinger
Director

ATTEST: _____
CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY